IN THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT 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,	Division L
Assignee.	

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OBJECTION BY SHIRLEY AND JOHN LANGSTON AND CRYSTAL AND LEONARD TINELLI TO ASSIGNEE'S MOTION FOR (A) ORDER APPROVING SETTLEMENT AND COMPROMISE OF CLAIMS AGAINST FORMER DIRECTORS AND OFFICERS (B) ORDER AUTHORIZING PAYMENT OF PROFESSIONA FEES AND (C) FINAL JUDGMENT AS TO SETTLED CLAIMS IN LAWSUIT

Shirley Langston and John Langston (the "Langstons") and Crystal and Leonard Tinelli (the "Tinellis") (Collectively, "Objectors") by and through undersigned counsel, now respectfully file this Objection to 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 (the "Settlement Motion"), and state:

1. The "Objectors" are plaintiffs in separate cases pending in the Circuit Court of Hillsborough County, Florida, against former physician employees of the Laser Spine Institute, LLC ("LSI") for medical malpractice and other parties and claims. Objectors have also filed direct lawsuits against former officers and managers of LSI ("LSI's Former Managers") alleging that LSI's Former Managers are directly liable to Objectors pursuant to § 605.04093 (LLCs) and § 607.0831 (corporations). These statutes provide, in pertinent part, with emphasis added:

> 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.**

> 607.0831 Liability of directors.—

(1) **A director is not personally liable for monetary damages to the corporation or any other person for any statement,** vote, decision to take or not to take action, or any failure to take any action, as a director, unless:
(a) The director breached or failed to perform his or her duties as a director; and
(b) The director's breach of, or failure to perform, those duties constitutes any of the following:
1. A violation of the criminal law, unless the director had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against a director in any criminal proceeding for a violation of the criminal law estops that director from contesting the fact that his or her breach, or failure to perform, constitutes a violation of the criminal law; but does not estop the director from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful;
2. A circumstance under which the transaction at issue is one from which the director derived an improper personal benefit, either directly or indirectly;
3. A circumstance under which the liability provisions of s. 607.0834 are applicable;
4. In a proceeding by or in the right of the corporation to procure a judgment in its favor or by or in the right of a shareholder, conscious disregard for the best interest of the corporation, or willful or intentional misconduct; or
5. In a proceeding by or in the right of someone other than the corporation or a shareholder, recklessness or an act or omission which 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 Objection hereinafter refers to the above statutory exclusion of liability protection as "Reckless Conduct," and contend that the Objectors have the right to sue LSI's Former Managers personally and directly. Assignee contends that it has the sole authority to sue LSI's Former Managers for claims Objectors are bringing and Assignee and the proposed release parties, by the Settlement Motion, intend to claim that the proposed released parties will be released from Objectors' direct claims based on a failure of LSI's physician employees to maintain medical malpractice insurance.

The Objectors' Pending Litigation:

From some point in or about 2015, LSI's Former Managers engaged in Reckless Conduct stripping them of the above statutory immunity from proceedings in the right of someone other than the LLC or corporation, including Objectors, by cancelling statutorily required medical

malpractice insurance for their physician employees and caused their physician employees to practice medicine in violation of Florida's physician financial responsibility requirements, § 458.320. As a result, the Objectors are now suing uninsured physicians. In 2015, LSI's Former Managers stripped all of the balance sheet equity out of LSI and LSI affiliates by borrowing $150,000,000 from Texas Capital Bank, N.A., and affiliated lenders, and LSI's Former Managers had actual knowledge that uninsured medical malpractice claims were increasing by millions of dollars per year but continued to operate without free cash reserves to pay claims and in violation of law by causing LSI's physician employees to practice medicine without statutory compliance of Florida's financial responsibility requirements for physicians, § 458.320. Objectors allege that this conduct constitutes "recklessness" that eliminates the statutory protections from personal liability of § 605.04093 and § 607.0831 and exposes LSIs former managers to individual liability ("Reckless Conduct") to Objectors' direct claims.

Objectors have sued or attempted to sue LSIs former managers in the following lawsuits. There are no final binding orders entered in any cases.

The Langstons:

1) 17-CA-010423, Circuit Court of Hillsborough County, Florida, Division B:
    a. Motion to amend to add Former Managers as defendants, denied.
    b. Petition for Writ of Certiorari, denied by one word order, "denied,", which does not establish law of the case and is not an affirmance, *Bevan v. Wanicka,* 505 So. 2d 1116, 1117 (Fla. 2d DCA 1987) (Exhibit B P. 80). ("At the outset, we note that a simple denial of certiorari without opinion is not an affirmance and does not establish the law of the case.").
2) 20-CA-000930, Circuit Court Hillsborough County, Florida Division L:

This lawsuit raises the same claims as above, and was filed as a protective lawsuit in the event that the above motion to amend was denied. There was an agreement to extend time for responding pending the ruling of the Second DCA with a joint motion for agreed order staying the case and an agreed order staying the case. Now that the Second DCA has denied the Petition but without a binding order on the merits, this case is ready to proceed. However, when undersigned counsel proceeded on that course, the response from one defendant is that this Settlement will extinguish those claims.

3) There is a related case pending in this case against Texas Capital Bank, which is a lawsuit for aiding and abetting fraud and other claims. This was removed to federal court, remand order entered, but the remand has not yet completely processed. This is a Division L case on remand.

The Tinellis:

1) 20-CA-008352, Division L. Since the Tinellis' medical malpractice case was filed after undersigned counsel became aware of the Reckless Conduct allegations, one case is filed and is pending that includes LSI's Former Managers as defendants and includes medical malpractice and counts based on Reckless Conduct. One defendant moved to dismiss, others have appeared.

2) There is a removed case pending in federal district court set for trial March 2022 against Texas Capital Bank.

2. Assignee has opposed the Objectors' direct claims, claiming that only the Assignee can sue the former managers for whatever claims relate to LSI's employee physicians' practice of medicine in violation of law, and Assignee asserts that only the Assignee can settle the claims

including Objectors' direct claims against LSI's former managers related to the lack of malpractice insurance. Assignee, and the proposed released parties, contend that the Objectors will be barred from suing LSI's Former Managers for Reckless Conduct based on LSI's physician employee's violation of financial responsibility laws if this settlement is approved.

3. Assignee also claims that the Assignee has the power to settle Objectors direct claims over Objectors' objections, and without allocating settlement amounts received in settlement of Objectors' direct claims, and without paying Objectors the amounts received for the settlement of Objectors' direct claims, and pay Objectors only as pro rata unsecured claimants. As stated in the Settlement Motion, Assignee intends to settle all claims for a lump sum amount without allocation of the settlement amount as to claims settled, and Assignee contends that this eliminates Objectors' direct claims relating to LSI's employee physicians' practice of medicine in violation of law without insurance. As will be discussed later herein, Assignee's position is contrary to the applicable statutes and case law to date.

4. The Assignee has standing to file a Supplemental Proceeding to determine the validity, priority, or extent of a lien or other interest in property, § 727.110 (b). However, instead of filing a Supplemental Proceeding as required by the statute, the Assignee seeks approval of a Settlement Agreement and General Release, ("Settlement and Release") Exhibit A to the Settlement Motion, in which:

a. Soneet R. Kapila (the "Assignee" or "Plaintiff"), in his capacity as the Assignee of Laser Spine Institute, LLC ("LSI") is defined as one of the "Parties";

b. The "Claims" the Assignee proposes to settle include claims against former managers, and officers for, "failing to obtain adequate insurance coverage for the Companies and improperly implementing or continuing self-insurance programs for professional

liability insurance, medical malpractice insurance, Settlement Agreement and General Release, Exhibit A to the Motion ("Settlement and Release") P. 3;

c. The Settlement and Release includes language that, "the Parties agree that the Assignee has sole legal standing and authority to pursue and settle the Claims in accordance with Chapter 727, Florida Statutes, as assignee for the benefit of creditors of the LSI Entities," Settlement and Release, Page 3, and to the extent that the proposed Order is entered, the proposed Order grants the Motion approving the Settlement and Release and thereby would arguably ratify and adopt this conclusion of law;

d. The "Release" the Assignee proposes to grant to the Releasees includes a release from, "any claims for failing to obtain adequate insurance coverage for the Companies and implementing or continuing self-insurance programs for professional liability insurance, medical malpractice insurance, and employee health insurance," Settlement and Release, P. 5;

e. The dismissal includes the agreement to "to dismiss with prejudice all claims in the Lawsuits by filing Joint Stipulations for Dismissal with Prejudice within five business days from Plaintiff's receipt of the Settlement Payment," Settlement and Release, P. 6.

5. The Proposed Order ("Proposed Order") includes the following provisions:

a. "In the context of a Chapter 727 assignment, the Assignee has the sole authority and standing to prosecute the Claims being resolved and enter into a Settlement in connection therewith. *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)," (Proposed Order, P. 2);

b. The Proposed Order grants the Motion, approves the releases, authorize the dismissal of the lawsuits.

Background Facts:

6. Texas Capital Bank, N.A., ("TCB") as the Swing Line Lender, L/C Issuer, and Administrative Agent for multiple lenders of lenders entered a Credit Agreement with LSI and affiliates, loaned LSI approximately $150,000,000.00, and received a priority lien on all assets other than tort claims. It appears that the tort claims Assignee proposes to settle are not within the priority lien claims of TCB. However, prior to the filing of this Petition for Assignment for the Benefit of Creditors, TCB claimed a perfected priority lien on all assets including all cash and cash accounts. Section 7.12 (b) of the Credit Agreement provides for the establishment of a Cash Reserve Account ("Cash Reserve Account") and states, verbatim:

> (b) Borrowers shall maintain the Cash Reserve Account[1] at all times. provided, that Administrative Agent and Required Lenders may, in their sole discretion after Borrower Representative's written request, waive such requirement, in whole or in part, based on various factors, including but not limited to whether (i) any litigation or material claims exist involving non-medical malpractice matters. and (ii) all medical malpractice claims and potential litigation related to such claims are properly reserved for in the Cash Reserve Account in amounts that are considered commercially reasonable based on the Borrowers' historical settlement experience and the probable near term losses associated with claims and, provided, further, that, Administrative Agent shall deposit in one of Borrowers' operating accounts maintained in accordance with Section 7.12(a) all interest and other income earned from time to time on the Cash Reserve Account so long as the Cash Reserve Account balance is not less than $10.000,000.

[1] The Cash Reserve Account is defined in Article 1 as ""Cash Reserve Account" means a restricted access deposit account maintained at Administrative Agent in an amount of at least $10,000,000."

7. Pursuant to the terms of the Credit Agreement and the UCC Financing Statement, together with related Loan Documents, TCB claims a perfected priority lien in all assets of LSI assigned to Assignee in the Assignment Case.

8. At all times after July 2, 2015, TCB held a first lien on the Cash Reserve Account, TCB had the power to require LSI to maintain the Cash Reserve Account, and TCB retained the "sole discretion" to waive the Cash Reserve Account only upon (a) LSI's written request and (b) TCB's determination that "all medical malpractice claims and potential litigation related to such claims are properly reserved for in the Cash Reserve Account in amounts that are considered commercially reasonable." However, TCB held a first lien securing all of LSI's borrowing under the Credit Agreement, including a first lien on any amounts designed as the Cash Reserve Account. By this means, TCB controlled whether or not funds were available to pay LSI's medical malpractice claims.

9. Under Florida law, LSI's employee physicians were obligated to comply with the Financial Responsibility Requirements of Section 458.320, Fla. Stat. LSI treated patients in an ambulatory surgical center licensed under Chapter 395, Fla. Stat., and therefore LSI's employee physicians were required to maintain one of the following minimum financial responsibility requirements as stated in § 458.320 (2), Fla. Stat.:

a. Establishing and maintaining an escrow account consisting of cash or assets eligible for deposit in an amount not less than $250,000 per claim, with a minimum annual aggregate of not less than $750,000;

b. 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, with various alternatives as set forth in the statute, including "through a

plan of self-insurance as provided in s. 627.357, or through a plan of self-insurance which meets the conditions specified for satisfying financial responsibility in s. 766.110;" or

c. Obtaining and maintaining an unexpired irrevocable letter of credit, established pursuant to chapter 675, in an amount not less than $250,000 per claim, with a minimum aggregate availability of credit of not less than $750,000.

10. The "Notes" to the LSI Holdco and Subsidiary Consolidated Financial Statements, Exhibit A, Page 32, contain the following at Note 5, with "Dollars in 000's," meaning, that where the below states, the "self-insured retention, is $1,000 per incident, it means $1.000,000 per incident."

> **Malpractice Professional Liability Insurance**
> The Company is a party to claims filed against it in the normal course of business, principally related to malpractice assertions. The Company purchased professional liability insurance coverage on a claims-made basis with a per claim limit of $20,000, an annual aggregate limit of $20,000, and a self-insured retention amount of $1,000 per incident. During 2016, the Company added a self-insured annual aggregate limit of $6,000. In addition the Company purchased excess coverage with an annual aggregate limit of $30,000. Prior to March 1, 2014, the Company maintained professional liability insurance coverage on a claims-made basis with a per claim limit of $1,000, an annual aggregate limit of $3,000, and a self-insured retention amount of $100 per incident. In addition the Company purchased excess coverage with an annual aggregate limit of $20,000.
> **Malpractice Professional Liability Insurance (Continued)**
> The provision for estimated medical malpractice claims and other claims includes estimates of the ultimate costs for both reported claims and claims incurred but not reported. In 2017 and 2016, the Company engaged an independent actuarial firm to assist in determining the provision for medical malpractice claims, including incurred but not reported losses. The Company has used a similar method to estimate insurance recoveries related to these claims. **The Company's estimated accrual totaled approximately $14,236 as of December 31, 2017, of which approximately $5,566 is included in accrued expenses and approximately $8,670 is in other long-term liabilities in the accompanying consolidated alance sheets. The Company's estimated accrual totaled approximately $12,300 as of December 31, 2016, of which approximately $5,600 is included in accrued expenses and approximately $6,700 is in other long-term liabilities in the**

> **accompanying consolidated balance sheets. The Company has also recorded approximately $5,566 and $5,600 of estimated insurance recoveries as of December 31, 2017 and 2016, respectively, which is included in prepaid expenses and other current assets on the accompanying consolidated balance sheets.** The estimated amounts for professional liability claims included in the consolidated financial statements at December 31, 2017 and 2016, were not discounted.
> Expense incurred related to professional and general liability policies totaled approximately $3,403 and $4,661 for the years ended December 31, 2017 and 2016, respectively, which is included in general and administrative expenses on the accompanying consolidated statements of income.
> (Emphasis added).]

The above paragraph emphasized in bold indicates that for 2017, the total estimated accrued medical malpractice liability was $14,236,000.00, that would be offset by $5,566,000.00 in estimate insurance recoveries, yielding an estimated uninsured medical malpractice claim exposure without cash reserves of approximately $8,670,000.00 for 2017. For the year 2016, the accrued amount is $12,300,000.00, to be offset by $5,600,000.00 in estimated insurance recoveries, yielding an estimated uninsured medical malpractice claim exposure without cash reserves of approximately $6,700,000.00. The records therefore show that the former managers not only knew that LSI was amassing millions of dollars of uninsured medical malpractice claims without operating reserves to pay the claims, but also, that the claims were increasing from 2016 through 2017.

11. Accordingly, based on the financial records, the Managers had actual knowledge that LSI was operating without insurance for the first $1,000,000.00 per medical malpractice claim incurred. Coupled with the above description of the TCB loan and lien, LSI's managers therefore had actual knowledge that all of the medical malpractice claims being incurred were not only uninsured, but that LSI had no free cash reserves to pay the claims. At least by 2016, and continuing through the present, LSI's former managers, who Assignee now proposes to release of

all claims, were causing LSI to fail to maintain customary professional liability insurance as required by Florida law for no apparent reason other than to save money on insurance premiums and shift the risk of medical malpractice to LSI's physician employees, who were illegally practicing medicine, and to LSI's physician employee's patients, including the Objectors, who underwent uninsured surgeries. The Cash Reserve Account required by the Credit Agreement did not comply with the requirements of any self-insurance requirements of § 458.320, Fla. Stat. because it was not set up through Florida's Department of Insurance, did not require an escrow account not subject to TCB's liens, and did not otherwise comply with the requirements of § 458.320, Fla. Stat. and Florida Administrative Code Chapter 69O-187, "Professional Liability Self-Insurance Trust Funds," including the requirement to file an application with the Florida Department of Insurance, the establishment of a trust fund that would be free from TCB's first priority lien, and require a "run-off" mode to ensure that all claims were paid before the plan was terminated.

12. Regardless of the Assignee's and LSI's protestations to the contrary, LSI's physician employees were not in compliance with Florida's financial responsibility requirements under § 458.320, Fla. Stat., from at least some point in 2016 through the cessation of business in March of 2019. To the extent that either the Assignee continues to claim that there are issues that LSI's physicians may have been in compliance, Objectors are entitled to the filing of a Supplemental Proceeding and a full evidentiary determination of these facts. However, on material facts not in dispute, based on the explicit language of both the insurance policies and the audited financial statements, LSI's physician employees were operating in violation of law.

13. LSI's financial statements disclose the fact that LSI was amassing millions of dollars in uninsured medical malpractice claims without reserves and while LSI and affiliates were

insolvent on a balance sheet basis. Indeed, upon or within a few months of the TCB loan in July of 2015, LSI became insolvent on a balance sheet basis:

a. The December 2015 financial statement Exhibit A, Page 203, shows $5,800,000.00 in professional liability exposure and showing that LSI was insolvent by $46,677,819.00;

b. By June of 2017, Exhibit A Page 1, the balance sheet shows that the level of insolvency had increased to $73,461,704.00, so in 18 months, the level of insolvency had increased by approximately $29,000,000.00. Further, this exhibit shows that LSI and its former managers had actual knowledge that professional liability risks had increased to $7,250,205.00, while the Cash Reserve Account was zero and while LSI was insolvent. After December of 2015, LSI operated without even the Cash Reserve Account, which is shown as having a zero balance sometime after December 2015. Accordingly, LSI's management knew that LSI was incurring medical malpractice liability without the ability to pay said claims and was insolvent; and TCB was claiming a first priority lien on all receivables and income generated by LSI through LSI's foregoing illegal conduct. LSI's former managers knew that the company's insolvency was increasing in an unsustainable level at about $1.61 million per month, so the company was clearly overleveraged, undercapitalized, and losing money on operations. This is confirmed by the 2018 financial statement, Exhibit A Page 10, showing a January 2018 negative deficit of $104,005.501, or approximately $58,000,000 additional negative equity in the 24 month period from December 2015 through January 2018. Again, this shows losses of approximately $2.41 million dollars per month in operations. So management

knew that (1) the company was insolvent (2) the insolvency was increasing and (3) the monthly losses were increasing. Management also knew that the medical malpractice claims were uninsured with no reserves and were increasing.

14. Against this backdrop, pursuant to the physician-patient relationship LSI and its former managers knew that LSI's employee physicians assumed a position of trust and confidence with patients, and LSI's former managers knew that the non-disclosure by LSI of LSI's employee physicians practice of medicine in violation of Florida's Financial Responsibility requirements of § 458.320, Fla. Stat. while LSI was insolvent constituted the fraudulent concealment of material facts from LSI's patients.

15. LSI caused LSI's employee physicians to fraudulently and/or recklessly conceal from patients the fact that LSI was causing its physician employees to practice medicine in violation of the Financial Responsibility requirements of § 458.320, Fla. Stat., and LSI's former managers had actual knowledge that:

a. By review of financial balance sheets before 2015, Exhibit A Page 208, there were no carried liabilities for "professional liability risks" through at least February 2015;

b. By December of 2015, LSI balance sheet showed professional liability risks of $5,800,000.00; and for June of 2016, $5,497,219; Exhibit A Page 204;

c. LSI balance sheets showed professional liability risks of December 2016 in the amount of $6,696,521; March of 2017, $7,188,201; and April 2017 $7,250,205, Exhibit A Page 1.

d. By December of 2017, the carried professional liability risk was $8,669,934.00, Exhibit A Page 8.

e. LSI's former managers also had actual knowledge that LSI was exposed to one million dollars per claim from both actual insurance policies provided, Exhibit A Page 11, and received a detailed explanation in the Consolidated Financial Statements for Years Ending December 31, 2016 and 2017. The Consolidated Financial Statements for the Years Ending December 31, 2016 and December 31, 2017 also state that LSI had retained an independent actuarial firm who estimated accrued total was $14,236,000.00.

f. In addition to the foregoing, by August of 2017, LSI began supplying "Confidential and Privileged Report on Litigation", Exhibit A, Pages 39-202, that show the following:

   i. June 2017: 8 self insured claims up to $1,000,000 each plus 4 self insured claims in presuit ($12,000,000.00 exposure);

   ii. August 2017: 8 self insured claims up to $1,000,000 each plus 5 self insured claims in presuit ($13,000,000.00 exposure);

   iii. September 2017: 8 self insured claims up to $1,000,000 each plus 4 self insured claims in presuit ($12,000,000.00 exposure);

   iv. October 2017: 8 self insured claims up to $1,000,000 each plus 3 self insured claims in presuit ($11,000,000.00 exposure);

   v. November 2017: 14 self insured claims up to $1,000,000 each plus 2 self insured claims in presuit ($16,000,000.00 exposure);

   vi. December 2017: 13 self insured claims up to $1,000,000 each plus 1 self insured claims in presuit ($14,000,000.00 exposure);

vii. February 2018: 15 self insured claims up to $1,000,000 each plus 1 self insured claims in presuit ($16,000,000.00 exposure);

viii. March 2018: 15 self insured claims up to $1,000,000 each plus 2 self insured claims in presuit ($17,000,000.00 exposure);

ix. August 2018: 17 self insured claims up to $1,000,000 each plus 2 self insured claims in presuit ($19,000,000.00 exposure);

x. September 2018: 17 self insured claims up to $1,000,000 each plus 2 self insured claims in presuit ($19,000,000.00 exposure);

xi. October 2018: 17 self insured claims up to $1,000,000 each plus 3 self insured claims in presuit ($19,000,000.00 exposure);

xii. November 2018: 16 self insured claims up to $1,000,000 each plus 3 self insured claims in presuit ($19,000,000.00 exposure);

xiii. December 2018: 17 self insured claims up to $1,000,000 each plus 3 self insured claims in presuit ($20,000,000.00 exposure)

g. LSI was causing physician employees to practice medicine in violation of Florida's Financial Responsibility requirements of § 458.320, Fla. Stat.;

h. LSI was incurring millions of dollars in liability for medical malpractice claims;

i. LSI was insolvent, operating without the legal minimum insurance requirements as required by § 458.320, Fla. Stat., and unable to pay the accruing medical malpractice claims;

j. LSI was plunging into insolvency while increasing medical malpractice liability; and

k. In spite of the foregoing, the former managers continued to operate without statutorily required insurance amassing an ever increasing uninsured medical malpractice claim level without operating reserves to pay claims, and without free assets to pay claims because all assets were pledged to TCB and LSI was insolvent in an amount of almost $100,000,000.00 by 2017.

16. LSI currently contends that it is uninsured and that no funding is available to pay medical malpractice claims.

Argument

Issue 1: Only this Court has Subject Matter to Determine the Scope of the Assignee's Release, and the Order is Ambiguous as to Whether the Objectors' Individual Direct Claims are Intended to be Released.

The Objectors have claims pending against the LSI's Former Managers for Reckless Conduct who are the proposed releasees, and the Assignee takes the position that only the Assignee controls all claims against the former managers and this settlement extinguishes any claims of the Objectors against the former managers.

Only this Court has the subject matter jurisdiction to determine the assets of the estate. The Settlement Motion, the Settlement and Release, and the Order, are ambiguous as to whether the direct claims of the Objectors for Reckless Conduct by causing LSI's physician employees to practice medicine in violation of law would purport to be extinguished by an order approving the Settlement Motion. It is clear to Objectors that the Settlement Motion, the Settlement and Release, and the Order, are written in such a way to provide language so the released parties may claim that Objectors' direct claims for Reckless Conduct are extinguished by this settlement. Objectors' counsel has been notified by one attorney represented one party who would be released under this settlement that the party contends that the release will extinguish all claims of the Objectors.

Assignee will argue in the lawsuits filed by the Objectors that the claims of the Objectors have been released. The Motion should be denied to the extent that there should be no ambiguity. This Court is the only Court that has subject matter jurisdiction to determine property of the Assignors' estates, and the Order should leave no ambiguity. The Order should state clearly state whether all claims of the Objectors based on the practice of medicine by LSI's physician employees without statutorily compliant financial responsibility pursuant to § 458.320, Fla. Stat., are extinguished and released and cite the specific cases pending that are affected by this release or identify what claims are released and what claims survive.

Issue 2: The Assignee has no Standing to Sue the Former Managers. The In Pari Delicto Defense Precludes a Corporation from Suing its Insiders where the Corporation Itself Engaged in the Illegal Conduct.

In *O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1046 (Fla. 2d DCA 2007) (Exhibit B Page 71) Florida's Second DCA recognized that the doctrine of in pari delicto may operate to preclude a bankruptcy trustee from suing third parties. The Court states:

> In pari delicto means "in equal fault." . . . "In pari delicto refers to the plaintiff's participation in the same wrongdoing as the defendant." (citations omitted) . . . Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing." (citations omitted).
> . . .
>
> The defense [of in pari delicto] is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.
> . . .
> Where the defense of in pari delicto is asserted against a corporate entity based on the misconduct of the corporation's agents, it must be determined whether the misconduct of those agents is properly imputed to the corporation.
> . . .
>
> But if a corporate agent was "acting adversely to the corporation's interests, the knowledge and misconduct of the agent are not imputed to the corporation." (citations omitted) . . .
>
> This limitation on the general rule that the acts of a corporate agent are imputed to the corporation is commonly known as the "adverse interest exception." (citations omitted).

. . .

> In summary, determining whether misconduct should be imputed to a corporation requires that the focus of analysis be on whether the misconduct was calculated to benefit the corporation. The misconduct will be imputed where the corporation has been operated as an "engine of theft."

O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039, 1044-46 (Fla. 2d DCA 2007).

In *O'Halloran,* after confirmation of a Chapter 11 plan of reorganization in bankruptcy court, the bankruptcy trustee sued third parties in state court. The trial court dismissed on the grounds of in pari delicto. The Second DCA recognized that the in pari delicto defense applied to bankruptcy trustees:

> The law is well established that under § 541(a) of the Bankruptcy Code, "[a] bankruptcy trustee stands in the shoes of the debtor.'" (citations omitted). "If a claim of [the debtor] would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense." Id.; (citations omitted), *Id.,* at 1046.

Because the bankruptcy trustee had alleged facts to allege that the misconduct of the entity can be considered distinct from the alleged misconduct of the corporate agents because there was no allegation that the corporate insiders participated in the specific wrongdoing alleged against the entity, the Second DCA reversed the dismissal, but stated that the defendants had the right on remand to establish "the facts necessary to support" the in pari delicto defense, *Id.,* at 1047.

In *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145 (11th Cir. 2006) (Exhibit B Page 61), the Eleventh Circuit articulated that the bankruptcy definition of property of the estate and stated that "[l]egal interests or equitable interests" include any causes of action the debtor may bring," *Id*., at 1149. This means that if a trustee cannot "bring" the action, it is not property of the estate. Accordingly, where the doctrine of in pari delicto bars the trustee from suing, the claim is not property of the estate. "A trustee, as the representative of the estate, succeeds into the rights of the debtor-in-bankruptcy and has standing to bring any suit that the

debtor corporation could have brought outside of bankruptcy," *Id*. at 1149. Stating that the bankruptcy trustee "stands in the shoes," *Id*. at 1150, and "[i]f a claim of [the entity] would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense, *Id.* at 1150, applying the doctrine, the Eleventh Circuit affirmed the dismissal of a R.I.C.O. complaint "because [the entity] was an active participant in the Ponzi scheme . . . recovery was barred based on the face of his complaint, *Id*. at 1150, by the in pari delicto doctrine.

Here, the nonpayment of insurance was not done for the purpose of injuring LSI. To the contrary, the nonpayment of insurance and the operation of the corporation by physician employees violating the law was done for the purpose of benefitting LSI by saving insurance premiums through illegal self-insurance, creating LSI as an "engine of theft," . *O'Halloran*, 969 So. 2d at 1046. LSI's managers decided to expose the patients of LSI's physician employees to illegal uninsured surgeries in order to benefit, not to harm, LSI, through illegal conduct. Like driving an uninsured vehicle, the owner saves money unless there is a collision. Here, the Assignee has not done an analysis of whether all of the premiums saved by LSI, through the intentional violation of law governing its physician employees implemented by the former managers to expose LSI's patients to uninsured surgeries, may ultimately have resulted in no monetary damage to LSI. If LSI save more in premiums than it paid in claims, the illegal conduct of LSI caused no actual damage but may have financially benefitted LSI. But there is no evidence that the illegal conduct of the former managers was done to injure LSI. There is no reasonable argument that the lack of insurance caused LSI to cease operations. But, since LSI, through its former managers, was the "engine of theft" *O'Halloran*, 969 So. 2d at 1046, LSI cannot now sue its former managers for the failure to obtain insurance, and the Assignee therefore has no standing to sue its former

managers for claims relating to the decision by the former mangers to conduct business by causing its physician employees to violate the law. Accordingly, LSI cannot sue its former managers due to the doctrine of *in pari delicto:*

> In the instant complaint for damages to creditors caused by the fraudulent conduct of the debtor corporation and others such as corporate affiliates or directors, the bankruptcy trustee does not have standing to sue the third parties because the cause of action belongs to the injured creditors and not to the debtor corporation. (citations omitted). Because the bankruptcy trustee stands in the shoes of the debtor corporation, she has standing only to bring those actions that the debtor corporation could have brought. (citations omitted). The fact that the debtor was acting in pari delicto with third parties whose wrongdoing allegedly injured the debtor bars recovery by the trustee on a suit filed against those same third parties on behalf of the debtor's estate. *Nat'l City Bank of Minneapolis v. Lapides (In re Transcolor Corp.)*, 296 B.R. 343, 367 (Bankr. D. Md. 2003).

The point here is that, due to the in pari delicto defense, the Assignee has no standing to try to settle claims against former managers relating to LSI's decision to cause its physician employees to violate the law because the Assignee cannot sue them in the first place. The claims cannot be brought by the Assignee because the Assignors were in pari delicto. As has been often cited, Chapter 727 defines the scope of causes of action that are property of the estates as, "claims and causes of action, whether arising by contract or in tort, wherever located, and by whomever held at the date of the assignment," § 727.103 (1). The in pari delicto defense eliminates the Assignee's "claim or cause of action" because, where the in pari delicto defense exists, the claim cannot be brought and is therefore not property of the estate.

Moreover, as the Second DCA has ruled that the in pari delicto defense requires a factual analysis, as stated below, the Assignee cannot ask the Court to determine whether the Assignee has an interest in the claim except by Supplemental Proceeding. While the Assignee can sue the former managers to recoup fraudulent conveyances where the former managers looted the entity and removed assets from the entity, the Assignee cannot sue former managers for illegal conduct

by the former managers that was taken for the benefit of the corporation and for the purpose of injuring third parties. The Assignee, standing in the shoes of the entity, has no standing to sue for claims relating to the uninsured medical malpractice claims. The Assignee is attempting to release parties from claims the Assignee does not have and cannot bring, and the Motion must be denied.

Issue 3: The Assignee Cannot Release the Released Parties from the Claims of the Tinellis and the Langstons.

The Langstons and the Tinellis are pursuing statutory claims under Florida's LLC Act, Chapter 605, and Florida' corporations Act, Chapter 607. While the Settlement Motion and the Settlement and Release do not specifically identify the direct claims of the Langstons and Tinellis as being extinguished and released, there is no question that the Assignee intends for that to occur and is simply leaving it ambiguous for other courts to work through the order. But the Assignee does not control any claims of the Langstons and Tinellis.

Various bankruptcy courts have worked through this issue and the ultimate analysis is a determination under state law of whether a corporation can pierce its own corporate veil. There is no binding precedent in Florida from either a district court of appeals or the Florida Supreme Court. In an opinion from the United States Bankruptcy Court of the Middle District of Florida, Orlando Division, *In re Xenerga, Inc.,* 449 B.R. 594 (Bankr. M.D. Fla. 2011) (Exhibit B Page 55). In *Xenerga,* the Court held that an alter ego veil piercing claim, relying *on Baillie Lumber Co. v. Thompson*, 391 F.3d 1315 (11th Cir. 2004) (Exhibit B Page 48) (the *Baillie* case is frequently referred to as "*Icarus Holdings*"), is property of the estate, but direct claims, such as the claims filed by Objectors, are not:

> The Eleventh Circuit Court of Appeals has held an alter ego action belongs to the bankruptcy estate under § 541 if (1) it is "a general claim that is common to all creditors,"

> and (2) state law allows the corporate entity to bring an alter ego action against its principal. An alter ego claim is a general one when liability extends "to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." In other words, if the injury alleged in the alter ego action is an injury to the corporation and thus suffered generally by all creditors, and is not an injury inflicted directly on any one creditor, the trustee has exclusive standing to bring such an alter ego action. Conversely, a trustee may not bring an alter ego claim if the alleged injury is specific to one creditor and not to the debtor corporation and creditors generally. *In re Xenerga, Inc*., 449 B.R. 594, 598-99 (Bankr. M.D. Fla. 2011) (Exhibit B Page 55).

In *Xenerga*, the issue before the Court was exactly the issue here. The bankruptcy trustee was proposing a settlement to release insiders from all veil piercing claims including direct claims filed by creditors. The court ultimately allowed the trustee standing to release alter ego claims that any creditor could bring, but denied the motion because the trustee was trying to also release direct claims permitted by statute that the creditors were bringing directly against the parties to be released. This is exactly what the Assignee is doing here. Specifically, the *Xenerga* court held:

> NTAE, however, has raised two direct claims against the Principals that do not rely upon either an alter ego finding or the debtor's independent liability: (1) its claim that the Principals are each individually liable under the Florida Deceptive and Unfair Trade Practices Act (Count IX), and (2) its claim that the Principles and Filta conspired with Xenerga to violate FDUTPA and commit other wrongful actions (Count X). Well established Florida case law holds that claims against a corporation's principal under the FDUTPA need only "allege that the individual was a direct participant in the improper dealings." 21 Piercing the corporate veil is unnecessary to find a corporation's principal individually liable. 22 NTAE thus need not bring an alter ego action to establish the Principals' liability under the FDUTPA. Accordingly, NTAE's claim under FDUTPA is a direct claim against the Principals that belongs solely to NTAE and not the estate.
>
> Likewise, NTAE's conspiracy claim is directly against the Principals and Filta. The claim alleges Clewes and Sayers each conspired with Xenerga and Filta to commit unlawful acts, including fraudulent inducement into two contracts, fraudulent transfer of funds, violation of the FUDTPA, and breaches of fiduciary duties. The claim does not rely upon an alter ego finding because it alleges the Clewes and Sayers are liable in their capacity as individuals for conspiring with Xenerga and Filta. Thus, to the extent NTAE's conspiracy claim is a viable claim it is a direct claim against the Principals and Filta.
>
> Because two of the Claims the trustee seeks to settle are direct claims held by NTAE against non-debtors, the trustee cannot settle these two claims. The proposed compromise improperly attempts to settle claims that are not property of the debtor's estate under § 541 of the Bankruptcy Code. *Id.*, at 600.

The claims of the Objectors are direct claims by statute. § 605.04093. The Objectors are suing for the Objectors' damages pursuant to § 605.04093 (1) (a) and (b) (5) which the Assignee is not doing and cannot do. There is nothing in § 605.04093 that suggests that an action by either the LLC or its Assignee insulates Former Managers from an action by a third party pursuant to § 605.04093 (1) (a) and (b) (5). The statute provides:

> 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.

Since the LLC cannot insulate its managers from third party lawsuits, 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). 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. As the Eleventh Circuit recently stated:

> Our analysis is straightforward. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). "When the words of a statute are unambiguous . . . [our] 'judicial inquiry is complete.'" *Villarreal v. R.J. Reynolds Tobacco Co*., 839 F.3d 958, 969 (11th Cir. 2016) (quoting Conn. Nat'l Bank, 503 U.S. at 254).
>
> *Gil v. Winn-Dixie Stores, Inc*., No. 17-13467, 2021 U.S. App. LEXIS 10024, at *17 (11th Cir. Apr. 7, 2021).(Exhibit B Page 19).

There is nothing in the text of either Chapter 605 or 607 that marginally suggests or alludes to the Assignee's claim that direct causes of action of "someone other than the limited liability company or a member" can somehow be extinguished by either the LLC, or the Assignee, as the LLC's successor in interest. This is not a matter of "equity," "fairness," whether the Objectors are trying to "skip the line," as the Assignee has declared the Objectors are attempting, or any other the other legislative considerations that might go into amending the statute. The matter is, as the Eleventh Circuit states, the "legislature says in a statute what it means and means in a statute what it says there," and what it says in the legislation is that third parties may bring direct proceedings against former managers and officers. The Assignee's resort to comparison to bankruptcy cases does not expand this because, as stated above.

Issue 4: If the Assignee Owns the Claims, the Released Parties are Liable for 100% of All Claims- In this Case, $500,000,000.00 or more in claims. The $9,000,000.00 Settlement is facially insufficient.

When the Assignee declares that it has the right to bring claims on behalf of all creditors, the more correct way to say it is that the Assignee has the right to bring the total sum of all claims of all creditors. When a corporate veil is avoided on behalf of all creditors, the result is that the individuals doing business are liable for 100% of the debt. Here, that appears to be in excess of five hundred million dollars.

This analysis is borne out by two opinions from the same case, *Baillie Lumber Co. v. Thompson*, 391 F.3d 1315 (11th Cir. 2004))("Baillie I") (Exhibit B Page 48); *Baillie Lumber Co. v. Thompson*, 279 Ga. 288, 612 S.E.2d 296 (2005) (Exhibit B Page 14). *Baillie Lumber Co., LP v. Thompson*, 413 F.3d 1293 (11th Cir. 2005) ("*Baillie II*") adopted the Georgia Supreme Court's analysis. In *Baillie I (*which is referred to in the *Xenerga* opinion as "Icarus Holdings,"), Icarus filed bankruptcy, and Baillie Lumber had sold lumber to Icarus prepetition. Icarus' primary member had engaged in financial irregularities that harmed Icarus' liquidity. After bankruptcy, Icarus sued its member. Baillie also sued the member in state court, alleging an alter ego claim, and argued in bankruptcy court that Baillie's claim against the member was not property of the bankruptcy estate. "Baillie contends that Icarus and the Official Committee of Unsecured Creditors of Icarus ("Committee") have no authority to settle the alter ego claim against Thompson," *Baillie,* 391 F.3d at 1318,. After reviewing conflicting decisions out of different courts, the Eleventh Circuit states:

> [W]e hold that in order to bring an exclusive alter ego action under section 541, a bankruptcy trustee's claim should (1) be a general claim that is common to all creditors and (2) be allowed by state law. See In re iPCS, Inc., 297 B.R. 283, 297 (Bankr. N.D. Ga. 2003). In this action, we find that Baillie Lumber asserts only a general cause of action and no personal damages that are unique to them. Baillie Lumber's claim would be personal if Baillie Lumber itself was "harmed and no other . . . creditor has an interest in the cause."

> Koch, 831 F.2d at 1348. The claim is a general one when liability extends "to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Id.* at 1349. Here, the assertion is that Thompson blurred the line between himself and the corporation by taking assets of the corporation and using them to his own personal ends. Unlike the Steinberg shareholders, Thompson did "loot" the corporate assets. An alter ego action under these circumstances could be brought by all creditors of Icarus. Baillie Lumber has shown no unique or personal harm aside from the fact that each creditor would demand a different amount in compensation. By misappropriating corporate assets, Thomson caused direct harm to the corporation and only indirect harm to Baillie Lumber. Thus, this action meets our first factor. However, it is unclear whether Georgia law allows a corporation to bring an alter ego action against itself.
>
> *Baillie Lumber Co. v. Thompson*, 391 F.3d 1315, 1321 (11th Cir. 2004).

The Eleventh Circuit then certified the state law question of whether Georgia law allowed the representative of a debtor corporation to bring an alter ego claim against the corporation's former principal to the Georgia Supreme Court, and in *Baillie Lumber Co. v. Thompson*, 279 Ga. 288, 612 S.E.2d 296 (2005), the Supreme Court answered the question in the affirmative, and added, "Thus, it is readily apparent that where the corporate entity is disregarded, a principal found liable under an alter ego theory should be liable for the entirety of the corporation's debt," *Id.,* at 301. This is consistent with Florida law, *Mayer v. Eastwood-Smith & Co*., 164 So. 684 (1935) ("when fraud or illegal act is attempted, fiction will be disregarded by the court and the acts of the real parties dealt with as though no corporation had been formed"), cited by *USP Real Estate Inv. Trust v. Discount Auto Parts, Inc.,* 570 So.2d 386 (Fla. 1D DCA 1990).

This is also consistent with the Assignee's claim here. The Assignee claims to be suing the parties to be released on behalf of all creditors. The Assignee claims that it is now releasing the claims of all creditors. That is the sum total of all claims of all creditors. The Assignee, therefore, is releasing hundreds of millions of dollars in claims for $9,000,000.00. As set forth below, the Assignee has offered no evidence to support the Motion and the Motion must be denied.

Issue 5: This Settlement requires a Supplemental Proceeding.

This Court has exclusive subject matter jurisdiction to determine property of the estate, § 727.109 (8) (b) ("determine any of the following actions brought by the assignee, which she or he is empowered to maintain: . . . (b) Determine the validity, priority, and extent of a lien or other interests in assets of the estate." Here, the Assignee has simply "declared" that the Assignee owns all claims against the parties to be released relating to the violations of Florida's professional liability statute by LSI's physician employees, and the Assignee further intends to release the parties. Obviously, the idea is that the released parties will then carry these releases into litigation brought by Objectors and seek dismissals, thereby effectively arguing that the other courts must determine whether or not the Assignee's release in fact releases them from the direct claims brought by the Objectors. There is no purpose in granting an \ambiguous motion or entering an ambiguous order. As described above, there are two factual and legal issues that must be litigated:

1) Whether the in pari delicto defense eliminates causes of action the Assignee has brought against the proposed released parties, and therefore, whether the Assignee has standing to deliver the releases; and
2) Whether the Assignee can also release direct claims that the Objectors are bringing against anyone, that is, whether the Objectors claims are property of the Assignment Estates.

As described in Chapter 727, for the Assignee to ask the Court to determine the extent of an interest in assets of the estate, a Supplemental Proceeding is required per § 727.110 (1) (b):

> 727.110 Actions by assignee and other parties in interest.—
> (1) All matters requiring court authorization under this chapter shall be brought by motion, except for the following matters, which shall be brought by supplemental proceeding, as provided in subsection (2):
> . . .
> (b) An 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); and

The way the statute is written, only this Court has the exclusive jurisdiction to determine what is, and what is not, an asset of the estate, and the exclusive way to do that is by the Assignee's filing of a Supplemental Proceeding, service of process, and litigation under the Florida Rules of Civil Procedure. The Objectors have the procedural due process rights under Chapter 727 to be sued in a supplemental proceeding, discovery, motions practice, and trial, before the Court can essentially enter a declaratory judgment determining that the Objectors' direct claims are property of the estate and extinguishing the claims of the Objectors. This cannot be accomplished through motions practice.

Moreover, since only this Court has subject matter jurisdiction, other courts cannot interpret either the statute or the order and make independent interpretations. If the order is sufficiently ambiguous to leave doubt as to what is released, the parties will have to come back to this Court under Rule 1.540 and ask for clarification.

Issue 6: The Motion is not Supported by Competent, Admissible Evidence.

The Settlement Motion and the Settlement and Release are not supported by evidence. As stated by the Fourth DCA:

> Fourth, the practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.
>
> *Leon Shaffer Golnick Advert. v. Cedar*, 423 So. 2d 1015, 1016-17 (Fla. 4th DCA 1982) (Exhibit B Page 1).

The Settlement Motion is not supported by any evidence at all. Essentially, the Assignee asks the Court to abdicate the Court's jurisdictional role as fact finder. The Assignee's position is

an “"it is because I say it is" position. This sort of ipse dixit reasoning is insufficient to support a finding . . .” *State v. Wooten*, 260 So. 3d 1060, 1067 (Fla. 4th DCA 2018).

The applicable statute, §727.109, states that “ [t]he court shall have power to:

> (1) Enforce all provisions of this chapter.
> (7) Upon notice as provided under s. 727.111 to all creditors and consensual lienholders, hear and determine a motion brought by the assignee for approval of a proposed sale of assets of the estate other than in the ordinary course of business, or the compromise or settlement of a controversy, and enter an order granting such motion notwithstanding the lack of objection if the assignee reasonably believes that such order is necessary to proceed with the action contemplated by the motion. (emphasis added).

The Court, not the Assignee, has the power to determine a motion brought by the Assignee for approval of a settlement, and evidence is required. Without evidence, the motion must be denied.

In the same vein, the Settlement Motion and the Settlement and Release include multiple agreed conclusions of law that the Assignee has no standing to declare, including “the Parties agree that the Assignee has sole legal standing and authority to pursue and settle the Claims in accordance with Chapter 727, Florida Statutes, as assignee for the benefit of creditors of the LSI Entities,” Settlement and Release, Page 3, and asks this Court to declare that this Order is appealable as a partial final judgment, Proposed Order, page 3. The Release also includes language that the release includes, “any claims for failing to obtain adequate insurance for the companies and implementing or continuing self-insurance programs for professional liability insurance, medical malpractice insurance, and employee health insurance,” Settlement and Release, P. 5. This is entirely too broad as it purports to include Objectors’ claims.

The specific areas where admissible evidence should be required are:

a. “The Collection Factor.” Assignee alleges that “there is substantial doubt as to the collectability of any judgment that might be obtained against the Defendants,” without

evidence. The Settlement Motion does not state the available coverage limits, provide any estimate of defense costs that would erode coverage limits as a wasting policy, or, perhaps most importantly, provide financial statements or affidavits of the Defendants. There is no evidence from which the Court can rule that judgments would not be collectible.

b. "Complexity of Litigation." Assignee contends that multi-year litigation would result in a significant investment in legal and professional fees, however, the contingency fee agreements attached to the Settlement Motion provide that the attorneys are on a pure contingency fee basis for all filed lawsuits, and also, the attorneys have the obligation to advance costs until such time as the Assignee has sufficient funds to pay costs. The fact that the projected damages could approach $750,000,000.00 and essentially pay all claims in full justify, minimally, admission of expert testimony on a reasonable litigation budget to litigate these claims. The number of documents and depositions estimated by Assignee, 20 depositions and 30,000 documents, are not so unwieldly or expensive to walk away from hundreds of millions of dollars in recovery due to "complexity." Frankly, there is nothing all that complex about what occurred. It is well documented that on July 2, 2015, LSI's Former Managers stripped $150,000,000 of balance sheet equity leaving the company without any free cash reserves and amassing millions of dollars in debt including uninsured medical malpractice claims. All of the transfers are clearly voidable and the Assignee makes no effort to explain any possible defenses to any of the claims. There do not appear to be any substantial defenses. Further, since LSI had multiple attorneys and accountants, there is no discussion of those third party claims.

c. "Paramount Interest of Creditors." The settlement will result in the general unsecured creditors receiving such a nominal recovery that the recovery is meaningless. A $9,000,000.00 settlement, less $2,050,080.00 in contingency legal fees, less the $1,000,000.00 approx. allocation to TCB assuming something in the neighborhood of the current request is allowed, less administrative fees of approximately $4,000,000.00 as stated in the recently filed issue statement for trial on the TCB compromise, would yield, at best $1,000,000 to $2,000,000 in distributions for what appear to be over $600,000,000 in claims or less than a penny on the dollar. While this does not necessarily mean that the settlement should not be approved, if the settlement is nevertheless a reasonable recovery for creditors, a more thorough evidentiary analysis must be presented to the Court for the Court to approve on an evidentiary basis this settlement that essentially pays only administrative claims while all other creditors receive such a nominal recovery to effectively be zero. This is particularly important because, if successful, the veil piercing litigation would result in the payment of 100% of the allowed claims.

d. And, as stated above, evidence as to the scope of the property of the estate and the extent of the proposed releases must be adjudicated by the Court, not simply declared by the Assignee.

This is in addition to the above claims that no evidence has been presented to establish that the Objectors direct claims are property of the estate. Cited cases are attached as Composite Exhibit B.

CONCLUSION

In conclusion, the Objectors respectfully request that the Settlement Motion be denied.

Wherefore; the Objectors request that the Settlement Motion be denied, and for such other relief as the Court deems appropriate.

Certificate of Service: I hereby certify that a copy of the foregoing was efiled and service will be made through the Court's efiling service this 16 day of April, 2021.

Respectfully submitted,
/s/**Donald J. Schutz**
Donald J. Schutz, Esq.
Fla Bar No. 382701
535 Central Avenue
St. Petersburg, FL 33701
727-823-3222/727-895-3222 Telefax
donschutz@netscape.net (Secondary)
don@lawus.com (Primary)
Attorney for Objectors

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LSI Holdco, LLC and Subsidiaries
Consolidated Balance Sheets

	April 2017	March 2017	December 2016
Assets			
Current assets:			
Cash and cash equivalents	$ 1,318,383	$ 1,681,657	$ 3,660,344
Accounts receivable	79,631,179	80,679,551	89,184,339
Less: Allowance for uncollectible accounts	(42,505,526)	(44,117,586)	(48,557,150)
Net accounts receivable	37,125,653	36,561,965	40,627,189
Notes receivable	19,406,100	19,077,820	16,926,650
Less: Allowance for uncollectible notes	(5,232,324)	(5,010,697)	(4,014,672)
Net notes receivable	14,173,776	14,067,123	12,911,978
Prepaid expenses and other current assets	8,597,910	8,735,097	8,621,945
Medical supplies inventory	604,157	612,835	605,434
Total current assets	**61,819,879**	**61,658,677**	**66,426,890**
Fixed assets			
Property and equipment	116,674,865	116,508,545	116,067,803
Less: accumulated depreciation	(42,131,058)	(41,653,950)	(38,958,337)
Net fixed assets	**74,543,807**	**74,854,595**	**77,109,466**
Restricted cash	-	-	1,774,552
Other long term assets	1,666,748	1,634,737	997,983
Total assets	**$ 138,030,434**	**$ 138,148,009**	**$ 146,308,891**
Liabilities and members' equity (deficit)			
Current liabilities:			
Accounts payable	$ 9,941,342	$ 10,674,835	$ 12,363,606
Accrued expenses	32,421,285	37,536,028	41,768,578
Patient reimbursements	672,695	672,752	688,808
Current portion of deferred lease expense	1,945,350	1,945,350	1,945,350
Current portion of capital lease obligations	111,422	125,100	164,699
Current maturities of long-term debt	7,500,000	7,500,000	3,750,000
Total current liabilities	**52,592,094**	**58,454,065**	**60,681,041**
Long-term debt			
Line of credit	7,000,000	-	6,425,081
Term loan, less current maturities	127,500,000	127,500,000	131,250,000
Less: unamortized debt issuance costs	(2,150,852)	(2,264,055)	(2,603,664)
Long-term debt less unamortized debt issuance costs	**132,349,148**	**125,235,945**	**135,071,417**
Other long-term liabilities			
Deferred lease expense	18,322,443	18,271,696	18,084,290
Capital lease obligations	978,248	978,248	978,248
Professional liability risks	7,250,205	7,188,201	6,696,521
Total other long-term liabilities	**26,550,896**	**26,438,145**	**25,759,059**
Total liabilities	**211,492,138**	**210,128,155**	**221,511,517**
Members' equity (deficit)	**(73,461,704)**	**(71,980,146)**	**(75,202,626)**
Total liabilities and members' equity (deficit)	**$ 138,030,434**	**$ 138,148,009**	**$ 146,308,891**

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LASER SPINE INSTITUTE®

LSI Holdco, LLC and Subsidiaries
Consolidated Statements of Cash Flows

	One Month Ended April 2017	Four Months Ended April 2017
Cash flows from operating activities:		
Net loss	$ (1,481,557)	$ (5,256,601)
Adjustment to reconcile net loss to net cash from operating activities:		
Depreciation and amortization	625,473	3,924,109
Bad debt expense	893,859	3,346,924
Loss on disposal of property and equipment	-	104,400
Amortization of deferred loan costs	113,203	452,812
Loss on debt modification	-	-
Incentive compensation units	-	-
Changes in assets and liabilities:		
(Increase) decrease in:		
Inventory	8,678	1,277
Accounts receivable	(1,235,920)	1,372,264
Notes receivable	(328,280)	(2,479,450)
Prepaid expenses and other current assets	3,783	(8,793)
Increase (decrease) in:		
Accounts payable	(733,493)	(2,422,264)
Patient reimbursements	(57)	(16,113)
Accrued expenses, including deferred lease expense	(5,001,993)	(8,555,457)
Net cash from operating activities	**(7,136,304)**	**(9,536,892)**
Cash flows from investing activities:		
Purchase of property and equipment	(166,320)	(1,399,925)
Proceeds from the sale of property and equipment	-	87,700
Change in restricted cash	-	1,774,552
Acquisition of intangible assets	(46,972)	(786,562)
Net receipts of (disbursements for) other assets	-	-
Net cash from investing activities	**(213,292)**	**(324,235)**
Cash flows from financing activities:		
Borrowings on long-term debt	-	-
Principal payments on long-term debt	-	-
Net payments on revolving credit agreements	7,000,000	574,919
Financing costs paid	-	-
Principal payments on capital lease obligations	(13,678)	(53,277)
Distributions to members	-	-
Contributions from members	-	6,997,524
Net cash from financing activities	**6,986,322**	**7,519,166**
Net change in cash	(363,274)	(2,341,961)
Cash and cash equivalents		
Beginning	1,681,657	3,660,344
Ending	$ 1,318,383	$ 1,318,383
Supplemental disclosures of cash flow information		
Cash paid for interest	$ 993,161	$ 3,664,947

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LSI Holdco, LLC and Subsidiaries
Consolidated Statements of Members' Equity (Deficit)

	Four Months Ended	Twelve Months Ended
	April 2017	December 2016
Beginning balance	$ (75,202,626)	$ (58,634,885)
Members' distributions	-	-
Members' contributions	6,997,524	-
Conversion of debt to membership units	-	50,250,002
Incentive compensation units	-	157,074
Net income/(loss)	(5,256,601)	(66,974,818)
Ending balance	$ (73,461,704)	$ (75,202,626)

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LSI Holdco, LLC and Subsidiaries
Consolidated Statement of Operations
Actual vs. Budget

	Month to Date April 2017						Year to Date April 2017					
	Actual	Rev%	Budget	Rev%	$ Var	%Var	Actual	Rev%	Budget	Rev%	$ Var	%Var
Time of Service	5,410,605	32.7%	6,661,005	31.8%	(1,250,400)	18.8%	25,453,246	33.8%	25,715,937	31.8%	(262,691)	-1.0%
Patient Remaining Responsibility	482,144	2.9%	742,000	3.5%	(259,856)	-35.0%	2,051,173	2.7%	2,702,475	3.3%	(651,302)	-24.1%
Insurance Revenue	10,470,463	63.3%	12,936,286	61.8%	(2,465,823)	-19.1%	46,089,865	61.2%	48,944,481	61.8%	(3,854,616)	-7.7%
Surgical Revenue	16,353,212	98.9%	20,339,291	97.2%	(3,976,079)	-19.5%	73,594,284	97.6%	78,352,893	97.0%	(4,768,609)	-6.1%
Non Surgical Revenue	60,031	0.4%	238,500	1.1%	(178,469)	-74.8%	757,783	1.0%	1,008,875	1.2%	(252,092)	-25.1%
Other Revenue	125,997	0.8%	341,200	1.6%	(215,203)	-63.1%	1,020,316	1.4%	1,431,200	1.8%	(410,884)	-28.7%
REVENUE	**16,549,240**	**100.0%**	**20,918,991**	**100.0%**	**(4,369,751)**	**-20.9%**	**75,367,383**	**100.0%**	**80,798,968**	**100.0%**	**(5,431,585)**	**-6.7%**
Salaries and Wages	6,123,087	37.0%	6,794,118	32.5%	(671,036)	-9.9%	28,563,743	37.9%	30,522,593	37.8%	(1,958,850)	-6.4%
Benefits	713,314	4.3%	887,458	4.2%	(174,144)	-19.6%	3,890,966	5.2%	4,070,457	5.0%	(179,491)	-4.4%
Medical Supplies	1,172,657	7.1%	1,618,515	7.7%	(445,858)	-27.5%	5,669,145	7.5%	6,251,426	7.7%	(582,281)	-9.3%
Patient Fees	15,939	0.1%	771,590	3.3%	(255,651)	-94.1%	716,004	1.0%	980,890	1.2%	(264,886)	-27.0%
Equipment Rent And Maintenance	156,479	0.9%	200,605	1.0%	(44,126)	-22.0%	725,650	1.0%	827,480	1.0%	(101,830)	-12.3%
Building Rent, Utilities, And Maintenance	1,178,239	7.1%	1,236,884	5.9%	(58,645)	-4.7%	4,583,072	6.1%	4,889,049	6.1%	(305,977)	-6.3%
Advertising And Marketing	4,435,981	26.8%	4,394,660	21.0%	41,321	0.9%	17,507,009	23.2%	17,818,242	22.1%	(311,233)	-1.7%
Professional Fees	257,129	1.6%	245,834	1.2%	7,295	2.9%	884,567	1.2%	870,985	1.1%	13,582	1.6%
Provision for Bad Debts	893,859	5.4%	941,355	4.5%	(47,496)	-5.0%	3,346,924	4.4%	3,135,954	3.9%	210,970	6.7%
Other Operating Expenses	1,444,102	8.7%	1,564,647	7.5%	(120,545)	-7.7%	5,984,095	7.9%	6,075,131	7.5%	(91,036)	-1.5%
TOTAL OPERATING EXPENSES	**16,390,781**	**99.0%**	**18,159,666**	**86.8%**	**(1,768,885)**	**-9.7%**	**71,871,175**	**95.4%**	**75,442,207**	**93.4%**	**(3,571,032)**	**-4.7%**
ADJUSTED EBITDA	**158,459**	**1.0%**	**2,759,325**	**13.2%**	**(2,600,866)**	**-94.3%**	**3,496,208**	**4.6%**	**5,356,761**	**6.6%**	**(1,860,553)**	**-34.7%**
	1.0%		***13.2%***		***-12.2%***		***4.6%***		***6.6%***		***-2.0%***	
Total Non Recurring Expenses	64,757	0.4%	27,416	0.1%	37,336	136.2%	816,478	1.1%	886,606	1.1%	(70,128)	-7.9%
EBITDA	**93,707**	**0.6%**	**2,731,909**	**13.1%**	**(2,638,202)**	**-96.6%**	**2,679,730**	**3.6%**	**4,470,155**	**5.5%**	**(1,790,425)**	**-40.1%**
Interest Expense/ Income	949,793	5.7%	968,640	4.6%	(18,847)	-1.9%	4,012,219	5.3%	4,024,560	5.0%	(12,341)	-0.3%
Depreciation & Amortization	625,473	3.8%	1,072,610	5.1%	(447,137)	-41.7%	3,924,109	5.2%	4,158,528	5.1%	(234,419)	-5.6%
Total Other Non Operating Expenses	1,575,266	9.5%	2,041,250	9.8%	(465,984)	-22.8%	7,936,328	10.5%	8,183,088	10.1%	(246,760)	-3.0%
NET INCOME/LOSS	**(1,481,559)**	**-9.0%**	**690,659**	**3.3%**	**(2,172,218)**	**-314.5%**	**(5,256,598)**	**-7.0%**	**(3,712,933)**	**-4.6%**	**(1,543,665)**	**41.6%**

Statistics:						
MD	822	999	(177)	3,686	3,909	(223)
MIS	49	61	(12)	250	246	4
Total Surgical volume	**871**	**1,060**	**(189)**	**3,936**	**4,155**	**(219)**
Rate Per Surgery	18,787	19,188	(401)	18,698	18,860	(162)
Provision for Bad Debt	(1,026)	(888)	(138)	(850)	(755)	(96)
Net Rate Per Surgery	**17,760**	**18,300**	**(539)**	**17,847**	**18,105**	**(258)**
FTE's	843	839	4	843	839	4
Patient Days	20	20	-	84	84	-
Payroll Days	20	20	-	85	85	-
Expenses/Net Revenue	99.0%	86.8%	12.2%	95.4%	93.4%	2.0%
Collections/Net Revenue	91.5%	0.0%	91.5%	99.1%	0.0%	99.1%

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LASER SPINE INSTITUTE®

LSI Holdco, LLC and Subsidiaries
Consolidated Statement of Operations
Year over Year

	Month to Date						Year to Date					
	April 2017	Rev%	April 2016	Rev%	$ Var	%Var	April 2017	Rev%	April 2016	Rev%	$ Var	%Var
Time of Service	5,410,605	32.7%	7,272,621	33.7%	(1,862,016)	-25.6%	25,453,246	33.8%	25,557,978	30.3%	(104,732)	-0.4%
Patient Remaining Responsibility	482,144	2.9%	346,043	1.6%	136,101	39.3%	2,051,173	2.7%	1,358,353	1.6%	692,820	51.0%
Insurance Revenue	10,470,463	63.3%	13,933,970	64.6%	(3,463,507)	-24.9%	46,089,865	61.2%	57,329,456	67.9%	(11,239,591)	-19.6%
Surgical Revenue	16,363,212	98.9%	21,552,634	99.9%	(5,189,422)	-24.1%	73,594,284	97.6%	84,245,787	99.8%	(10,651,503)	-12.6%
Non Surgical Revenue	60,031	0.4%	-	0.0%	60,031	100.0%	752,783	1.0%	-	0.0%	752,783	100.0%
Other Revenue	125,997	0.8%	19,946	0.1%	106,051	531.7%	1,020,316	1.4%	166,238	0.2%	854,078	513.8%
REVENUE	**16,549,240**	**100.0%**	**21,572,580**	**100.0%**	**(5,023,340)**	**-23.3%**	**75,367,383**	**100.0%**	**84,412,025**	**100.0%**	**(9,044,642)**	**-10.7%**
Salaries and Wages	6,123,082	37.0%	9,669,593	44.8%	(3,546,511)	-36.7%	28,563,743	37.9%	36,545,189	43.3%	(7,981,446)	-21.8%
Benefits	713,314	4.3%	1,358,513	6.3%	(645,199)	-47.5%	3,890,966	5.2%	6,044,483	7.2%	(2,153,517)	-35.6%
Medical Supplies	1,172,657	7.1%	2,192,986	10.2%	(1,020,329)	-46.5%	5,669,145	7.5%	8,590,382	10.2%	(2,921,237)	-34.0%
Patient Fees	15,939	0.1%	630,856	2.9%	(614,917)	-97.5%	716,004	1.0%	2,287,381	2.7%	(1,571,377)	-68.7%
Equipment Rent And Maintenance	156,479	0.9%	169,090	0.8%	(12,611)	-7.5%	725,650	1.0%	717,451	0.8%	8,199	1.1%
Building Rent, Utilities, And Maintenance	1,178,239	7.1%	1,390,304	6.4%	(212,065)	-15.3%	4,583,072	6.1%	4,530,842	5.4%	52,230	1.2%
Advertising And Marketing	4,435,981	26.8%	4,468,056	20.7%	(32,075)	-0.7%	17,507,009	23.2%	20,549,844	24.3%	(3,042,835)	-14.8%
Professional Fees	257,129	1.6%	794,269	3.7%	(537,140)	-67.6%	884,567	1.2%	2,863,418	3.4%	(1,978,851)	-69.1%
Provision for Bad Debts	893,859	5.4%	732,745	3.4%	161,114	22.0%	3,346,924	4.4%	1,653,034	2.0%	1,693,890	102.5%
Other Operating Expenses	1,444,102	8.7%	1,573,589	7.3%	(129,487)	-8.2%	5,584,095	7.9%	6,438,390	7.6%	(454,295)	-7.1%
TOTAL OPERATING EXPENSES	**16,390,781**	**99.0%**	**22,980,001**	**106.5%**	**(6,589,220)**	**-28.7%**	**71,871,175**	**95.4%**	**90,220,414**	**106.9%**	**(18,349,239)**	**-20.3%**
ADJUSTED EBITDA	**158,459**	**1.0%**	**(1,407,421)**	**-6.5%**	**1,565,880**	**-111.3%**	**3,496,208**	**4.6%**	**(5,808,389)**	**-6.9%**	**9,304,597**	**-160.2%**
	1.0%		*-6.5%*		*7.5%*		*4.6%*		*-6.9%*		*11.5%*	
Total Non Recurring Expenses	64,752	0.4%	72,092	0.3%	(7,340)	-10.2%	816,478	1.1%	(906,749)	-1.1%	1,723,227	-190.0%
EBITDA	**93,707**	**0.6%**	**(1,479,513)**	**-6.9%**	**1,573,220**	**-106.3%**	**2,679,730**	**3.6%**	**(4,901,640)**	**-5.8%**	**7,581,370**	**-154.7%**
Interest Expense/ Income	949,793	5.7%	660,629	3.1%	289,164	43.8%	4,012,219	5.3%	2,539,624	3.0%	1,472,595	58.0%
Depreciation & Amortization	625,473	3.8%	778,584	3.6%	(153,111)	-19.7%	3,924,109	5.2%	3,730,909	3.8%	693,200	21.5%
Total Other Non Operating Expenses	1,575,266	9.5%	1,439,213	6.7%	136,053	9.5%	7,936,328	10.5%	5,770,533	6.8%	2,165,795	37.5%
NET INCOME/LOSS	**(1,481,559)**	**-9.0%**	**(2,918,726)**	**-13.5%**	**1,437,167**	**-49.2%**	**(5,256,598)**	**-7.0%**	**(10,672,173)**	**-12.6%**	**5,415,575**	**-50.7%**
Statistics:												
MID	822		1,131		(309)		3,686		4,387		(701)	
MIS	49		78		(29)		250		301		(51)	
Total Surgical volume	**871**		**1,209**		**(338)**		**3,936**		**4,688**		**(752)**	
Rate Per Surgery	18,787		17,827		960		18,698		17,971		727	
Provision for Bad Debt	(1,026)		(606)		(420)		(850)		(353)		(498)	
Net Rate Per Surgery	**17,760**		**17,221**		**540**		**17,847**		**17,618**		**229**	
FTE's	843		1,185		(344)		843		1,186		(344)	
Patient Days	20		20		-		84		84		-	
Payroll Days	20		20		-		85		85		-	
Expenses/Net Revenue	99.0%		106.5%		-7.5%		95.4%		106.9%		-11.5%	
Collections/Net Revenue	91.5%		0.0%		91.5%		99.1%		0.0%		99.1%	

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LASER SPINE INSTITUTE®

LSI Holdco, LLC and Subsidiaries Consolidated Statement of Operations Trend	2016 Apr	2016 May	2016 Jun	2016 Jul	2016 Aug	2016 Sep	2016 Oct	2016 Nov	2016 Dec	2017 Jan	2017 Feb	2017 Mar	2017 Apr
Time of Service	7,272,621	6,128,061	6,581,236	6,061,762	6,339,324	5,679,481	5,908,973	5,895,407	5,419,069	6,804,274	6,206,572	7,031,795	5,410,605
Patient Remaining Responsibility	346,043	280,527	341,530	429,966	464,538	395,522	442,495	340,633	310,562	551,636	448,484	568,909	482,144
Insurance Revenue	13,933,970	13,854,748	14,475,955	12,984,117	14,686,000	12,933,836	12,728,524	13,634,238	15,133,448	11,241,518	10,774,520	13,603,355	10,470,463
Surgical Revenue	21,552,634	20,263,336	21,398,721	19,475,845	21,489,862	19,008,839	19,079,992	19,870,798	20,863,079	18,597,428	17,429,585	21,204,059	16,363,212
Non Surgical Revenue	-	-	-	-	-	-	-	383,757	261,970	300,338	319,504	72,910	60,031
Other Revenue	19,946	49,252	510,590	194,943	35,615	29,101	22,268	19,255	18,818	447,923	168,086	278,310	125,997
REVENUE	**21,572,580**	**20,312,588**	**21,909,311**	**19,670,788**	**21,525,477**	**19,037,940**	**19,102,260**	**20,273,810**	**21,143,867**	**19,345,689**	**17,917,175**	**21,555,279**	**16,549,240**
Salaries and Wages	9,669,593	9,705,510	9,419,373	8,183,654	8,814,385	8,591,974	7,738,648	8,310,942	8,546,623	7,763,537	7,066,689	7,610,437	6,123,082
Benefits	1,358,513	1,577,145	1,515,049	1,482,772	1,130,673	1,254,174	836,442	1,096,110	740,889	1,226,997	944,350	1,006,306	713,314
Medical Supplies	2,192,986	2,213,741	1,902,420	1,849,952	1,504,014	1,411,159	1,531,361	1,570,207	1,952,703	1,497,470	1,383,511	1,615,511	1,172,657
Patient Fees	630,856	612,570	619,475	595,122	420,951	(47,655)	164,429	226,964	421,441	163,879	263,128	273,057	15,939
Equipment Rent And Maintenance	169,090	258,096	252,628	247,812	250,772	147,087	175,257	208,002	223,080	169,969	191,742	207,461	156,479
Building Rent, Utilities, And Maintenance	1,390,304	1,493,149	1,509,902	1,871,768	1,460,974	1,363,930	1,358,131	1,237,878	960,077	1,048,128	1,166,887	1,189,820	1,178,239
Advertising And Marketing	4,468,056	4,741,146	4,618,317	4,449,888	4,521,467	4,600,664	4,752,325	4,600,299	4,797,956	4,305,408	4,288,033	4,477,591	4,435,981
Professional Fees	794,269	626,191	640,011	299,568	638,909	427,496	268,592	253,916	10,893,916	162,194	233,436	231,808	257,129
Provision for Bad Debts	732,745	744,568	737,396	868,579	1,294,741	1,114,150	976,136	847,585	9,968,700	1,104,078	451,138	897,850	893,859
Other Operating Expenses	1,573,589	1,336,244	1,357,173	1,325,954	1,213,521	1,158,303	1,246,751	1,268,732	3,326,775	1,500,733	1,504,141	1,535,122	1,444,102
TOTAL OPERATING EXPENSES	**22,980,001**	**23,308,360**	**22,571,744**	**21,175,079**	**21,250,357**	**20,021,282**	**19,048,072**	**19,610,635**	**41,832,160**	**18,942,393**	**17,493,055**	**19,044,963**	**16,390,781**
ADJUSTED EBITDA	**(1,407,421)**	**(2,995,772)**	**(662,433)**	**(1,504,291)**	**275,120**	**(983,342)**	**54,188**	**663,175**	**(20,688,293)**	**403,296**	**424,120**	**2,510,316**	**158,459**
	-6.5%	***-14.7%***	***-3.0%***	***-7.6%***	***1.3%***	***-5.2%***	***0.3%***	***3.3%***	***-97.8%***	***2.1%***	***2.4%***	***11.6%***	***1.0%***
Total Non Recurring Expenses	72,092	258,834	1,095,012	1,110,453	2,349,741	664,642	1,230,235	1,453,663	5,086,935	35,270	433,802	282,654	64,752
EBITDA	**(1,479,513)**	**(3,254,606)**	**(1,757,445)**	**(2,614,744)**	**(2,074,621)**	**(1,647,984)**	**(1,176,047)**	**(790,488)**	**(25,775,228)**	**368,026**	**(9,682)**	**2,227,662**	**93,707**
Interest Expense/ Income	660,629	663,946	929,551	957,508	1,195,646	1,402,251	1,145,207	1,449,098	1,368,648	1,021,984	937,380	1,103,063	949,793
Depreciation & Amortization	778,584	769,240	963,824	914,023	1,005,977	1,019,944	1,020,709	1,001,779	1,404,642	1,104,634	1,098,293	1,095,710	625,473
Total Other Non Operating Expenses	1,439,213	1,433,186	1,893,375	1,871,531	2,201,623	2,422,195	2,165,916	2,450,877	2,773,290	2,126,618	2,035,673	2,198,773	1,575,266
NET INCOME/LOSS	**(2,918,726)**	**(4,687,792)**	**(3,650,820)**	**(4,486,275)**	**(4,276,244)**	**(4,070,179)**	**(3,341,963)**	**(3,240,865)**	**(28,548,518)**	**(1,758,592)**	**(2,045,355)**	**28,889**	**(1,481,559)**
Statistics:													
MD	1,131	1,054	1,165	1,027	1,076	962	949	1,003	1,102	977	850	1,037	822
MIS	78	66	72	68	73	63	62	67	63	55	69	77	49
Total Surgical volume	**1,209**	**1,120**	**1,237**	**1,095**	**1,149**	**1,025**	**1,011**	**1,070**	**1,165**	**1,032**	**919**	**1,114**	**871**
Rate Per Surgery	17,827	18,092	17,299	17,786	18,703	18,545	18,872	18,570	17,908	18,021	18,966	19,034	18,787
Provision for Bad Debt	(606)	(665)	(596)	(793)	(1,127)	(1,087)	(966)	(792)	(8,557)	(1,070)	(491)	(806)	(1,026)
Net Rate Per Surgery	17,221	17,427	16,703	16,993	17,576	17,458	17,907	17,778	9,351	16,951	18,475	18,228	17,760
FTE's	1,186	1,181	1,100	1,055	984	987	967	994	971	959	935	902	843
Patient Days	21	21	22	20	23	21	21	21	21	21	20	23	20
Payroll Days	21	22	22	21	23	22	21	22	22	22	20	23	20
Expenses/Net Revenue	106.5%	114.7%	103.0%	107.6%	98.7%	105.2%	99.7%	96.7%	197.8%	97.9%	97.6%	88.4%	99.0%
Collections/Net Revenue	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	109.9%	95.3%	91.5%

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LSI Holdco, LLC and Subsidiaries
Consolidated Financial Statements
January 31, 2018

Unaudited and Preliminary
Prepared in accordance with GAAP

LASER SPINE INSTITUTE

LSI Holdco, LLC and Subsidiaries
Consolidated Balance Sheets

	January 2018	December 2017
Assets		
Current assets:		
Cash and cash equivalents	$ 2,098,272	$ 8,935,486
Accounts receivable	55,189,712	58,207,796
Less: Allowance for uncollectible accounts	(27,873,151)	(28,890,493)
Net accounts receivable	27,316,561	29,317,303
Notes receivable	18,604,925	18,355,843
Less: Allowance for uncollectible notes	(5,171,793)	(4,982,828)
Net notes receivable	13,433,132	13,373,015
Prepaid expenses and other current assets	9,791,414	10,085,231
Medical supplies inventory	645,222	644,338
Total current assets	**53,284,601**	**62,355,373**
Fixed assets		
Property and equipment	120,502,830	120,217,632
Less: accumulated depreciation	(53,167,795)	(51,984,252)
Net fixed assets	**67,335,035**	**68,233,380**
Restricted cash	-	-
Other long term assets	1,089,390	1,073,542
Total assets	**$ 121,709,026**	**$ 131,662,295**
Liabilities and members' equity (deficit)		
Current liabilities:		
Accounts payable	$ 13,379,144	$ 14,713,960
Accrued expenses	27,745,731	31,293,245
Patient reimbursements	542,260	602,301
Current portion of deferred lease expense	792,128	792,128
Current portion of capital lease obligations	279,490	302,801
Current maturities of long-term debt	25,687,500	25,937,500
Total current liabilities	**68,426,253**	**73,641,935**
Long-term debt		
Line of credit	15,000,000	15,000,000
Term loan, less current maturities	115,312,500	115,312,500
Less: unamortized debt issuance costs	(1,528,580)	(1,676,262)
Long-term debt less unamortized debt issuance costs	**128,783,920**	**128,636,238**
Other long-term liabilities		
Deferred lease expense	18,826,781	18,885,347
Capital lease obligations	872,761	872,761
Professional liability risks	8,804,812	8,669,934
Total other long-term liabilities	**28,504,354**	**28,428,042**
Total liabilities	**225,714,527**	**230,706,215**
Members' equity (deficit)	**(104,005,501)**	**(99,043,920)**
Total liabilities and members' equity (deficit)	**$ 121,709,026**	**$ 131,662,295**

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LASER SPINE INSTITUTE

LSI Holdco, LLC and Subsidiaries
Consolidated Statements of Cash Flows

	One Month Ended January 2018
Cash flows from operating activities:	
Net loss	$ (4,961,581)
Adjustment to reconcile net loss to net cash from operating activities:	
Depreciation and amortization	1,194,261
Bad debt expense	188,966
Loss on disposal of property and equipment	-
Amortization of deferred loan costs	147,681
Loss on debt modification	-
Incentive compensation units	-
Changes in assets and liabilities:	
(Increase) decrease in:	
Inventory	(884)
Accounts receivable	2,000,742
Notes receivable	(249,083)
Prepaid expenses and other current assets	267,252
Increase (decrease) in:	
Accounts payable	(1,334,816)
Patient reimbursements	(60,041)
Accrued expenses, including deferred lease expense	(3,471,201)
Net cash from operating activities	**(6,278,704)**
Cash flows from investing activities:	
Purchase of property and equipment	(285,199)
Proceeds from the sale of property and equipment	-
Change in restricted cash	-
Net cash from investing activities	**(285,199)**
Cash flows from financing activities:	
Borrowings on long-term debt	-
Principal payments on long-term debt	(250,000)
Net payments on revolving credit agreements	-
Financing costs paid	-
Principal payments on capital lease obligations	(23,311)
Distributions to members	-
Contributions from members	-
Net cash from financing activities	**(273,311)**
Net change in cash	(6,837,214)
Cash and cash equivalents	
Beginning	8,935,486
Ending	$ 2,098,272
Supplemental disclosures of cash flow information	
Cash paid for interest	$ 986,616

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LSI Holdco, LLC and Subsidiaries
Consolidated Statements of Members' Equity (Deficit)

	One Month Ended	Twelve Months Ended
	January 2018	December 2017
Beginning balance	$ (99,043,920)	$ (75,202,626)
Members' distributions	-	-
Members' contributions	-	22,152,430
Conversion of debt to membership units	-	-
Incentive compensation units	-	-
Net income/(loss)	(4,961,581)	(45,993,723.71)
Ending balance	$ (104,005,501)	$ (99,043,920)

Last Updated: 2/23/20189:40 AM

MedPro Group
a Berkshire Hathaway company

Issuing Company:
National Fire & Marine Insurance Company
Omaha, Nebraska

Forming Part of Policy No.:	EN004806
Issued to:	LSI HoldCo LLC
Policy Period:	From 01/01/2018 to 07/01/2019 at 12:01 a.m. at the address of the First Named Insured stated herein.

SCHEDULE OF UNDERLYING COVERAGE

Professional Liability Coverage Part:

NAME OF CARRIER/ POLICY NUMBER/ POLICY PERIOD	TYPE OF COVERAGE PROVIDED	LIMITS OF LIABILITY
Laser Spine Institute LLC Self Insured Retention 01-01-18 to 07-01-19	Professional Liability - Claims Made	The professional underlying SIR is a combined single limit of liability of $1,000,000 per claim/$6,000,000 aggregate for Indemnity and Expense
Mcare Fund 03-01-17 to 03-01-18	Professional Liability	$500,000 each Loss Event $1,500,000 Annual Aggregate Excess of: National Fire & Marine Insurance Company Policy Number HN004806

General Liability Coverage Part:

NAME OF CARRIER/ POLICY NUMBER/ POLICY PERIOD	TYPE OF COVERAGE PROVIDED	LIMITS OF LIABILITY
Laser Spine Institute LLC Self Insured Retention 01-01-18 to 07-01-19	General Liability - Occurrence	The general liability underlying SIR is a combined single limit of liability of $25,000 per claim/$50,000 aggregate for indemnity and expense.

Follow Form Coverage Part:

NAME OF CARRIER/ POLICY NUMBER/ POLICY PERIOD	TYPE OF COVERAGE PROVIDED	LIMITS OF LIABILITY	FOLLOWED POLICY INDICATED BY X
The Hartford 20 UEN IA2588 03-01-17 to 03-01-18	Automobile Liability	$1,000,000	X
The Hartford 20 WB AS7258 03-01-17 to 03-01-18	Employers Liability	Per Event Limit of Liability Employment-Related Accident: $1,000,000 Per Employee Limit of Liability Employment-Related Disease:	X

		$1,000,000 Policy Limit of Liability Employment-Related Disease: $1,000,000	

LSI HOLDCO LLC AND SUBSIDIARIES
(A LIMITED LIABILITY COMPANY)

CONSOLIDATED FINANCIAL STATEMENTS

YEARS ENDED DECEMBER 31, 2017 AND 2016

LSI HOLDCO LLC AND SUBSIDIARIES
TABLE OF CONTENTS
YEARS ENDED DECEMBER 31, 2017 AND 2016

INDEPENDENT AUDITORS' REPORT

Board of Managers
LSI HoldCo LLC and Subsidiaries
Tampa, Florida

We have audited the accompanying consolidated financial statements of LSI HoldCo LLC and Subsidiaries, which comprise the consolidated balance sheet as of December 31, 2017, and the related consolidated statements of income, changes in members' equity (deficit), and cash flows for the year then ended, and the related notes to the consolidated financial statements.

Management's Responsibility for the Consolidated Financial Statements

Management is responsible for the preparation and fair presentation of these consolidated financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of consolidated financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' Responsibility

Our responsibility is to express an opinion on these consolidated financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the consolidated financial statements. The procedures selected depend on the auditors' judgment, including the assessment of the risks of material misstatement of the consolidated financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the consolidated financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the consolidated financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the financial position of LSI HoldCo LLC and Subsidiaries as of December 31, 2017, and the results of their operations and their cash flows for the year then ended in accordance with accounting principles generally accepted in the United States of America.

Other Matter

The 2016 consolidated financial statements of LSI HoldCo LLC and Subsidiaries were audited by other auditors whose report dated May 5, 2017, expressed an unmodified opinion on those statements.

DRAFT ONLY

CliftonLarsonAllen LLP

Charlotte, North Carolina
REPORT DATE

LSI HOLDCO LLC AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEETS
DECEMBER 31, 2017 AND 2016
(DOLLARS IN 000'S)

	2017	2016
ASSETS		
CURRENT ASSETS		
Cash and Cash Equivalents	$ 8,935	$ 3,660
Accounts Receivable, Net	29,317	40,627
Notes Receivable, Net	13,297	12,912
Prepaid Expenses and Other Current Assets	9,665	9,227
Total Current Assets	61,214	66,426
RESTRICTED CASH	-	1,775
PROPERTY AND EQUIPMENT, Less Accumulated Depreciation	68,233	77,109
INTANGIBLE ASSETS, Net of Amortization	770	612
OTHER ASSETS	303	386
Total Assets	$ 130,520	$ 146,308
LIABILITIES AND NET ASSETS		
CURRENT LIABILITIES		
Accounts Payable	$ 13,862	$ 12,362
Accrued Expenses	31,345	41,769
Current Portion of Deferred Lease Expense	695	1,945
Patient Reimbursements	338	389
Deferred Revenue	265	300
Current Maturities of Capital Leases	303	165
Current Maturities of Long-Term Debt	15,938	3,750
Total Current Liabilities	62,746	60,680
LONG-TERM LIABILITIES		
Long-Term Debt, Less Current Maturities	128,636	135,071
Other Long-Term Liabilities, Less Current Portion	9,670	6,697
Deferred Lease Expense, Less Current Portion	18,403	18,084
Capital Lease Obligations, Less Current Portion	873	978
Loans from Members	10,000	-
Total Long-Term Liabilities	167,582	160,830
Total Liabilities	230,328	221,510
COMMITMENTS AND CONTINGENCIES		
MEMBERS' DEFICIT	(99,808)	(75,202)
Total Liabilities and Net Assets	$ 130,520	$ 146,308

See accompanying Notes to Consolidated Financial Statements.

LSI HOLDCO LLC AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF INCOME
YEARS ENDED DECEMBER 31, 2017 AND 2016
(DOLLARS IN 000'S)

	2017	2016
NET PATIENT REVENUE	$ 187,456	$ 246,341
OPERATING EXPENSES		
Personnel Costs	90,810	127,816
General and Administrative	90,132	117,402
Patient Care Costs	17,634	27,818
Bad Debt Expense	9,016	18,205
Depreciation and Amortization	14,319	11,330
Total Operating Expenses	221,911	302,571
LOSS FROM OPERATIONS	(34,455)	(56,230)
OTHER INCOME (EXPENSE)		
Other Revenue	1,223	1,047
Interest Expense, Net	(13,526)	(11,651)
Incentive Unit Compensation	-	(140)
Total Other Income (Expense)	(12,303)	(10,744)
NET LOSS	$ (46,758)	$ (66,974)

See accompanying Notes to Consolidated Financial Statements.

LSI HOLDCO LLC AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF MEMBERS' EQUITY (DEFICIT)
YEARS ENDED DECEMBER 31, 2017 AND 2016
(DOLLARS IN 000'S)

BALANCE - DECEMBER 31, 2015	$	(58,635)
Conversion of Debt to Membership Units		50,250
Incentive Compensation Units		157
Net Loss		(66,974)
BALANCE - DECEMBER 31, 2016		(75,202)
Conversion of Debt to Membership Units		15,155
Member Contributions		6,997
Net Loss		(46,758)
BALANCE - DECEMBER 31, 2017	$	(99,808)

See accompanying Notes to Consolidated Financial Statements.

LSI HOLDCO LLC AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS
YEARS ENDED DECEMBER 31, 2017 AND 2016
(DOLLARS IN 000'S)

	2017	2016
CASH FLOWS FROM OPERATING ACTIVITIES		
Net Loss	$ (46,758)	$ (66,974)
Adjustments to Reconcile Net Income (Loss) to Net Cash Provided (Used) by Operating Activities:		
Depreciation and Amortization	14,319	11,330
Bad Debt Expense	11,126	18,205
Loss on Disposal of Property and Equipment	30	321
Amortization of Deferred Loan Costs	1,462	817
Loss on Debt Modification	78	780
Incentive Compensation Units	-	157
(Increase) Decrease in Assets:		
Accounts Receivable	2,619	8,411
Notes Receivable	(2,820)	(16,829)
Prepaid Expenses and Other Assets	(355)	(2,722)
Increase (Decrease) in Liabilities:		
Accounts Payable, Accrued Expenses, and Deferred Lease Expense	1,878	23,015
Patient Reimbursements	(51)	297
Deferred Revenue	(35)	(28)
Net Cash Used by Operating Activities	(18,507)	(23,220)
CASH FLOWS FROM INVESTING ACTIVITIES		
Purchase of Property and Equipment, Net	(13,455)	(13,235)
Purchase of Intangible Assets	(786)	-
Proceeds from Sale of Property and Equipment	98	10
Change in Restricted Cash	1,775	8,225
Net Cash Used by Investing Activities	(12,368)	(5,000)
CASH FLOWS FROM FINANCING ACTIVITIES		
Borrowings on Long-Term Debt	10,000	50,000
Proceeds from Convertible Promissory Note	15,155	-
Payments on Long-Term Debt, Including Capital Lease Obligations	(3,965)	(12,072)
Net Change in Revolving Credit Agreements	8,575	(7,174)
Financing Costs Paid on New Debt	(612)	(1,012)
Contribution from Members	6,997	-
Net Cash Provided by Financing Activities	36,150	29,742
NET INCREASE IN CASH AND CASH EQUIVALENTS	5,275	1,522
Cash and Cash Equivalents - Beginning of Year	3,660	2,138
CASH AND CASH EQUIVALENTS - END OF YEAR	$ 8,935	$ 3,660

See accompanying Notes to Consolidated Financial Statements.

LSI HOLDCO LLC AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS (CONTINUED)
YEARS ENDED DECEMBER 31, 2017 AND 2016
(DOLLARS IN 000'S)

	2017	2016
SUPPLEMENTAL DISCLOSURE OF CASH FLOW INFORMATION		
Cash Paid for Interest	$ 11,439	$ 9,975
SUPPLEMENTAL DISCLOSURES OF NONCASH INVESTING AND OPERATING ACTIVITIES		
Property and Equipment Acquired through Accounts Payable	$ 492	$ 9,252
Property and Equipment Acquired through Capital Lease	$ 330	$ 1,215
Property and Equipment Acquired through Lease Incentives	$ -	$ 12,326
Increase in Other Current Assets and Other Liabilities	$ -	$ (8,172)
SUPPLEMENTAL DISCLOSURE OF NONCASH FINANCING ACTIVITIES		
Conversion of Long-Term Debt and Accrued Interest in to Class A Membership Units	$ -	$ 50,250
Conversion of Long-Term Debt and Accrued Interest in to Class A-1 Membership Units	$ 15,155	$ -

See accompanying Notes to Consolidated Financial Statements.

NOTE 1 ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Organization

LSI HoldCo LLC (HoldCo), a Delaware limited liability company, together with its wholly-owned subsidiaries, provides minimally invasive spinal surgical services and imaging, diagnostic and pain management services from its out-patient facilities in Florida, Arizona, Pennsylvania, Oklahoma, Ohio, Rhode Island, and Missouri.

To fulfill its corporate purpose, HoldCo acts as a parent holding company to the following wholly owned subsidiaries:

- Florida limited liability corporations:
  - Laser Spine Institute, LLC
  - Laser Spine Surgical Center, LLC
  - LSI Management Company, LLC
  - Total Spine Care, LLC (formerly LSI Flexible Schedule, LLC) (no operations)
- Laser Spine Surgery Center of Arizona, LLC, an Arizona limited liability corporation
- Laser Spine Surgery Center of Pennsylvania, LLC, a Pennsylvania limited liability corporation
- Laser Spine Surgery Center of Oklahoma, LLC, an Oklahoma limited liability corporation
- Laser Spine Institute Consulting, LLC, a Delaware limited liability corporation
  - CLM Aviation, LLC (no operations)
  - Marodyne Medical, LLC (no operations)
- Medical Care Management Services, LLC, a Delaware limited liability corporation
- Laser Spine Surgery Center of Cleveland, LLC, an Ohio limited liability corporation
- Laser Spine Surgery Center of Cincinnati, LLC, an Ohio limited liability corporation
- Laser Spine Surgery Center of St. Louis, LLC, a Missouri limited liability corporation
- Laser Spine Surgery Center of Warwick, LLC, a Rhode Island limited liability corporation (no operations)
- Ambulatory Anesthesia Resource Group, LLC, a Florida limited liability corporation
- Spine DME Solutions, LLC, a Florida limited liability corporation

Principles of Consolidation

The accompanying consolidated financial statements present the consolidated financial position, results of operations and cash flows of HoldCo and its wholly owned subsidiaries. HoldCo and the above-mentioned wholly owned subsidiaries are collectively referred to as (the Company). All material balances and transactions between the entities have been eliminated upon consolidation.

Accounting Estimates

The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

NOTE 1 ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Cash and Cash Equivalents

The Company maintains its cash and cash equivalents in bank depository accounts which, at times, exceed federally-insured limits. The Company has not experienced any losses in such accounts. Cash and cash equivalents include short-term investments with original maturities of three months or less.

Restricted Cash

Restricted cash as of December 31, 2016, consists of cash collateral required to be held in connection with long-term debt. No such collateral was required as of December 31, 2017.

Net Patient Revenue and Accounts Receivable

Net patient service revenue is reported at the estimated net realizable amounts due from patients, third-party payers and others for services rendered, including estimated retroactive adjustments arising from future audits, reviews and investigations. Retroactive adjustments are considered in the recognition of revenue on an estimated basis in the period the related services are rendered, and such amounts are adjusted in future periods as adjustments become known or as years are no longer subject to audits, reviews and investigations. During 2017 and 2016, the Company provided services to certain patients who were out-of-network.

Accounts receivable are reduced by an allowance for doubtful accounts. In evaluating the collectability of accounts receivable, management analyzes its past history and identifies trends for each of its major payor sources of revenue to estimate the appropriate allowance for doubtful accounts. Management regularly reviews collection data for these major payor sources in evaluating the sufficiency of the allowance for doubtful accounts. During the years ended December 31, 2017 and 2016, the Company reported an allowance for uncollectible accounts on accounts receivable of $28,890 and $48,557, respectively. During 2017, the Company reported $6,581 and $2,435 of bad debt expense relating to patient receivable and note receivable, respectively. During 2016, the Company reported $14,239 and $3,966 of bad debt expense relating to patient receivable and note receivable, respectively.

Notes Receivable

The Company allows patients to finance service payments through third party collection agency. Revenue and notes receivable are recorded at the time of surgery, less the allowance for uncollectible accounts and collection fees. During the years ended December 31, 2017 and 2016, the Company reported an allowance for uncollectible accounts on notes receivable of $5,059 and $4,015, respectively.

NOTE 1 ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Property and Equipment

Individual assets costing more than $1 (or $5 for procured minor surgical hand instruments), with a useful life of twelve months or more are capitalized. Property and equipment is recorded at cost less accumulated depreciation. Depreciation is generally provided on the straight-line method over the estimated useful lives of the respective assets, which is three to seven years for medical equipment and office furniture and equipment and three years for computer-related equipment. Amortization of tenant improvements is provided on the straight-line method over the shorter of the useful lives of the assets or the term of the lease.

Intangible Assets

Intangible assets consist of trademarks, trade names, certain direct marketing costs, and a noncompete agreement. The trade names were determined to have indefinite lives and are carried at cost and are not amortized, but are assessed for impairment at least annually or more frequently if events occur or circumstances change indicating that the assets may be impaired. The Company conducts its impairment test upon a triggering event at the entity level. In conducting the impairment test, the fair value of the Company's intangibles is compared to the carrying amount. If the fair value exceeds the carrying amount, no impairment exists. If the carrying amount exceeds the fair value, the Company recognizes an impairment loss for the excess of the carrying amount over the fair value. No impairment charges were recognized during the years ended December 31, 2017 and 2016. Intangible assets with definite lives are amortized on a straight-line basis over the estimated useful life of the assets, which is fifteen years for the trademarks, four years for the direct marketing costs, and six years for the noncompete agreement.

Deferred Revenue

Deferred revenue represents patient deposits collected in advance of services being provided to patients.

Deferred Loan Costs

Deferred loan costs are amortized over the term of the applicable loans, using the straight-line method, which approximates the effective-interest method. As of December 31, 2017 and 2016, unamortized deferred financing costs, which are presented as a deduction of long-term debt on the accompanying consolidated balance sheets, were $1,676 and $2,604, respectively. When the long-term debt was amended in December 2017, the Company capitalized $612 of additional loan cost and realized a loss on debt modification of $78 which is reported within General and Administrative expenses within the consolidated statements of income. When debt was amended in November 2016, the Company capitalized $1,012 of additional loan cost and realized a loss on debt modification of $780 which is reported within General and Administrative expenses within the consolidated statements of income.

NOTE 1 ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Fair Value Measurements

Fair value measurement appies to reported balances that are required or permitted to be measured at fair value under an existing accounting standard. The Company emphasizes that fair value is a market-based measurement, not an entity-specific measurement. Therefore, a fair value measurement should be determined based on the assumptions that market participants would use in pricing the asset or liability and establishes a fair value hierarchy.

The fair value hierarchy consists of three levels of inputs that may be used to measure fair value as follows:

Level 1 – Inputs that utilize quoted prices (unadjusted) in active markets for identical assets or liabilities that the Company has the ability to access.

Level 2 – Inputs that include quoted prices for similar assets and liabilities in active markets and inputs that are observable for the asset or liability, either directly or indirectly, for substantially the full term of the financial instrument. Fair values for these instruments are estimated using pricing models, quoted prices of securities with similar characteristics, or discounted cash flows.

Level 3 – Inputs that are unobservable inputs for the asset or liability, which are typically based on an entity's own assumptions, as there is little, if any, related market activity.

In instances where the determination of the fair value measurement is based on inputs from different levels of the fair value hierarchy, the level in the fair value hierarchy within which the entire fair value measurement falls is based on the lowest level input that is significant to the fair value measurement in its entirety.

Subsequent to initial recognition, the Company may remeasure the carrying value of assets and liabilities measured on a nonrecurring basis to fair value. Adjustments to fair value usually result when certain assets are impaired. Such assets are written down from their carrying amounts to their fair value.

Equity-Based Compensation

Equity-based compensation expense is charged to earnings net of the estimated impact of forfeited awards. As such, the Company recognizes equity-based compensation expense only for those awards that are estimated to ultimately vest over their requisite service period, based on a straight-line method. There may be adjustments to future periods if actual forfeitures differ from current estimates.

NOTE 1 ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Distributions to Members

Distributions are made to members as allowed for under the terms of the amended and restated operating agreement. In November 2016, the Company entered into an amended credit agreement (see Note 3). As part of the amended agreement, the Company is permitted to make tax distributions to its members provided that they meet specified criteria. The Company is not permitted to make distributions to members outside of the permitted tax distributions.

Advertising Costs

The Company typically expenses advertising costs as incurred. Advertising costs were $53,093 and $57,632 for the years ended December 31, 2017 and 2016, respectively, and are included in general and administrative expenses on the accompanying consolidated statements of income. During the year ended December 31, 2017, direct advertising media costs of $787 were capitalized and are included in intangible assets in the accompanying consolidated balance sheet.

Start-Up Costs

The Company expenses start-up costs as incurred, related to the Company's expansion.

Income Taxes

The Company's income or loss is taxed directly to its members as a partnership for income tax purposes. As a result, no income taxes have been recognized in the accompanying consolidated financial statements.

The Company has applied guidance contained in the FASB Codification to evaluate its tax positions and concluded that the Company has taken no uncertain tax positions that require adjustment to the consolidated financial statements to comply with the provisions of this guidance.

Recent Accounting Pronouncements

In May 2014, the FASB issued ASU No. 2014- 09, *Revenue from Contracts with Customers (Topic 606)*, requiring an entity to recognize the amount of revenue to which it expects to be entitled for the transfer of promised goods or services to customers. The updated standard will replace most existing revenue recognition guidance in U.S. GAAP when it becomes effective and permits the use of either a full retrospective or retrospective with cumulative effect transition method. In August 2015, the FASB issued ASU No. 2015-14 which defers the effective date of ASU No. 2014-09 one year making it effective for annual reporting periods beginning after December 15, 2018. The Company has not yet selected a transition method and is currently evaluating the effect that the standard will have on the consolidated financial statements.

NOTE 1 ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Recent Accounting Pronouncements (Continued)

In February 2016, the FASB issued ASU No. 2016-02, *Leases (Topic 842)*. The guidance in this ASU supersedes the leasing guidance in Topic 840, Leases. Under the new guidance, lessees are required to recognize lease assets and lease liabilities on the balance sheet for all leases with terms longer than 12 months. Leases will be classified as either finance or operating, with classification affecting the pattern of expense recognition in the income statement. The new standard is effective for fiscal years beginning after December 15, 2019. Management is currently evaluating the potential impact that the adoption of this update will have on its financial reporting.

Subsequent Events

Management has evaluated subsequent events through REPORT DATE, which is the date on which the consolidated financial statements were available to be issued.

NOTE 2 PROPERTY AND EQUIPMENT

Property and equipment consisted of the following as of December 31:

	2017	2016
Office Furniture and Equipment	$ 29,621	$ 24,591
Medical Equipment	22,447	23,176
Tenant Improvements	65,715	65,438
Construction in Progress	2,434	2,862
Total	120,217	116,067
Less Accumulated Depreciation	51,984	38,958
Total Property and Equipment	$ 68,233	$ 77,109

Depreciation expense related to property and equipment totalled $13,691 and $10,978 for the years ended December 31, 2017 and 2016, respectively. During 2017, the Company wrote off approximately $127 in assets that were not fully depreciated, resulting in a loss of $30 which is included in general and administrative expenses. During 2016, the Company wrote off approximately $10,000 in assets that were not fully depreciated, resulting in a loss of $321 which is included in general and administrative expenses. Construction in progress as of December 31, 2017 primarily relates to proprietary software. Included in medical equipment is approximately $1,478 of assets acquired through capital lease obligations.

NOTE 3 LONG-TERM DEBT

A summary of long-term debt as of December 31 is as follows:

	2017	2016
Term loan with amended borrowings of $135,000, interest per annum at LIBOR plus applicable margin of 5.00% (6.34% at December 31, 2017) payable monthly, principal due on maturity in January 2019	$ 131,250	$ 135,000
Revolving line of credit in an amount up to $15,000, interest per annum at LIBOR plus applicable margin of 5.00% (6.34% at December 31, 2017) payable monthly, principal due on maturity in January 2019	15,000	6,425
Loan from Members of $10,000, interest per annum at 12% payable monthly, principal due on maturity in April 2019	10,000	-
Total	156,250	141,425
Less Unamortized Deferred Loan Costs	1,676	2,604
Less Current Maturities	15,938	3,750
Total Long-Term Debt Obligations	$ 138,636	$ 135,071

Term Loan

In July 2015, the Company entered into a credit agreement which included a term loan in the amount of $150,000. In November 2016, the credit agreement was amended (the First Amendment) to have borrowings of $135,000. Under the First Amendment, the term loan bears interest at either prime rate plus an applicable margin as defined in the credit agreement or the London Interbank Offered Rate (LIBOR) plus an applicable margin as defined in the credit agreement, (7.75% as of December 31, 2016). Under the First Amendment, Interest on borrowings is payable monthly and principal is payable quarterly based on the amount specified in the credit agreement.

The credit agreement was amended in September 2017 (the Second Amendment), and again in December 2017 (the Third Amendment). Under the Third Amendment, monthly principal payments are required beginning in January 2018 in amounts as specified in the Third Amendment. The term loan matures January 1, 2019. Under the Third Amendment, the term loan bears interest at either prime rate plus an applicable margin as defined in the credit agreement or LIBOR plus an applicable margin as defined in the credit agreement, (6.34% as of December 31, 2017).

NOTE 3 LONG-TERM DEBT (CONTINUED)

Revolving Line of Credit

In conjunction with the credit agreement, in July 2015, the Company entered into a revolving line of credit which allowed for maximum borrowings of $50,000 and bears interest at either prime rate plus an applicable margin as defined in the credit agreement or LIBOR plus an applicable margin as defined in the credit agreement.

Under the terms of the First Amendment, the maximum borrowings for the revolving line of credit were reduced to $25,000. Under the terms of the Second Amendment, the amended revolving line of credit was reduced to maximum borrowings of $17,000. Under the terms of the Third Amendment, the maximum borrowings on the revolving line of credit were reduced to $15,000. The revolving line of credit matures January 1, 2019.

In connection with the credit agreement, and under the terms of the First Amendment, Second Amendment, and Third Amendment, the Company is required to comply with certain financial covenants including: (a) maintaining a maximum leverage ratio and a minimum debt service coverage ratio; (b) maintaining a certain cash balance on hand, unless funds are released for closing costs, principal and interest payments on loan, fees of administrative agent; (c) maximum capital expenditure limits; and (d) minimum EBIDTA. The credit agreement was collateralized by substantially all assets of the Company and guaranteed by the members.

The Company was in violation of certain of the above covenants during 2017; however, these violations were waived by the creditors as part of the Second Amendment and Third Amendment. Under the Third Amendment, adherence to certain of the above covenants, such as the maximum leverage ratio and minimum debt service coverage ratio will begin September 30, 2018.

Loans from Members

In July 2016, and as amended through November 18, 2016, the Company issued $50,000 of subordinate debt with certain members of the Company. The subordinate debt bore interest at 8% and was scheduled to mature in October 2020. The Company used $37,000 to pay down the existing balance of the revolving line of credit. In December 2016, the subordinate debt including accrued interest of $250 was converted into 6,620 units of Class A interest of the Company (see Note 10).

In September 2017, the Company issued a $15,000 convertible promissory note with certain members of the Company. The note bore interest at 8% and was scheduled to mature in March 1, 2019. In December 2017, the promissory note including accrued interest of $155 was converted into 78,775 units of Class A-1 interest of the Company (see Note 10).

In December 2017, the Company issued a $10,000 subordinated promissory note with certain members of the Company. The subordinated promissory note bears interest at 12% and matures April 2019.

NOTE 3 LONG-TERM DEBT (CONTINUED)

As of December 31, 2017, the scheduled principal repayments on long-term debt and payments on the revolving line of credit for the next five years are as follows:

	Term Loan	Revolving Line of Credit	Loan From Members	Total Principal
2018	$ 15,938	$ -	$ -	$ 15,938
2019	115,312	15,000	10,000	140,312
	$ 131,250	$ 15,000	$ 10,000	156,250

Guarantees on Debt Incurred by Members of Management to Acquire Membership Interests

The Company guarantees promissory notes issued to certain executives, former executives, and consultants (the Executives) of the Company by two financial institutions. The Executives used the proceeds from the issuance of the promissory notes to acquire an interest in the Company. The Company provided guarantees on an aggregate of approximately $87 of promissory notes issued to the Executives.

The Company can be required to perform on the guarantees only in the event of nonpayment of the debt by the Executives. Management evaluates the Company's exposure to loss at each balance sheet date and provides accruals for such as deemed necessary. No accrual was deemed necessary as of December 31, 2017 or 2016.

NOTE 4 LEASES

Capital Leases

The Company leases several assets under capital leases obligations, bearing interest rates varying from 4.03% to 8.25%. A schedule of leased property under capital leases follows as of December 31, 2017:

Equipment Under Capital Lease	$ 1,478
Less: Accumulated Amortization	(273)
Total	$ 1,205

NOTE 4 LEASES (CONTINUED)

Capital Leases (Continued)

Scheduled principal and interest repayments on capital lease obligations are as follows:

For the Year Ending December 31,		
2018	$	356
2019		286
2020		216
2021		203
2022		167
2023-2029		82
Total		1,310
Less: Amounts Represent Interest		(134)
Less: Current Portion		(303)
Long-Term Obligation Under Capital Lease	$	873

Lease Commitments

The Company leases administrative and medical office facilities and medical equipment under noncancelable operating leases which expire on varying dates through December 2021. The leases contain options that allow the Company to renew under certain terms and conditions. Certain leases also contain the option for the Company to buy-out the lease at fair market value prior to the lease expiration date. Rental expense under operating leases, recognized on a straight-line basis, was approximately $7,081 and $8,700 during the years ended December 31, 2017 and 2016, respectively, and recorded within General and Administrative in the consolidated statements of income.

Future minimum payments required under noncancelable operating leases consist of the following:

Year Ending December 31,	Amount	
2018	$	8,562
2019		7,602
2020		7,842
2021		7,994
2022		8,138
Thereafter		72,444
Total	$	112,582

NOTE 5 COMMITMENTS AND CONTINGENCIES

Litigation

The Company has been named as a defendant in various lawsuits. In the opinion of management, the amount of any additional potential liability, if any, is not likely to have a material adverse effect on the Company's business, financial condition, results of operations, or liquidity. However, as the outcome of litigation or other legal claims is difficult to predict, significant changes in the Company's exposure could occur. The Company recognized expense of approximately $130 and $10,800 related to these items for the years ended December 31, 2017 and 2016, respectively, which is reported within general and administrative expenses within the consolidated statements of income.

Health Care Reform

As a result of federal health care reform legislation, substantial changes are anticipated in the United States health care system. Such legislation includes numerous provisions affecting the delivery of health care services, the financing of health care costs, reimbursement of health care providers, and the legal obligations of health care insurers, providers, and employers. These provisions are currently slated to take effect over several years and began in 2014. Management continues to evaluate the potential impact of health care reform legislation.

Malpractice Professional Liability Insurance

The Company is a party to claims filed against it in the normal course of business, principally related to malpractice assertions. The Company purchased professional liability insurance coverage on a claims-made basis with a per claim limit of $20,000, an annual aggregate limit of $20,000, and a self-insured retention amount of $1,000 per incident. During 2016, the Company added a self-insured annual aggregate limit of $6,000. In addition the Company purchased excess coverage with an annual aggregate limit of $30,000. Prior to March 1, 2014, the Company maintained professional liability insurance coverage on a claims-made basis with a per claim limit of $1,000, an annual aggregate limit of $3,000, and a self-insured retention amount of $100 per incident. In addition the Company purchased excess coverage with an annual aggregate limit of $20,000.

NOTE 5 COMMITMENTS AND CONTINGENCIES (CONTINUED)

Malpractice Professional Liability Insurance (Continued)

The provision for estimated medical malpractice claims and other claims includes estimates of the ultimate costs for both reported claims and claims incurred but not reported. In 2017 and 2016, the Company engaged an independent actuarial firm to assist in determining the provision for medical malpractice claims, including incurred but not reported losses. The Company has used a similar method to estimate insurance recoveries related to these claims. The Company's estimated accrual totaled approximately $14,236 as of December 31, 2017, of which approximately $5,566 is included in accrued expenses and approximately $8,670 is in other long-term liabilities in the accompanying consolidated alance sheets. The Company's estimated accrual totaled approximately $12,300 as of December 31, 2016, of which approximately $5,600 is included in accrued expenses and approximately $6,700 is in other long-term liabilities in the accompanying consolidated balance sheets. The Company has also recorded approximately $5,566 and $5,600 of estimated insurance recoveries as of December 31, 2017 and 2016, respectively, which is included in prepaid expenses and other current assets on the accompanying consolidated balance sheets. The estimated amounts for professional liability claims included in the consolidated financial statements at December 31, 2017 and 2016, were not discounted.

Expense incurred related to professional and general liability policies totaled approximately $3,403 and $4,661 for the years ended December 31, 2017 and 2016, respectively, which is included in general and administrative expenses on the accompanying consolidated statements of income.

Various claims and assertions have been made against the Company in its normal course of providing services. In addition, other claims may be asserted arising from services provided to patients in the past. In the opinion of management, adequate provision has been made for losses which may occur from such asserted and unasserted claims that are not covered by liability insurance. Should this claims-made policy not be renewed or replaced with equivalent insurance, claims based on incidents occurring during the term of the claims-made policy but reported in subsequent periods would be uninsured. The Company has secured coverage through March 2018 and intends to renew coverage beyond this date.

NOTE 6 RETIREMENT PLAN

The Company has a 401(k) plan that provides retirement benefits for those employees who meet the eligibility requirements (an employee must complete three months of employment and be at least 18 years of age). During 2015 and through March 2016, the Company matched 100% of an employee's contribution up to the first 3% of compensation, plus 50% of an employee's contribution that exceeds 3% of compensation not to exceed 5% of compensation. Beginning in April 2016, the Company amended its 401 (k) plan and eliminated all Company matching contributions. For any previous Company contributions made, employees become vested in employer matching contributions after two years. The Company has the ability to make discretionary profit sharing contributions to the plan, in which employees vest over a four-year period. Total employer contributions to the plan for the years ended December 31, 2017 and 2016, were $0 and $1,674, respectively, which is included in personnel costs on the accompanying consolidated statements of income. The Company match was terminated effective August 2016 as a result of the financial hardships it was facing at the time. The plan is to return the benefit once the Company is back on a solid growth plan with stale profitability.

NOTE 7 OWNERSHIP APPRECIATION PLAN

The Company has an Ownership Appreciation Plan (the Plan) to grant certain employees and consultants points representing rights to receive payments as specified in the agreement. The points generally vest over a five-year period. The Plan was revised and amended during both 2010 and 2011 to modify and clarify certain terms in the Plan. Certain triggering events (e.g. sale of the Company, change in control, etc.) must occur before Plan participants receive certain payouts. As a result, the ultimate payout under terms of the Plan is not fixed or determinable at this time. Therefore, other than the payment of points- based bonuses under terms of the Plan as described below, no liabilities or expense have been reflected in the Company's consolidated balance sheets or statements of income, respectively.

Terms of the Plan provide that participants may receive a points-based bonus only if and when the Company declares a distribution to the members of the company. The amount of the points-based bonus paid to each employee is calculated as though the employee's vested points represent an actual ownership interest in the Company. As a result, points-based bonuses for eligible Plan participants and member distributions are calculated in the same manner. Total points-based bonuses paid to employees and consultants totaled $0 for both the years ended December 31, 2017 and 2016. In the current year, no additional points as part of the recapitalization were given.

NOTE 8 CONCENTRATION OF ACCOUNTS RECEIVABLE AND MAJOR PAYORS

The Company has a concentration of accounts receivables and net revenue with certain insurance companies as a result of assignments by the patient. As of December 31, 2017 and 2016, net accounts receivable from four insurance payors was approximately 82% and 83%, respectively. As of December 31, 2017, net patient revenue from four insurance payors was approximately 70% and as of December 31, 2016, net patient revenue from four insurance payors was approximately 60%.

NOTE 9 INTANGIBLE ASSETS

The gross carrying amount and accumulated amortization of intangible assets are summarized as follows at December 31:

	2017	2016
Indefinite Lived Assets:		
Tradename	$ 524	$ 524
Amortizable Intangible Assets:		
Noncompete Agreement	120	120
Intellectual property and Trademark	136	136
Direct-Response Advertisement Costs	786	-
	1,042	256
Less Accumulated Amortization	796	168
	246	88
Total	$ 770	$ 612

Future expected amortization expense as of December 31, 2017 is as follows:

Year Ending December 31,	Amount
2018	$ 84
2019	45
2020	54
2021	21
2022	9
Thereafter	33
Total	$ 246

NOTE 10 MEMBERSHIP UNITS

Under the Company's Second Amended and Restated Limited Liability Company Agreement (the Agreement), dated November 18, 2016 and in effect at December 31, 2016, the authorized capital of the Company consists of an aggregate 10,418.92 units divided into three classes. In November 2017, the Agreement was amended by the Company's Third Amended and Restated Limited Liability Company Agreement (the New Agreement). Under the New Agreement, dated November 13, 2017 and in effect at December 31, 2017, the authorized capital of the Company consists of an aggregate of 90,115.71 units divided into four classes. The outstanding units as of December 31, 2017 and 2016 are as follows:

	2017	2016
Class A	7,544.12	6,622.25
Class A-1	78,774.93	-
Class B	3,380.00	3,380.00
Class C	416.67	416.67
Total	90,115.72	10,418.92

During 2017, $15,155 of subordinate debt and accrued interest with certain members of the Company were converted into 78,774.93 Class A-1 Units.

During 2016, $50,250 of subordinate debt and accrued interest with certain members of the Company were converted into 6,620 Class A units. In December 2016, the Company entered into a severance agreement with a consultant of the Company, as part of the severance agreement the consultant was given 2.25 Class A units, compensation costs of approximately $17 were charged to operations for the Class A units.

Voting

Holders of Class A units and or Class B units shall be entitled to one vote with respect to such Class A interest or a Class B interest, as the case may be. No holder of a Class C units shall be entitled to vote with respect to such Class C units.

Distributions

All amounts determined by the board to be available for distribution shall be distributed to the unit holders in the following order and priority upon a liquidation event:

First, to the holders of the Class A interests (ratably among such holders based upon the aggregate Class A unpaid return with respect to all Class A interests held by each such holder immediately prior to such distribution), until the aggregate Class A unpaid return with respect to such holders' Class A interests has been reduced to zero. The preferred return is equal to a rate of 8% per annum which compound quarterly each March 31, June 30, September 30, and December 31. Accrued dividends shall be payable only when declared by the board. The Company shall not declare, pay, or set aside any dividends on units or shares of any other class or series of units or capital stock of the Company until all preferred unit dividends are paid in full. The preferred return amount is approximately $513 and $474 as of December 31, 2017 and 2016.

NOTE 10 MEMBERSHIP UNITS (CONTINUED)

Distributions (Continued)

Second, to the Class A holders (ratably among such holders based upon the aggregate Class A unreturned capital with respect to all Class A interests held by each such holder immediately prior to such distribution), until the aggregate Class A unreturned capital with respect to such holders' Class A interests has been reduced to zero, which is approximately $50,250 at December 31, 2017 and 2016.

Third, to the Class A-1 holders (ratably among such holders based upon the aggregate Class A-1 unreturned capital with respect to all Class A-1 interests held by each such holder immediately prior to such distribution), until the aggregate Class A-1 unreturned capital with respect to such holders' Class A-1 interests has been reduced to zero, which is approximately $15,155 at December 31, 2017.

Fourth, all remaining amounts to the holders of Class A interests, Class A-1 interests, Class B interests, and vested Class C interests.

Incentive Compensation Units

In November 2016, the Company, in accordance with its Amended and Restated Limited Liability Company Agreement, granted 416.66 Class C profits interest units to certain members of management of the Company. The Class C profits interest units were granted with no exercise price or payment by the executive (grantee) The Class C units vest as follows: 63% of the Class C units subject to award shall vest based on employment with the Company as defined in their respective grant agreement, the remaining 37% shall vest based on performance targets as set forth in the employment agreement and subject to the employee's continuous employment with the Company. Any unvested Class C units shall vest immediately prior to a change in control (as defined in the Agreement) and subject to the employee's continuous employment with the Company. Any portion not vested as of the termination date will be immediately forfeited.

A summary of the Class C profits interest units outstanding as of December 31, 2017 and 2016, are presented below:

	Class C Units
Outstanding - December 31, 2015	-
Granted	417
Exercised	-
Forfeited or Cancelled	-
Outstanding - December 31, 2016	417
Granted	-
Exercised	-
Forfeited or Cancelled	-
Oustanding - December 31, 2017	417

NOTE 10 MEMBERSHIP UNITS (CONTINUED)

Incentive Compensation Units

The fair value of the Class C profits interest units was estimated using the fair value of the Company utilizing a market approach. The fair value measurements were based on significant inputs that are not observable, and are considered a Level 3 item under the fair value hierarchy. The fair value of the Class C profits interests units was determined to be approximately $546 for all units granted during the year ended December 31, 2017 and 2016.

104.17 units vested and compensation costs of approximately $140 were charged to operations for the Class C profits interest units granted during the year ended December 31, 2016. No such amounts were recognized during the year ended December 31, 2017 as management did not consider it to be material. There remains $406 of unrecognized compensation as of December 31, 2017 and 2016, which is expected to be recognized over an average remaining period of four years. The remaining amount, will be recognized when the performance targets become probable of being achieved.

NOTE 11 FINANCIAL CONDITION

The Company experienced financial difficulties, resulting in consecutive years of net losses of approximately $46,758 and $66,974, for the years ended December 31, 2017 and 2016, respectively. As a result of the financial difficulties, the Company entered into the First Amendment, Second Amendment, and the Third Amendment as described in Note 3. Management is taking steps to ensure that the Company will continue as a going concern including: (a) re-organizing its management team, (b) implemented lean processes throughout the organization resulting in increased operating efficiencies and significant reductions in labor, (c) reducing discretionary spending, (d) implementing procedures to improve billing and collection efforts, and (e) applying strategies to improve volumes. Management believes these factors will have a significant positive impact on expenses, cash flows, and profitability; however, there can be no assurance that these initiatives will enable the Company to generate sufficient cash flows to fund operations and pay debts or maintain debt covenants in order to retain the Company's credit and revolving loan agreements.

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Report on Litigation as of August 31, 2017

- LSI currently has 13 filed medical negligence cases.
  - 8 of the filed cases are self-insured (LSI is self-insured up to $1 MM). 3 cases are covered by insurance with LSI having a $100,000 deductible; 2 cases have a zero ($0) deductible (due to the statutory requirements in Pennsylvania).
- LSI has 5 medical negligence claims in pre-suit (which are self-insured).
- LSI has 2 commercial litigation cases in which it is a defendant (Bailey and Bonati) and one in which LSI is a plaintiff (Global Aircraft).
- LSI has 1 employment law case pending.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 1, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claim DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 31, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 1, 2016, March 7, 2016, and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PATIENT reported urinary incontinence following the March 7, 2016, surgery. DOCTOR re-explored the area and found no leak, but PATIENT's complaints of incontinence continued and she as transported to a local hospital. PATIENT continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 28, 2017.

PATIENT (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 23, 2017.

PATIENT (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 29, 2015, December 9, 2015, and December 16, 2015
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Matthew E. Feinberg (Piliero Mazza PLLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical laminoforaminotomy with dura leak repair. The PATIENT experienced headaches, neck and back pain, and back spasms following the surgeries that required follow-up treatment and surgery. PATIENT also claims she suffered significant emotional distress, excruciating physical pain and suffering, inconvenience, and other non-economic damages.
- **Procedural Posture:** Notice of claims received July 11, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to investigate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was

different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.

- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** April 10, 2013
- **Insurance Policy:** Torus 2013 ($100,000 deductible)
- **Plaintiff's Attorney:** Mark H. Perenich (Perenich, Caulfield, Avril & Noyes, P.A.); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** Richard Mangan and Bryan Snyder (Rissman, Barrett)
- **General Nature of Claim:** PLAINTIFF had left cervical decompression surgery, had a dura leak, numbness in right upper and lower extremities, cord compression, and edema. PLAINTIFF was transferred to Largo Medical Center. Patient had subsequent fusion at a local hospital performed by a non-LSI surgeon. PLAINTIFF still complaining of extremity weakness and subsequent treating physician diagnosed her with a posterior spinal cord injury. Allegations include failure to properly evaluate, failure to require conservative therapy prior to surgery, and failure to properly perform surgery.
- **Procedural Posture:** Trial set for August 21, 2017.
- **Notes:** Patient previously retained another firm. LSI records indicate patient was told she may need fusion and she opted for less invasive decompression surgery first.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries:** August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)

- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was discharged at 10:40 a.m. with caregiver. At 5:00 p.m., PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was pronounced deceased at hospital at 6:00 p.m.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)

- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller) .); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for March 12, 2018.

PLAINTIFF (Arizona)

- **Target Physician:** None specifically named because injury occurred as PLAINTIFF positioned himself on operating table for surgery
- **Date of Surgery:** April 23, 2013
- **Insurance Policy:** Torus 2013 ($100,000 deductible)
- **Plaintiff's Attorney:** Sonja Duckstein (Law Office of Sonja Duckstein)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges that on April 23, 2013, prior to a scheduled surgery that PLAINTIFF was preparing to position himself on the operating table and the armrest came loose on the table, causing him to fall and injure his bicep. PLAINTIFF had bicep repair surgery. PLAINTIFF alleges negligence and medical malpractice.
- **Notes**: LSI previously paid patient $29,512.54 for repair surgery and lost wages, however a general release was not signed. Plaintiff has filed an offer of judgment for $75,000. LSI has filed an offer of judgment for $35,000.
- **Procedural Posture:** Mediation on February 9, 2017 ended in impasse. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTOR
- **Date of Surgery:** April 28, 2014
- **Insurance Policy:** MedPro 2015 ($0 deductible)
- **Plaintiff's Attorney:** Vincent S. Cimini (Cognetti & Cimini)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from the standard of care in the performance of lumbar decompression surgery by performing surgery at the wrong spinal level.
- **Procedural Posture:** Early stages of discovery.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team

- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served April 21, 2017.

Pending Employment Case

Horowitz, Peter (Tampa)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging

that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief is due to be filed on September 25, 2017. Bailey will then file a reply brief. Oral argument will be requested and scheduled. The appellate process is currently expected to continue into 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's

business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of September 30, 2017

- LSI currently has 12 filed medical negligence claims pending.
  - 8 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 2 claims are covered by insurance with LSI having a $100,000 deductible; 2 claims are covered by the Pennsylvania insurance structure pursuant to which LSI has a zero ($0) deductible.
- LSI has 4 medical negligence claims in the pre-suit stage (all 4 are self-insured).
- LSI has 2 medical negligence claims in which presuit has ended due to LSI's denial of the claim in the pre-suit period. LSI is now awaiting service of a complaint in each of those matters.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 employment law claim pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 1, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 31, 2017.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PATIENT. PATIENT claims that the multiple surgeries caused the formation of excessive scar tissue causing PATIENT significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 8, 2017.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PATIENT reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PATIENT's complaints of incontinence continued and she was transported to a local hospital. PATIENT continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 28, 2017.

PATIENT (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 23, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.

- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries:** August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.

- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Discovery stage. Trial set for March 19, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller) .); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar

decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.

- **Procedural Posture:** Early stages of discovery. Trial set for March 12, 2018.

PLAINTIFF (Arizona)

- **Target Physician:** None specifically named because injury occurred as PLAINTIFF positioned himself on operating table for surgery
- **Date of Surgery:** April 23, 2013
- **Insurance Policy:** Torus 2013 ($100,000 deductible)
- **Plaintiff's Attorney:** Sonja Duckstein (Law Office of Sonja Duckstein)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges that on April 23, 2013, prior to a scheduled surgery that PLAINTIFF was preparing to position himself on the operating table and the armrest came loose on the table, causing him to fall and injure his bicep. PLAINTIFF had bicep repair surgery. PLAINTIFF alleges negligence and medical malpractice.
- **Procedural Posture:** Settled for $45,000.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTOR
- **Date of Surgery:** April 28, 2014
- **Insurance Policy:** MedPro 2015 ($0 deductible)
- **Plaintiff's Attorney:** Vincent S. Cimini (Cognetti & Cimini)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from the standard of care in the performance of lumbar decompression surgery by performing surgery at the wrong spinal level.
- **Procedural Posture:** Settled.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR

- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served April 21, 2017.

Pending Employment Case

PLAINTIFF (Tampa)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal.

PLAINTIFF (Tampa)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.
- **Procedural Posture:** Complaint served and answer filed. Case removed to Federal Court.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief is due to be filed on October 9, 2017. Bailey will then file a reply brief. Oral argument will be requested and scheduled. The appellate process is currently expected to continue into 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision

of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of October 31, 2017

- LSI currently has 10 filed medical negligence claims pending.
  - 8 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 1 claim is covered by insurance with LSI having a $100,000 deductible; 1 claim is covered by the Pennsylvania insurance structure pursuant to which LSI has a zero ($0) deductible.
- LSI has 3 medical negligence claims in the pre-suit stage (all 3 are self-insured).
- LSI has 3 medical negligence claims in which presuit has ended due to LSI's denial of the claim in the pre-suit period (all are self-insured). LSI is now awaiting service of a complaint in each of those matters.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 2 employment law claims pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 1, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.

- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 31, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PATIENT reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PATIENT's complaints of incontinence continued and she was transported to a local hospital. PATIENT continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 28, 2017.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PATIENT. PATIENT claims that the multiple surgeries caused the formation of excessive scar tissue causing PATIENT significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 8, 2017.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

PATIENT (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 23, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.

- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries:** August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.

- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Discovery stage. Trial set for March 19, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller) .); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar

decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.

- **Procedural Posture:** Early stages of discovery. Trial set for March 12, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015; April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served April 21, 2017.

Pending Employment Case

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set

for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.
- **Procedural Posture:** Complaint served and answer filed. Case removed to Federal Court.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey will file a reply brief in early December 2017. Oral argument will be requested and scheduled. The appellate process is currently expected to continue into 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision

of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of October 31, 2018

- LSI currently has 19 filed medical negligence claims pending.
  - 17 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 2 claims are covered by the Pennsylvania insurance structure pursuant to which there is a zero ($0) deductible for each individual physician and up to $1 million deductible for LSI as entity.
- LSI has 3 medical negligence claims in the pre-suit stage (LSI is self-insured).
- LSI has 3 potential medical negligence claims in which we have been communicating with opposing counsel in an attempt to explore resolution of those claims prior to any presuit or suit.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 bankruptcy adversary proceeding pending.
- LSI has 2 interpleader actions pending.
- LSI has 2 employment law claims pending.

Potential Medical Negligence Claims (no formal presuit or suit)

PATIENT (Missouri)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** November 3, 2016, and November 8, 2016
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** None.
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy with decompression and a cervical laminectomy and foraminotomy with decompression. Following PATIENT'S cervical surgery, PATIENT reported excruciating neck pain and spasms and was advised to go to the emergency room. PATIENT did not show for scheduled LSI post-op evaluations and was repeatedly advised to go to the emergency room, but refused to do so until November 11, 2018. PATIENT was subsequently hospitalized and underwent a cervical fusion by an outside surgeon in the St. Louis area. PATIENT then returned home to Colorado and, about seven months later, underwent a lumbar fusion. PATIENT claims she has endured pain and suffering, and has been unable to return to work as a bookkeeper due to upper extremity pain and dysfunction.
- **Procedural Posture:** Investigation of potential claim.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Care at Issue:** August 1, 2016
- **Insurance Policy:** Self-Insured

- **Plaintiff's Attorney:** James Sawyer
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy including partial facetectomy with decompression. DOCTOR encountered a dura leak during the surgery. The patient returned home to another state and contacted LSI to report incontinence of stool and saddle numbness since the surgery. Physicians at a hospital in PATIENT's home state performed an MRI and found a collection of fluid within the surgical site compatible with a postoperative seroma, hematoma or abscess, with compression on the cauda equina nerve roots. Otherwise, the physicians found the spinal cord intact without compression and had no concern for any spinal cord issues. They suspected a likely seroma with anticipated improvement. PATIENT allegedly continues to complain of some degree of bowel incontinence.
- **Procedural Posture:** Investigation of potential claim, including gathering of medical records and billing. Patient and LSI have entered into tolling agreement to allow further investigation and negotiation.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS AND CRNA
- **Date(s) of Care at Issue:** December 15, 2017
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Thomas J. Misny
- **Defense Attorney:** Brad Longbrake (Hanna Campbell & Powell, LLP)
- **General Nature of Claim:** DOCTOR performed a laminotomy with foraminotomy and decompression of the nerve root at, right C4/5. Immediately following surgery, PATIENT complained of left arm and left leg numbness in the Post Anesthesia Care Unit. Anesthesiologist DOCTOR was called to the bedside. DOCTOR noted intact sensory functions but diminished motor skills on the left side. PATIENT was transferred to a local hospital. PATIENT was diagnosed with a spinal cord contusion and received physical therapy before being discharged home.
- **Procedural Posture:** Retained counsel to investigate potential claim.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Providers:** DOCTORS, CRNA, PA-C, NURSES
- **Date of Care at Issue:** October 6, 2017
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Janet G. Abaray and Jessica L. Powell (Burg Simpson Eldredge Hersh Jardine PC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke)
- **General Nature of Claim:** Unknown because PATIENT has not disclosed.
- **Reserves**: None set yet.
- **Procedural Posture:** Presuit Notices of Intent to Sue received October 3, 4, and 5, 2018.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** February 23, 2017, and February 27, 2017
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Heather Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed two lumbar decompression surgeries. PATIENT alleges that the surgeries performed do not match the patient's claimed symptoms and diagnostic test results.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 19, 2018.

PATIENT (Ohio)

- **Target Physicians:** DOCTOR
- **Date(s) of Care at Issue:** July 11, 2017, and September 28, 2017
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Frederick J. Johnson (Deters Law)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** Unknown because PATIENT has not disclosed.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 13, 2018.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for September 4, 2019.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase. Motion to dismiss pending for failure to comply with Florida pre-suit requirements.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Complaint served February 1, 2018. Defendants filed a motion to dismiss for failure to comply with presuit. Settlement pending approval by bankruptcy court. PLAINTIFF filed for bankruptcy protection.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. Mediation on June 29, 2018, ended in an *impasse*. Continuance of trial date granted. No new trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Kristi Neher Davisson, PLLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI filed motion to dismiss and motion to strike. Court granted the motion in part and gave plaintiff until August 13, 2018, to file amended complaint. Amended Complaint filed on August 13, 2018. LSI filed motion to dismiss which remains pending. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates); Maureen M. McBride (Lamb McErlane, PC); and John J. Hare, Esquire (Marshall Dennehey Warner Coleman & Goggin)
- **General Nature of Claim:** PLAINTIFF alleged poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with

caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.

- **Procedural Posture:** Trial resulted in jury verdict for plaintiff on March 28, 2018; awaiting trial judge's ruling on post-trial motions. Settlement discussions suspended.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. Motion for partial summary judgment filed by LSI which awaits ruling by Court. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with proper medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Discovery stage. Continuance of trial agreed upon. No new trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team

- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Discovery phase. Mediation on May 29, 2018, ended in *impasse.* Continuance of trial agreed upon. No new trial date set.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. The Court granted Defendants' Motion to Dismiss. PLAINTIFF has until January 31, 2019, to refile the claim, but has not yet done so.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to properly diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. LSI filed motion to dismiss which was granted. PLAINTIFF has until November 27, 2018, to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physicians:** DOCTORS
- **Dates of Care at Issue:** July 15, 2016, July 20, 2016, and September 13, 2016
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiffs' Attorney:** Joel A. LaCourse (LaCourse Law, PLLC)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)

- **General Nature of Claim:** PLAINTIFF alleges that, following his July 20, 2016, surgery, he experienced swelling, pain, and wound leakage from an infection in his back. DOCTOR performed exploration surgery with culture, incision, and debridement on September 13, 2016. The Complaint claims damages for severe and permanent injuries, emotional and mental trauma, as well as significant past and future medical expenses, loss of consortium, and economic loss.
- **Procedural Posture:** Complaint filed July 3, 2018. Complaint served September 7, 2018. Very early stage of case.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)
- **Defense Attorney:** Tracy S. Prewitt (O'Bryan, Brown & Toner, PLLC)
- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint served September 24, 2018. Very early stage of case.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but PLAINTIFF alleges that he failed to adequately treat PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. Discovery phase. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)

- **Defense Attorney:** Gregory S. Nesbitt (Kilcoyne & Nesbitt, LLC)
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Complaint filed January 23, 2018. Certificates of Merit filed March 22, 2018. Trial set for July 13, 2020.

PATIENT (Missouri)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: September 29, 2016
- **Insurance Policy:** Self-insured
- **Plaintiff's Attorney:** Eugene H. Fahrenkrog, Jr.
- **Defense Attorney:** Phillip Willman (Brown & James)
- **General Nature of Claim:** PATIENT underwent a left lumbar laminotomy and foraminotomy performed by DOCTOR 1. PATIENT alleges that she consented to a bilateral decompression surgery and that she suffered a lamina fracture. PATIENT also alleges that she had to undergo a subsequent surgery by DOCTOR 2 as the first decompression surgery was not bilateral.
- **Reserves**: None set.
- **Procedural Posture:** Complaint served August 21, 2018. Very early stage of case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that

Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a later fusion surgery performed by another physician.

- **Procedural Posture:** Discovery stage. Trial set November 26, 2018. Continuance agreed upon. No new date set.

Pending Bankruptcy Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Parties have agreed to settle.

Pending Interpleader Proceeding

PETITIONER (Oklahoma)

- **Target:** LSI OK
- **Petitioner's Attorney:** Brian D. Blackstock (Sweet Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Petition served April 23, 2018.

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Court dismissed LSI, and all other defendants, due to improper service. Plaintiff is challenging. LSI has no interest in matter and plaintiff agreed previously to dismiss LSI.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed. No recent activity.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. LSI intends to file a motion for summary judgment.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey

parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. LSI filed a cross-reply brief in January 2018. Oral argument took place on March 27, 2018. Decision of appellate court expected in latter half of 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual,

provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of November 30, 2018

- LSI currently has 18 filed medical negligence claims pending.
    - 16 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 2 claims are covered by the Pennsylvania insurance structure pursuant to which there is a zero ($0) deductible for each individual physician and up to $1 million deductible for LSI as entity.
- LSI has 3 medical negligence claims in the pre-suit stage (LSI is self-insured).
- LSI has 3 potential medical negligence claims in which we have been communicating with opposing counsel in an attempt to explore resolution of those claims prior to any presuit or suit.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 bankruptcy adversary proceeding pending.
- LSI has 2 interpleader actions pending.
- LSI has 2 employment law claims pending.

Potential Medical Negligence Claims (no formal presuit or suit)

PATIENT (Missouri)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** November 3, 2016, and November 8, 2016
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** None.
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy with decompression and a cervical laminectomy and foraminotomy with decompression. Following PATIENT'S cervical surgery, PATIENT reported excruciating neck pain and spasms and was advised to go to the emergency room. PATIENT did not show for scheduled LSI post-op evaluations and was repeatedly advised to go to the emergency room, but refused to do so until November 11, 2018. PATIENT was subsequently hospitalized and underwent a cervical fusion by an outside surgeon in the St. Louis area. PATIENT then returned home to Colorado and, about seven months later, underwent a lumbar fusion. PATIENT claims she has endured pain and suffering, and has been unable to return to work as a bookkeeper due to upper extremity pain and dysfunction.
- **Procedural Posture:** Investigation of potential claim.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Care at Issue:** August 1, 2016
- **Insurance Policy:** Self-Insured

- **Plaintiff's Attorney:** James Sawyer
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy including partial facetectomy with decompression. DOCTOR encountered a dura leak during the surgery. The patient returned home to another state and contacted LSI to report incontinence of stool and saddle numbness since the surgery. Physicians at a hospital in PATIENT's home state performed an MRI and found a collection of fluid within the surgical site compatible with a postoperative seroma, hematoma or abscess, with compression on the cauda equina nerve roots. Otherwise, the physicians found the spinal cord intact without compression and had no concern for any spinal cord issues. They suspected a likely seroma with anticipated improvement. PATIENT allegedly continues to complain of some degree of bowel incontinence.
- **Procedural Posture:** Investigation of potential claim, including gathering of medical records and billing. Patient and LSI have entered into tolling agreement to allow further investigation and negotiation.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS AND CRNA
- **Date(s) of Care at Issue:** December 15, 2017
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Thomas J. Misny
- **Defense Attorney:** Brad Longbrake (Hanna Campbell & Powell, LLP)
- **General Nature of Claim:** DOCTOR performed a laminotomy with foraminotomy and decompression of the nerve root at, right C4/5. Immediately following surgery, PATIENT complained of left arm and left leg numbness in the Post Anesthesia Care Unit. Anesthesiologist DOCTOR was called to the bedside. DOCTOR noted intact sensory functions but diminished motor skills on the left side. PATIENT was transferred to a local hospital. PATIENT was diagnosed with a spinal cord contusion and received physical therapy before being discharged home.
- **Procedural Posture:** Retained counsel to investigate potential claim.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Providers:** DOCTORS, CRNA, PA-C, NURSES
- **Date of Care at Issue:** October 6, 2017
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Janet G. Abaray and Jessica L. Powell (Burg Simpson Eldredge Hersh Jardine PC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke)
- **General Nature of Claim:** Unknown because PATIENT has not disclosed.
- **Reserves**: None set yet.
- **Procedural Posture:** Presuit Notices of Intent to Sue received October 3, 4, and 5, 2018.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** February 23, 2017, and February 27, 2017
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Heather Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed two lumbar decompression surgeries. PATIENT alleges that the surgeries performed do not match the patient's claimed symptoms and diagnostic test results.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 19, 2018.

PATIENT (Ohio)

- **Target Physicians:** DOCTOR
- **Date(s) of Care at Issue:** July 11, 2017, and September 28, 2017
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Frederick J. Johnson (Deters Law)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** Unknown because PATIENT has not disclosed.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 13, 2018.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for September 4, 2019.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase. Motion to dismiss pending for failure to comply with Florida pre-suit requirements.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Complaint served February 1, 2018. Defendants filed a motion to dismiss for failure to comply with presuit. Settlement pending approval by bankruptcy court. PLAINTIFF filed for bankruptcy protection.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. Mediation on June 29, 2018, ended in an *impasse*. Continuance of trial date granted. No new trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Kristi Neher Davisson, PLLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI filed motion to dismiss and motion to strike. Court granted the motion in part and gave plaintiff until August 13, 2018, to file amended complaint. Amended Complaint filed on August 13, 2018. LSI filed motion to dismiss which remains pending. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates); Maureen M. McBride (Lamb McErlane, PC); and John J. Hare, Esquire (Marshall Dennehey Warner Coleman & Goggin)
- **General Nature of Claim:** PLAINTIFF alleged poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with

caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.

- **Procedural Posture:** Trial resulted in jury verdict for plaintiff on March 28, 2018; awaiting trial judge's ruling on post-trial motions. PLAINTIFF unilaterally agreed to withdraw one of two claims, resulting in reduction of possible judgment by fifty percent (50%). Settlement discussions suspended.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. Motion for partial summary judgment filed by LSI which awaits ruling by Court. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with proper medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Discovery stage. Continuance of trial agreed upon. No new trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)

- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Discovery phase. Mediation on May 29, 2018, ended in *impasse.* Continuance of trial agreed upon. No new trial date set.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. The Court granted Defendants' Motion to Dismiss. PLAINTIFF has until January 31, 2019, to refile the claim, but has not yet done so.

PLAINTIFF (Oklahoma)

- **Target Physicians:** DOCTORS
- **Dates of Care at Issue:** July 15, 2016, July 20, 2016, and September 13, 2016
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiffs' Attorney:** Joel A. LaCourse (LaCourse Law, PLLC)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that, following his July 20, 2016, surgery, he experienced swelling, pain, and wound leakage from an infection in his back. DOCTOR performed exploration surgery with culture, incision, and debridement on September 13, 2016. The Complaint claims damages for severe and permanent injuries, emotional and mental trauma, as well as significant past and future medical expenses, loss of consortium, and economic loss.
- **Procedural Posture:** Complaint filed July 3, 2018. Complaint served September 7, 2018. Very early stage of case.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)

- **Defense Attorney:** Tracy S. Prewitt (O'Bryan, Brown & Toner, PLLC)
- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint served September 24, 2018. Very early stage of case.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but PLAINTIFF alleges that he failed to adequately treat PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. Discovery phase. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Gregory S. Nesbitt (Kilcoyne & Nesbitt, LLC)
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Complaint filed January 23, 2018. Certificates of Merit filed March 22, 2018. Trial set for July 13, 2020.

PATIENT (Missouri)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: September 29, 2016
- **Insurance Policy:** Self-insured
- **Plaintiff's Attorney:** Eugene H. Fahrenkrog, Jr.

- **Defense Attorney:** Phillip Willman (Brown & James)
- **General Nature of Claim:** PATIENT underwent a left lumbar laminotomy and foraminotomy performed by DOCTOR 1. PATIENT alleges that she consented to a bilateral decompression surgery and that she suffered a lamina fracture. PATIENT also alleges that she had to undergo a subsequent surgery by DOCTOR 2 as the first decompression surgery was not bilateral.
- **Reserves**: None set.
- **Procedural Posture:** Complaint served August 21, 2018. Very early stage of case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a later fusion surgery performed by another physician.
- **Procedural Posture:** Discovery stage. Trial set November 26, 2018. Continuance agreed upon. No new date set.

Pending Bankruptcy Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)

- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Parties have agreed to settle.

Pending Interpleader Proceeding

PETITIONER (Oklahoma)

- **Target:** LSI OK
- **Petitioner's Attorney:** Brian D. Blackstock (Sweet Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Petition served April 23, 2018.

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Court dismissed LSI, and all other defendants, due to improper service. Plaintiff is challenging. LSI has no interest in matter and plaintiff agreed previously to dismiss LSI.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed. No recent activity.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)

- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. LSI intends to file a motion for summary judgment.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. LSI filed a cross-reply brief in January 2018. Oral argument took place on March 27, 2018. Decision of appellate court expected in latter half of 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

LASER SPINE INSTITUTE

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Report on Litigation as of November 30, 2017

- LSI currently has 14 filed medical negligence claims pending.
  - 12 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 1 claim is covered by insurance with LSI having a $100,000 deductible; 1 claim is covered by the Pennsylvania insurance structure pursuant to which LSI has a zero ($0) deductible; 1 claim is a billing dispute.
- LSI has 2 medical negligence claims in the pre-suit stage (both are self-insured).
- LSI has 1 medical negligence claim in which presuit has ended due to LSI's denial of the claim in the pre-suit period (LSI is self-insured). LSI is now awaiting service of a complaint in that matter.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has one pending billing dispute proceeding.
- LSI has one pending adversary proceeding.
- LSI has one pending interpleader proceeding.
- LSI has 3 employment law claims pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 31, 2017.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)

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- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PATIENT. PATIENT claims that the multiple surgeries caused the formation of excessive scar tissue causing PATIENT significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 8, 2017.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint filed October 24, 2017. Complaint has not been served.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)

- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Discovery stage. Trial set for March 19, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016

- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PATIENT reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PATIENT's complaints of incontinence continued and she was transported to a local hospital. PATIENT continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery; failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting; failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller) .); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for October 1, 2018.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)

- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately provide treatment for PLAINTIFF's hematoma.
- **Reserves**: Not set.
- **Procedural Posture:** Complaint filed November 29, 2017.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that

Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.

- **Procedural Posture:** Complaint served April 21, 2017.

Pending Action for Billing Dispute

PATIENT (Arizona)

- **Target Physician:** Not applicable.
- **Date of Care at Issue:** January 18, 2017
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Pro Se
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** Billing dispute.
- **Reserves:** Not applicable.
- **Procedural Posture:** Complaint served November 20, 2017.

Pending Adversary Proceeding

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** RSUI
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Negotiating settlement.

Pending Interpleader Proceeding

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Interpleader action served November 21, 2017.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.
- **Procedural Posture:** Complaint served and answer filed. Case removed to Federal Court. Discovery phase. Trial set for February 4, 2019.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey will file a reply brief in mid-December 2017. Oral argument will be requested and scheduled. The appellate process is currently expected to continue into 2018.

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of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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- LSI currently has 16 filed medical negligence claims pending.
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- LSI has 1 billing dispute pending.
- LSI has 2 bankruptcy adversary proceedings pending.
- LSI has 1 interpleader action pending.
- LSI has 2 employment law claims pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PATIENT. PATIENT claims that the multiple surgeries caused the formation of excessive scar tissue causing PATIENT significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Denied claim in presuit process December 7, 2017. Awaiting service of complaint.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team

- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Denied claim in presuit process August 29, 2017. Awaiting service of complaint.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.

- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint filed October 24, 2017. Complaint has not been served. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Discovery stage. Trial set for March 19, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PATIENT reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PATIENT's complaints of incontinence continued and she was transported to a local hospital. PATIENT continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for October 1, 2018.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to property diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. Counsel to file motion to dismiss. PLAINTIFF will have one year from filing of motion to dsmiss to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately provide treatment for PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Kevin Wright
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Previously, we received a demand letter on July 11, 2017. Our PA outside counsel, Kevin Wright, responded asking for additional information. We never received a response. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

Pending Action for Billing Dispute

PLAINTIFF (Arizona)

- **Target Physician:** Not applicable.
- **Date of Care at Issue:** January 18, 2017
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Pro Se
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** Billing dispute in which PLAINTIFF alleges that LSI representatives provided information about her financial responsibility for charges which differed from invoice she received.
- **Procedural Posture:** Complaint served November 20, 2017. Case tentatively settled.

Pending Adversary Proceeding

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** RSUI
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Negotiating settlement.

Pending Interpleader Proceeding

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Interpleader action served November 21, 2017. LSI to be dismissed from claim.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal. Case has been dormant since that time.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.
- **Procedural Posture:** Complaint served and answer filed. Case removed to Federal Court. Discovery phase. Trial set for February 4, 2019.

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acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

LASER SPINE INSTITUTE

CONFIDENTIAL AND PRIVILEGED

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- LSI has 1 billing dispute pending.
- LSI has 2 bankruptcy adversary proceedings pending.
- LSI has 1 interpleader action pending.
- LSI has 2 employment law claims pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PATIENT. PATIENT claims that the multiple surgeries caused the formation of excessive scar tissue causing PATIENT significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Denied claim in presuit process December 7, 2017. Awaiting service of complaint.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team

- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Denied claim in presuit process August 29, 2017. Awaiting service of complaint.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.

- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint filed October 24, 2017. Complaint has not been served. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Discovery stage. Trial set for March 19, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PATIENT reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PATIENT's complaints of incontinence continued and she was transported to a local hospital. PATIENT continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery; failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for October 1, 2018.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to property diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. Counsel to file motion to dismiss. PLAINTIFF will have one year from filing of motion to dsmiss to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately provide treatment for PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Kevin Wright
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Previously, we received a demand letter on July 11, 2017. Our PA outside counsel, Kevin Wright, responded asking for additional information. We never received a response. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

Pending Action for Billing Dispute

PLAINTIFF (Arizona)

- **Target Physician:** Not applicable.
- **Date of Care at Issue:** January 18, 2017
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Pro Se
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** Billing dispute in which PLAINTIFF alleges that LSI representatives provided information about her financial responsibility for charges which differed from invoice she received.
- **Procedural Posture:** Complaint served November 20, 2017. Case tentatively settled.

Pending Adversary Proceeding

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** RSUI
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Negotiating settlement.

Pending Interpleader Proceeding

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Interpleader action served November 21, 2017. LSI to be dismissed from claim.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal. Case has been dormant since that time.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.
- **Procedural Posture:** Complaint served and answer filed. Case removed to Federal Court. Discovery phase. Trial set for February 4, 2019.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. Oral argument has been scheduled for March 27, 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially

acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

EXHIBIT J

Weekly Compliance Certificate

FOR WEEK ENDED	2/15/2019 (THE "SUBJECT PERIOD")
ADMINISTRATIVE AGENT:	Texas Capital Bank, National Association
BORROWER:	Laser Spine Institute, LLC, LSI Management Company, LLC, Laser Spine Institute Consulting LLC, and Medical Care Management Services, LLC
BORROWER REPRESENTATIVE:	Laser Spine Institute, LLC

This Compliance Certificate (this "***Certificate***") is delivered under the Credit Agreement (as amended, restated, supplemented or otherwise modified from time to time, the "***Credit Agreement***") dated as of July 2, 2015, by and among Borrower, the Lenders from time to time party thereto and Administrative Agent. Capitalized terms used in this Certificate shall, unless otherwise indicated, have the meanings set forth in the Credit Agreement. The undersigned hereby certifies to Administrative Agent and Lenders on behalf of the Borrowers, and not in his/her individual capacity, as of the date hereof that: (a) he/she is the Chief Financial Officer of Borrower Representative, and that, as such, he/she is authorized to execute and deliver this Certificate to Administrative Agent on behalf of each Obligated Party; (b) there currently exists an Event of Default under the Credit Agreement pursuant to Section 10.1(b) of the Credit Agreement whereby the Borrowers have failed to maintain the minimum EBITDA pursuant to Section 9.4 of the Credit Agreement, (c) the Borrowers' rolling 13-week Forecast attached to this Certificate have been prepared in good faith based on reasonable assumptions as of the end of and for the Subject Period; and (d) the information and detail regarding the number of surgeries completed in the immediately preceding week, the number of surgeries completed for the current month and the number of surgeries scheduled for the remainder of the current month is set forth below, and such information is true and accurate in all material respects on and as of the date of this Certificate:

• Number of surgeries completed in the immediately preceding week:	112
• Number of surgeries completed for the current month:	250
• Number of surgeries scheduled for the remainder of the current month:	244

IN WITNESS WHEREOF, the undersigned has executed this Certificate as of Monday, February 18, 2019

BORROWERS REPRESENTATIVE:

LASER SPINE INSTITUTE, LLC

By: _____
Name: Phil Picchietti
Title: Chief Financial Officer

CONFIDENTIAL AND PRIVILEGED

Report on Litigation as of December 31, 2018

- LSI currently has 19 filed medical negligence claims pending.
  - 17 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 2 claims are covered by the Pennsylvania insurance structure pursuant to which there is a zero ($0) deductible for each individual physician and up to $1 million deductible for LSI as entity.
- LSI has 3 medical negligence claims in the pre-suit stage (LSI is self-insured).
- LSI has 1 potential medical negligence claims in which we have been communicating with opposing counsel in an attempt to explore resolution of those claims prior to any presuit or suit.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 bankruptcy adversary proceeding pending.
- LSI has 2 employment law claims pending.

Potential Medical Negligence Claims (no formal presuit or suit)

PATIENT (Missouri)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** November 3, 2016, and November 8, 2016
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** None.
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy with decompression and a cervical laminectomy and foraminotomy with decompression. Following PATIENT'S cervical surgery, PATIENT reported excruciating neck pain and spasms and was advised to go to the emergency room. PATIENT did not show for scheduled LSI post-op evaluations and was repeatedly advised to go to the emergency room, but refused to do so until November 11, 2018. PATIENT was subsequently hospitalized and underwent a cervical fusion by an outside surgeon in the St. Louis area. PATIENT then returned home to Colorado and, about seven months later, underwent a lumbar fusion. PATIENT claims she has endured pain and suffering, and has been unable to return to work as a bookkeeper due to upper extremity pain and dysfunction.
- **Procedural Posture:** Patient has written numerous letters demanding settlement, but has not retained counsel.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Care at Issue:** August 1, 2016
- **Insurance Policy:** Self-Insured

- **Plaintiff's Attorney:** James Sawyer
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy including partial facetectomy with decompression. DOCTOR encountered a dura leak during the surgery. The patient returned home to another state and contacted LSI to report incontinence of stool and saddle numbness since the surgery. Physicians at a hospital in PATIENT's home state performed an MRI and found a collection of fluid within the surgical site compatible with a postoperative seroma, hematoma or abscess, with compression on the cauda equina nerve roots. Otherwise, the physicians found the spinal cord intact without compression and had no concern for any spinal cord issues. They suspected a likely seroma with anticipated improvement. PATIENT allegedly continues to complain of some degree of bowel incontinence.
- **Procedural Posture:** Investigation of potential claim, including gathering of medical records and billing. Patient and LSI entered into tolling agreement to allow further investigation and negotiation. Tolling period expired January 1, 2019. No complaint filed.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Providers:** DOCTORS, CRNA, PA-C, NURSES
- **Date of Care at Issue:** October 6, 2017
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Janet G. Abaray and Jessica L. Powell (Burg Simpson Eldredge Hersh Jardine PC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke)
- **General Nature of Claim:** Unknown because PATIENT has not disclosed.
- **Reserves**: None set yet.
- **Procedural Posture:** Presuit Notices of Intent to Sue received October 3, 4, and 5, 2018.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** February 23, 2017, and February 27, 2017
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Heather Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed two lumbar decompression surgeries. PATIENT alleges that the surgeries performed do not match the patient's claimed symptoms and diagnostic test results.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 19, 2018. Denied claim in presuit. Awaiting service of complaint.

PATIENT (Ohio)

- **Target Physicians:** DOCTOR
- **Date(s) of Care at Issue:** July 11, 2017, and September 28, 2017
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Frederick J. Johnson (Deters Law)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** Unknown because PATIENT has not disclosed.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 13, 2018.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for September 4, 2019.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase. Motion to dismiss for failure to comply with Florida pre-suit requirements denied. Must be set for an evidentiary hearing.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Complaint served February 1, 2018. Case settled, but PLAINTIFF filed for bankruptcy protection.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. Mediation on June 29, 2018, ended in an *impasse*. Continuance of trial date granted. New trial date to be set for August 12, 2019.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Kristi Neher Davisson, PLLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI filed motion to dismiss and motion to strike. Court granted the motion in part and gave plaintiff until August 13, 2018, to file amended complaint. Amended Complaint filed on August 13, 2018. LSI filed motion to dismiss and motion for sanctions which remains pending. PLAINTIFF'S counsel has tentatively agreed to dismissal with prejudice with no settlement funds to be paid.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates); Maureen M. McBride (Lamb McErlane, PC); and John J. Hare, Esquire (Marshall Dennehey Warner Coleman & Goggin)
- **General Nature of Claim:** PLAINTIFF alleged poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Trial resulted in jury verdict for plaintiff on March 28, 2018. Trial judge reduced verdict by fifty percent (50%). Appeal anticipated after judgment entered.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence

following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.

- **Procedural Posture:** Complaint served December 1, 2017. Motion for partial summary judgment filed by LSI which awaits ruling by Court. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with proper medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Discovery stage. Continuance of trial agreed upon. No new trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Discovery phase. Mediation on May 29, 2018, ended in *impasse*. Continuance of trial agreed upon. No new trial date set.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)

- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. The Court granted Defendants' Motion to Dismiss. PLAINTIFF has until January 31, 2019, to refile the claim, but has not yet done so.

PLAINTIFF (Oklahoma)

- **Target Physicians:** DOCTORS
- **Dates of Care at Issue:** July 15, 2016, July 20, 2016, and September 13, 2016
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiffs' Attorney:** Joel A. LaCourse (LaCourse Law, PLLC)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that, following his July 20, 2016, surgery, he experienced swelling, pain, and wound leakage from an infection in his back. DOCTOR performed exploration surgery with culture, incision, and debridement on September 13, 2016. The Complaint claims damages for severe and permanent injuries, emotional and mental trauma, as well as significant past and future medical expenses, loss of consortium, and economic loss.
- **Procedural Posture:** Complaint filed July 3, 2018. Complaint served September 7, 2018.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)
- **Defense Attorney:** Tracy S. Prewitt (O'Bryan, Brown & Toner, PLLC)
- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint served September 24, 2018. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, or in the alternative, to Transfer Venue pending with the Court.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)

- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but PLAINTIFF alleges that he failed to adequately treat PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. Discovery phase. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Gregory S. Nesbitt (Kilcoyne & Nesbitt, LLC)
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Complaint filed January 23, 2018. Certificates of Merit filed March 22, 2018. Trial set for July 13, 2020.

PATIENT (Missouri)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: September 29, 2016
- **Insurance Policy:** Self-insured
- **Plaintiff's Attorney:** Eugene H. Fahrenkrog, Jr.
- **Defense Attorney:** Phillip Willman (Brown & James)
- **General Nature of Claim:** PATIENT underwent a left lumbar laminotomy and foraminotomy performed by DOCTOR 1. PATIENT alleges that she consented to a bilateral decompression surgery and that she suffered a lamina fracture. PATIENT also alleges that she had to undergo a subsequent surgery by DOCTOR 2 as the first decompression surgery was not bilateral.
- **Reserves:** None set.
- **Procedural Posture:** Complaint served August 21, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)

- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Ohio)

- **Target Physicians:** DOCTORS AND CRNA
- **Date(s) of Care at Issue:** December 15, 2017
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Thomas J. Misny
- **Defense Attorney:** Brad Longbrake (Hanna Campbell & Powell, LLP)
- **General Nature of Claim:** DOCTOR performed a laminotomy with foraminotomy and decompression of the nerve root at, right C4/5. Immediately following surgery, PLAINTIFF complained of left arm and left leg numbness in the Post Anesthesia Care Unit. Anesthesiologist DOCTOR was called to the bedside. DOCTOR noted intact sensory functions but diminished motor skills on the left side. PLAINTIFF was transferred to a local hospital. PLAINTIFF was diagnosed with a spinal cord contusion and received physical therapy before being discharged home.
- **Procedural Posture:** Complaint served December 13, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a later fusion surgery performed by another physician.
- **Procedural Posture:** Discovery stage. Continuance of trial agreed upon. No new date set.

Pending Bankruptcy Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A

- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Parties have agreed to settle.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed. No recent activity.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. LSI intends to file a motion for summary judgment.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order.

The appellate court issued its ruling on February 3, 2016 (Bailey I). In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an amended final judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017.

On December 28, 2018, the appellate court issued its ruling (Bailey II). The appellate court again reversed the trial court and ruled that LSI should be required to pay disgorgement damages in a range exceeding $265 million. Defendants have filed a motion for rehearing, a motion for rehearing *en banc*, and motion to certify questions of great public importance to the Florida Supreme Court.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known

is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. LSI to file counterclaim early January 2019.

EXHIBIT C

Compliance Certificate

FOR QUARTER/YEAR ENDED December 31, 2017 (THE "***SUBJECT PERIOD***")
ADMINISTRATIVE AGENT: Texas Capital Bank, National Association
BORROWER: Laser Spine Institute, LLC, LSI Management Company, LLC, Laser Spine Institute Consulting LLC, and Medical Care Management Services, LLC
BORROWER REPRESENTATIVE: Laser Spine Institute, LLC

This Compliance Certificate (this "Certificate") is delivered under the Credit Agreement (as amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement") dated as of July 2, 2015, by and among Borrower, the Lenders from time to time party thereto and Administrative Agent. Capitalized terms used in this Certificate shall, unless otherwise indicated, have the meanings set forth in the Credit Agreement. The undersigned hereby certifies to Administrative Agent and Lenders on behalf of the Borrowers, and not in his/her individual capacity, as of the date hereof that: (a) he/she is the Chief Financial Officer of Borrower Representative, and that, as such, he/she is authorized to execute and deliver this Certificate to Administrative Agent on behalf of each Obligated Party; (b) he/she has reviewed and is familiar with the terms of the Credit Agreement and has made, or has caused to be made under his/her supervision, a detailed review of the transactions and condition (financial or otherwise) of each Obligated Party during the Subject Period; (c) no Event of Default currently exists or has occurred which has not been cured or waived by Required Lenders or all Lenders, as required by the Loan Documents; [or LIST DEFAULTS AND ACTIONS BEING TAKEN] (d) the representations and warranties of each Borrower contained in Article 6 of the Credit Agreement, and any representations and warranties of any Obligated Party that are contained in any document furnished at any time under or in connection with the Loan Documents, are true and correct in all material respects (except to the extent that such representations or warranties are qualified by materiality or Material Adverse Event, in which instance such representations or warranties are true and correct in all respects after giving effect to such qualification) on and as of the date hereof with the same force and effect as if such representations and warranties had been made on and as of such date, except to the extent that such representations and warranties specifically refer to an earlier date, in which case they were true and correct in all material respects (except to the extent that such representations or warranties are qualified by materiality or Material Adverse Event, in which instance such representations or warranties are true and correct in all respects after giving effect to such qualification) as of such earlier date, and except that for purposes of this Certificate, the representations and warranties contained in Section 6.2 of the Credit Agreement shall be deemed to refer to the most recent statements furnished pursuant to Section 7.1 of the Credit Agreement, including the statements in connection with which this Certificate is delivered; (e) the financial statements of each Obligated Party attached to this Certificate, if any, were prepared in accordance with GAAP, (subject to year-end audit adjustments and the absence of footnotes), and fairly present in all material respects the financial condition and results of operations of the Parent and its Subsidiaries, on a consolidated basis, as of the end of and for the Subject Period; (f) the financial covenant analyses and information set forth below are true and accurate on and as of the date of this Certificate; and (g) the status of compliance by each Borrower with certain covenants of the Credit Agreement at the end of the Subject Period is as set forth below:

Dollars in thousands	In Compliance as of End of Subject Period **(Please Indicate)**	
1. Financial Statements, Reports and Other Information (Article 7—Affirmative Covenants)		
(a) Provide annual audited FYE financial statements within 130 days after the last day of each fiscal year, beginning with the fiscal year ending December 31, 2016, and a Compliance Certificate.	Yes	No
(b) Provide monthly financial statements, Compliance Certificate, and summary accounts receivable report within 30 days after the last day of each fiscal month ending after the First Amendment Effective Date.	Yes	No
(c) Provide other reporting required by Section 7.1 of the Credit Agreement timely.	Yes	No
(d) Taxes have been paid and insurance is effective as required by Sections 7.4 and 7.5 of the Credit Agreement	Yes	No
2. Subsidiaries None, except as listed on Schedule 6.13.	Yes	No
3. Debt None, except Debt permitted by Section 8.1 of the Credit Agreement. (Details below.)	Yes	No
(d) Amount of Guarantees, if any, $ 86		
(e) Purchase Money Debt and Capitalized Lease Obligations $ 1,176		
4. Liens None, except Liens permitted by Section 8.2 of the Credit Agreement.	Yes	No
5. Acquisitions and Mergers None, except those permitted by Section 8.3 of the Credit Agreement. (Details to be disclosed, if applicable.)	Yes	No

6. Restricted Payments Yes No

None, except as permitted by Section 8.4 of the Credit Agreement.

7. Loans and Investments Yes No

None, except those permitted by Section 8.5 of the Credit Agreement. (Details below.)

(e) Investments in Core Business of $ -

8. Issuance of Equity Yes No

None, except issuances permitted by Section 8.6 of the Credit Agreement.

9. Affiliate Transactions Yes No

None, except transactions permitted by Section 8.7 of the Credit Agreement.

10. Dispositions of Assets Yes No

None, except dispositions permitted by Section 8.8 of the Credit Agreement. (Details below.)

(c) Amount of Dispositions during the current fiscal year

$ 204	Obsolete Equipment Proceeds	$ 88
	Marrick AR Sale Proceeds	$ 116

11. Sale and Leaseback Transactions Yes No

None, except transactions permitted by Section 8.9 of the Credit Agreement.

12. Prepayment of Debt Yes No

None, except prepayments permitted by Section 8.10 of the Credit Agreement.

13. Changes in Nature of Business Yes No

None, except changes permitted by Section 8.11 of the Credit Agreement.

14. Environmental Protection Yes No

No activity likely to cause violations of Environmental Laws or create any Environmental Liabilities for which any Borrower or any Subsidiary would be responsible.

15. Changes in Fiscal Year; Accounting Practices Yes No

None, except transactions permitted by Section 8.13 of the Credit Agreement.

16. No Negative Pledge Yes No

None, except those permitted by Section 8.14 of the Credit Agreement.

17. Leverage Ratio (detail shown on attached) (Section 9.1)

Maximum of _____ to 1.00 at end of Subject Period, beginning with the fiscal quarter ending March 31, 2017

Quarter Ending	Maximum Ratio
September 30, 2017	No Maximum ratio
December 31, 2017	No Maximum ratio
March 31, 2018	No Maximum ratio
June 30, 2018	No Maximum ratio
From and after September 30, 2018	5.00 to 1.00

(Defined as (a) all Debt of Borrowers and their Subsidiaries, other than Subordinated Debt permitted under Section 8.1(n), as of such date minus the Cash Reserve Account balance as of such date to (b) EBITDA of Borrowers and their Subsidiaries for the four fiscal quarters most recently ended; provided that, for purposes of calculating the Leverage Ratio in determining compliance with Section 9.1, (i) EBITDA for the measurement period ending September 30, 2018, shall be EBITDA for the fiscal quarter ended on such date multiplied by 4; and (ii) EBITDA for the measurement period ending December 31, 2018, shall be the sum of actual EBITDA for the two fiscal quarters ending on such date multiplied by 2.

_____ ÷ _____ = _____ Yes No

Debt EBITDA

18. Debt Service Coverage Ratio (detail shown on attached) (Section 9.2) Yes No

Minimum of _____ to 1.00 at end of Subject Period, beginning as of September 30, 2018

Period	Minimum Ratio
September 30, 2017 to June 30, 2018	No minimum ratio
From and after September 30, 2018	1.10 to 1.0

(Defined as (a) EBITDA minus cash taxes paid minus Permitted Tax Distributions paid minus Unfinanced Capital Expenditures to (b) Debt Service, in each case for Borrowers and their Subsidiaries, on a consolidated basis, for such four fiscal quarter period; provided that, for purposes of calculating EBITDA in determining compliance with this Section 9.2, (i) EBITDA for the measurement period ending September 30, 2018, shall be EBITDA for the fiscal quarter ending on such date multiplied by 4; and (ii) EBITDA for the measurement period ending December 31, 2018, shall be the sum of actual EBITDA for the two fiscal quarters ending on such date multiplied by 2; provided, further, that for purposes of calculating Debt Service in determining compliance with Section 9.2, the sum of regularly scheduled principal payments in respect of the Term Loan shall be deemed to be $250,000 per month for the period beginning October 1, 2017 and ending December 31, 2017.

($ -	-	$ -	-	$ -	-	) =	$ -
EBITDA		cash taxes paid		Permitted Tax Distributions paid		Unfinanced Capital Expenditures	

($ -	+	)	=	$ -
Scheduled principal payments on all Debt		Cash Interest Expense		**0.00**

19. Capital Expenditures (Detail shown on attached) (Section 9.3) Yes No

Maximum of $2,000,000 from the First Amendment Effective Date through December 31, 2016, $5,000,000 during the fiscal year ending December 31, 2017 and $3,500,000 during the fiscal year ending December 31, 2018, Capital Expenditures (excluding payments of Capitalized Lease Obligations in respect of medical equipment) made during current fiscal year :

$ 4,855

20. Minimum EBITDA Test (Detail shown on attached) (Section 9.4) Yes No

Minimum EBITDA of _____ at _____
(for the period beginning March 1, 2018 and ending on such date)

Test Period beginning March 1, 2018 and ending	*Minimum EBITDA Amount*
March 31, 2018	$0
April 30, 2018	$320,000
May 30, 2018	$600,000
June 30, 2018	$1,105,000
July 31, 2018	$1,660,000
August 31, 2018	$2,610,000

(Defined as EBITDA; provided that, solely for purposes of determining compliance with this Section 9.4, EBITDA for each of the test periods ending above shall be EBITDA for the period beginning on March 1, 2018 and ending on the last day of each such test period).

21. Mandatory Prepayments $ -

(if any, per attached detailed calculations)

Amount of Mandatory Prepayments made during the Subject Period

(a) Amount of net cash proceeds of dispositions required to prepay Term Loans pursuant to Section 2.9(d)(i): $ -

(b) Amount of Excess Cash Flow required to prepay Term Loans pursuant to Section 2.9(d)(ii): $ -

(c) Amount of net cash proceeds from issuance of equity required to prepay Term Loans pursuant to Section 2.9(d)(iii): $ -

(d) Amount of net cash proceeds from issuance of Debt required to prepay Term Loans pursuant to Section 2.9(d)(iv): $ -

(e) Amount of net cash proceeds from Extraordinary Receipts required to prepay Term Loans pursuant to Section 2.9(d)(v): $ -

22. Report on Reimbursement Rates and Insurance Payments

Attached is a report on material changes in reimbursement rates and insurance claim payments since the most recently delivered Compliance Certificate.

23. Report on Litigation

Attached is a detailed report on all litigation and threatened litigation.

IN WITNESS WHEREOF, the undersigned has executed this Certificate as of

January 30, , 2018 .

BORROWERS REPRESENTATIVE:
LASER SPINE INSTITUTE, LLC
By: Alan D Campbell
Alan D Campbell (Jan 29, 2018)

Name: Alan Campbell
Title: Chief Financial Officer

EXHIBIT J

Weekly Compliance Certificate

FOR WEEK ENDED	2/23/2018 (THE "SUBJECT PERIOD")
ADMINISTRATIVE AGENT:	Texas Capital Bank, National Association
BORROWER:	Laser Spine Institute, LLC, LSI Management Company, LLC, Laser Spine Institute Consulting LLC, and Medical Care Management Services, LLC
BORROWER REPRESENTATIVE:	Laser Spine Institute, LLC

This Compliance Certificate (this "***Certificate***") is delivered under the Credit Agreement (as amended, restated, supplemented or otherwise modified from time to time, the "***Credit Agreement***") dated as of July 2, 2015, by and among Borrower, the Lenders from time to time party thereto and Administrative Agent. Capitalized terms used in this Certificate shall, unless otherwise indicated, have the meanings set forth in the Credit Agreement. The undersigned hereby certifies to Administrative Agent and Lenders on behalf of the Borrowers, and not in his/her individual capacity, as of the date hereof that: (a) he/she is the Chief Financial Officer of Borrower Representative, and that, as such, he/she is authorized to execute and deliver this Certificate to Administrative Agent on behalf of each Obligated Party; (b) no Event of Default currently exists or has occurred which has not been cured or waived by Required Lenders or all Lenders, as required by the Loan Documents; [or LIST DEFAULTS AND ACTIONS BEING TAKEN] (c) the Borrowers' rolling 13-week Forecast attached to this Certificate have been prepared in good faith based on reasonable assumptions as of the end of and for the Subject Period; and (d) the information and detail regarding the number of surgeries completed in the immediately preceding week, the number of surgeries completed for the current month and the number of surgeries scheduled for the remainder of the current month is set forth below, and such information is true and accurate in all material respects on and as of the date of this Certificate:

• Number of surgeries completed in the immediately preceding week:	176
• Number of surgeries completed for the current month:	521
• Number of surgeries scheduled for the remainder of the current month:	109

IN WITNESS WHEREOF, the undersigned has executed this Certificate as of

Monday, February 26, 2018

BORROWERS REPRESENTATIVE:

LASER SPINE INSTITUTE, LLC

By: _____
Name: Alan Campbell
Title: Chief Financial Officer

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Report on Litigation as of February 28, 2018

- LSI currently has 18 filed medical negligence claims pending.
    - 15 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 1 claim is covered by insurance with LSI having a $100,000 deductible; 2 claims are covered by the Pennsylvania insurance structure pursuant to which LSI has a zero ($0) deductible; 1 claim is a billing dispute.
- LSI has 1 medical negligence claim in the pre-suit stage (LSI is self-insured).
- LSI has 1 medical negligence claims in which presuit has ended. We are now awaiting service of the complaint.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 billing dispute pending.
- LSI has 2 bankruptcy adversary proceedings pending.
- LSI has 1 interpleader action pending.
- LSI has 3 employment law claims pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Denied claim in presuit process August 29, 2017. Awaiting service of complaint.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016

- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.

- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Complaint served; discovery phase.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Discovery stage. Trial set for March 19, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for October 1, 2018.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to properly diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. Our Oklahoma outside counsel to file motion to dismiss. PLAINTIFF will have one year from filing of motion to dismiss to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)
- **Defense Attorney:** None assigned
- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint has not been served.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)

- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately provide treatment for PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Kevin Wright
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Previously, we received a demand letter on July 11, 2017. Our PA outside counsel, Kevin Wright, responded asking for additional information. We never received a response. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team

- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

Pending Action for Billing Dispute

PLAINTIFF (Arizona)

- **Target Physician:** Not applicable.
- **Date of Care at Issue:** January 18, 2017
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Pro Se
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** Billing dispute in which PLAINTIFF alleges that LSI representatives provided information about her financial responsibility for charges which differed from invoice she received.
- **Procedural Posture:** Complaint served November 20, 2017. Case tentatively settled.

Pending Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** RSUI
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.

Procedural Posture: Negotiating settlement.

Llerena, Denise (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Negotiating settlement.

Pending Interpleader Proceeding

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Interpleader action served November 21, 2017. LSI to be dismissed from claim.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal. Case has been dormant since that time.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)

- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.
- **Procedural Posture:** Complaint served and answer filed. Case removed to federal court. Discovery phase. Trial set for February 4, 2019.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. LSI filed a cross-reply brief in January 2018. Oral argument has been scheduled for March 27, 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives.

Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of March 31, 2018

- LSI currently has 18 filed medical negligence claims pending.
    - 15 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 1 claim is covered by insurance with LSI having a $100,000 deductible; 2 claims are covered by the Pennsylvania insurance structure pursuant to which there is a zero ($0) deductible for physician and up to $1 million deductible for LSI as entity; 1 claim is a billing dispute.
- LSI has 2 medical negligence claims in the pre-suit stage (LSI is self-insured).
- LSI has 1 medical negligence claims in which presuit has ended. We are now awaiting service of the complaint.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 2 bankruptcy adversary proceedings pending.
- LSI has 1 interpleader action pending.
- LSI has 3 employment law claims pending.

Presuit Ended – Complaint Expected

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** January 29, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT experienced cardiac or respiratory arrest and CPR was provided. PATIENT started to breathe on her own and was transported to the hospital via EMS. PATIENT claims DOCTOR or other LSI healthcare providers failed to properly manage her post-surgical opioid medications leading to cardiopulmonary arrest. PATIENT claims memory loss, fainting spells, worsened back pain, and recurrent bladder infections.
- **Procedural Posture:** Denied claim in presuit process August 29, 2017. Awaiting service of complaint.

Pre-Suit Medical Negligence Claims

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)

- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Care at Issue:** December 24, 2015
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Alan F. Wagner, Esquire (Wagner McLaughlin, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a bilateral L5-S1 decompression with annuloplasty from right-sided approach with fluoroscopic and microscopic guidance. PATIENT alleges "failure to protect the S1 nerve root."
- **Procedural Posture:** Pre-Suit Notice of Intent received March 8, 2018.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** September 7, 2012
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** A physician's assistant employed by LSI was initially named as a defendant, but was later dismissed from the case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF significant symptoms not present prior to surgery, including back and leg pain and leg weakness.
- **Procedural Posture:** Complaint served; discovery phase.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)

- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Kristi Neher Davisson, PLLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)

- **General Nature of Claim:** PLAINTIFF alleged poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Trial resulted in verdict for plaintiff on March 28, 2018; post-trial and appellate remedies to be pursued.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. Motion to dismiss filed by LSI which awaits ruling by Court.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with proper medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014

- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for October 1, 2018.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to properly diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. LSI filed motion to dismiss which was granted. PLAINTIFF will have one year from filing of motion to dismiss to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)
- **Defense Attorney:** None assigned

- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint has not been served.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately treat for PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Kevin Wright
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Previously, we received a demand letter on July 11, 2017. Our PA outside counsel, Kevin Wright, responded asking for additional information. We never received a response. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine

following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.

- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

Pending Bankruptcy Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** RSUI
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Negotiating settlement.

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Negotiating settlement.

Pending Interpleader Proceeding

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Interpleader action served November 21, 2017. LSI to be dismissed from claim.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal. Case has been dormant since that time.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Gary Printy, Jr. (Printy & Printy, P.A.)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Network Engineer who performed services pursuant to an agreement with an LSI vendor alleges racial discrimination and retaliation.

- **Procedural Posture:** Complaint served and answer filed. Case removed to federal court. Discovery phase. Trial set for February 4, 2019.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. LSI filed a cross-reply brief in January 2018. Oral argument took place on March 27, 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company.

Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

LASER SPINE INSTITUTE

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Report on Litigation as of June 30, 2017

- LSI currently has 13 filed medical negligence cases.
  - 8 of the filed cases are self-insured (LSI is self-insured up to $1 MM). 3 cases are covered by insurance with LSI having a $100,000 deductible; 2 cases have a zero ($0) deductible (due to the statutory requirements in Pennsylvania).
- LSI has 4 medical negligence claims in pre-suit (which are self-insured).
- LSI has 2 commercial litigation cases in which it is a defendant (Bailey and Bonati) and one in which LSI is a plaintiff (Global Aircraft).
- LSI has 1 employment law case pending.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PATIENT claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PATIENT's post operative status.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received April 24, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT claims negligence for performing unnecessary surgery on PATIENT. The PATIENT also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 1, 2017.

PATIENT (Ohio)

- **Target Physician:** DOCTORS
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PATIENT has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 23, 2017.

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PATIENT alleges a failure to timely provide medical records when requested as required by statute. We are not aware of any other specific allegations at this time.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received May 31, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant St. Vincent's Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to investigate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for May 7, 2018.

PLAINTIFF (Arizona)

- **Target Physicians:** DOCTORS
- **Insurance Policy:** Torus 2012 ($100,000 deductible)
- **Plaintiff's Attorney:** Zaheer A. Shah, MD, JD and Kyle Shelton (Shah and Associates, P.L.L.C.)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges LSI damaged nerves in the low back area during performance of lumbar decompression surgery, causing the entire left side of his body to be numb.
- **Procedural Posture:** Trial set for April 16, 2018.
- **Notes:** Eileen Knighton, PA was initially named as a defendant and was dismissed.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Torus 2013 ($100,000 deductible)
- **Plaintiff's Attorney:** Mark H. Perenich (Perenich, Caulfield, Avril & Noyes, P.A.); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** Richard Mangan and Bryan Snyder (Rissman, Barrett)
- **General Nature of Claim:** PLAINTIFF had left cervical decompression surgery, had a dura leak, numbness in right upper and lower extremities, cord compression, and edema. PLAINTIFF was transferred to Largo Medical Center. Patient had subsequent fusion at a local hospital performed by a non-LSI surgeon. PLAINTIFF still complaining of extremity weakness and subsequent treating physician diagnosed her with a posterior spinal cord injury. Allegations include failure to properly evaluate, failure to require conservative therapy prior to surgery, and failure to properly perform surgery.
- **Procedural Posture:** Trial set for August 21, 2017.
- **Notes:** Patient previously retained another firm. LSI records indicate patient was told she may need fusion and she opted for less invasive decompression surgery first.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Anthony and Partners, LLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in performing her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI has filed motion to dismiss and motion to strike. No recent activity. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self Insured (up to $1 million)
- **Plaintiff's Attorney:** Geoffrey T. Moore (The Maher Law Firm), C. Steven Yerrid (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR failed to obtain proper informed consent for lumbar fusion surgery and that the lumbar fusion was performed below the standard of care, leaving the PLAINTIFF in worsened condition (including sexual dysfunction), and requiring later revision surgery by another surgeon at another facility.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Insurance Policy:** MedPro ($0 deductible)
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF's allegations still unclear given early stages of this matter. We suspect PLAINTIFF will allege poor management of PLAINTIFF's post-surgery medications leading to fatal overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was discharged at 10:40 a.m. with caregiver. At 5:00 p.m., PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was pronounced deceased at hospital at 6:00 p.m.
- **Procedural Posture:** Complaint served and answer filed. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller) .); C. Steven Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Early stages of discovery. Trial set for March 12, 2018.

PLAINTIFF (Arizona)

- **Target Physician:** None specifically named because injury occurred as PLAINTIFF positioned himself on operating table for surgery
- **Insurance Policy:** Torus 2013 ($100,000 deductible)
- **Plaintiff's Attorney:** Sonja Duckstein (Law Office of Sonja Duckstein)
- **Defense Attorney:** Scott A. Holden (Holden & Armer)
- **General Nature of Claim:** PLAINTIFF alleges that on April 23, 2013, prior to a scheduled surgery that PLAINTIFF was preparing to position himself on the operating table and the armrest came loose on the table, causing him to fall and injure his bicep. PLAINTIFF had bicep repair surgery. PLAINTIFF alleges negligence and medical malpractice.
- **Notes**: LSI previously paid patient $29,512.54 for repair surgery and lost wages, however a general release was not signed. Plaintiff has filed an offer of judgment for $75,000. LSI has filed an offer of judgment for $35,000.
- **Procedural Posture:** Mediation on February 9, 2017 ended in impasse. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTOR
- **Insurance Policy:** MedPro 2015 ($0 deductible)
- **Plaintiff's Attorney:** Vincent S. Cimini (Cognetti & Cimini)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from the standard of care in the performance of lumbar decompression surgery by performing surgery at the wrong spinal level.
- **Procedural Posture:** Early stages of discovery.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Complaint served April 21, 2017.
- **Notes:** Plaintiff's current settlement demand is $975,000.

Pending Employment Case

Horowitz, Peter (Tampa)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)

- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. A second Notice of Lack of Prosecution was issued by the clerk on July 22, 2016. A hearing was set for October 27, 2016. Before the hearing, the plaintiff's attorney served boilerplate discovery requests to create docket activity and avoid dismissal.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief is currently scheduled to be filed on July 15, 2017. The appellate process is expected to continue into 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of August 31, 2018

- LSI currently has 19 filed medical negligence claims pending.
    - 17 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 2 claims are covered by the Pennsylvania insurance structure pursuant to which there is a zero ($0) deductible for each individual physician and up to $1 million deductible for LSI as entity.
- LSI has 2 medical negligence claims in the pre-suit stage (LSI is self-insured).
- LSI has 2 potential medical negligence claims in which we have been communicating with opposing counsel in an attempt to explore resolution of those claims prior to any presuit or suit.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 bankruptcy adversary proceeding pending.
- LSI has 2 interpleader actions pending.
- LSI has 3 employment law claims pending.

Potential Medical Negligence Claims (no formal presuit or suit)

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Care at Issue:** August 1, 2016
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** James Sawyer
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy including partial facetectomy with decompression. DOCTOR encountered a dura leak during the surgery. The patient returned home to another state and contacted LSI to report incontinence of stool and saddle numbness since the surgery. Physicians at a hospital in PATIENT's home state performed an MRI and found a collection of fluid within the surgical site compatible with a postoperative seroma, hematoma or abscess, with compression on the cauda equina nerve roots. Otherwise, the physicians found the spinal cord intact without compression and had no concern for any spinal cord issues. They suspected a likely seroma with anticipated improvement. PATIENT allegedly continues to complain of some degree of bowel incontinence.
- **Procedural Posture:** Investigation of potential claim, including gathering of medical records and billing.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS AND CRNA
- **Date of Care at Issue:** December 15, 2017

- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Thomas J. Misny
- **Defense Attorney:** Brad Longbrake (Hanna Campbell & Powell, LLP)
- **General Nature of Claim:** DOCTOR performed a laminotomy with foraminotomy and decompression of the nerve root at, right C4/5. Immediately following surgery, PATIENT complained of left arm and left leg numbness in the Post Anesthesia Care Unit. Anesthesiologist DOCTOR was called to the bedside. DOCTOR noted intact sensory functions but diminished motor skills on the left side. PATIENT was transferred to a local hospital. PATIENT was diagnosed with a spinal cord contusion and received physical therapy before being discharged home.
- **Procedural Posture:** Retained counsel to investigate potential claim.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** February 23, 2017, and February 27, 2017
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Heather Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed two lumbar decompression surgeries. PATIENT alleges that the surgeries performed do not match the patient's claimed symptoms and diagnostic test results.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 19, 2018.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS
- **Date(s) of Care at Issue:** July 25, 2016, August 24, 2016, and September 15, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas H. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR #1 performed a lumbar decompression surgery. DOCTOR #2 performed a SNRB, and DOCTOR #3 performed a lumbar revision and decompression surgery. PATIENT has not identified any specific allegations of medical negligence.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received August 9, 2017.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial set for December 3, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase. Motion to dismiss pending.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF significant symptoms not present prior to surgery, including back and leg pain and leg weakness.

- **Procedural Posture:** Complaint served February 1, 2018. Defendants filed a Motion to Dismiss for failure to comply with presuit. Settlement pending approval by bankruptcy court. PLAINTIFF filed for bankruptcy protection.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. Mediation on June 29, 2018, ended in an *impasse*. Trial set February 18, 2019.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Kristi Neher Davisson, PLLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in her November 20, 2013, spine surgery.

- **Procedural Posture:** LSI filed motion to dismiss and motion to strike. Court granted the motion in part and plaintiff has until August 13, 2018, to file amended complaint. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF alleged poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Trial resulted in verdict for plaintiff on March 28, 2018; awaiting ruling on post-trial motions. Settlement discussions ongoing.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. Motion for partial summary judgment filed by LSI which awaits ruling by Court.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims

negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with proper medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.

- **Procedural Posture:** Complaint served and answer filed. Discovery stage. Mediation scheduled for September 24, 2018. Trial set for April 22, 2019.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Discovery phase. Trial set for October 1, 2018. Mediation on May 29, 2018, ended in *impasse.*

- **PLAINTIFF (Ohio)**
- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. The Court granted Defendants' Motion to Dismiss. PLAINTIFF has until January 31, 2019, to refile the claim, but has not yet done so.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)

- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to properly diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. LSI filed motion to dismiss which was granted. PLAINTIFF has until November 27, 2018, to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physicians:** DOCTORS
- **Dates of Care at Issue:** July 15, 2016, July 20, 2016, and September 13, 2016
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiffs' Attorney:** Joel A. LaCourse (LaCourse Law, PLLC)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that, following his July 20, 2016, surgery, he experienced swelling, pain, and wound leakage from an infection in his back. DOCTOR performed exploration surgery with culture, incision, and debridement on September 13, 2016. The Complaint claims damages for severe and permanent injuries, emotional and mental trauma, as well as significant past and future medical expenses, loss of consortium, and economic loss.
- **Procedural Posture:** Complaint filed July 3, 2018. Complaint has not been served.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)
- **Defense Attorney:** None assigned
- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint has not been served.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that

DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately treat for PLAINTIFF's hematoma.

- **Procedural Posture:** Complaint filed November 29, 2017. Discovery phase. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Gregory S. Nesbitt
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Complaint filed January 23, 2018. Certificates of Merit filed March 22, 2018. No trial date set.

PATIENT (Missouri)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** September 29, 2016
- **Insurance Policy:** Self-insured
- **Plaintiff's Attorney:** Eugene H. Fahrenkrog, Jr.
- **Defense Attorney:** Phillip Willman (Brown & James)
- **General Nature of Claim:** PATIENT underwent a left lumbar laminotomy and foraminotomy performed by DOCTOR 1. PATIENT alleges that she consented to a bilateral decompression surgery and that she suffered a lamina fracture. PATIENT also alleges that she had to undergo a subsequent surgery by DOCTOR 2 as the first decompression surgery was not bilateral.
- **Reserves:** None set.
- **Procedural Posture:** Complaint served August 21, 2018.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine

following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.

- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Discovery stage. Trial set November 26, 2018.

Pending Bankruptcy Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Parties have agreed to settle.

Pending Interpleader Proceeding

PETITIONER (Oklahoma)

- **Target:** LSI OK
- **Petitioner's Attorney:** Brian D. Blackstock (Sweet Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Petition served April 23, 2018.

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)

- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Court dismissed LSI, and all other defendants, due to improper service. Plaintiff is challenging. LSI has no interest in matter and plaintiff agreed previously to dismiss LSI.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed. No recent activity.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** Yvette D. Everhart (Sass Law Firm)
- **Defense Attorney:** Todd S. Aidman (Ford & Harrison LLP)
- **General Nature of Claim:** Former Provider Relations liaison alleges he was terminated due to his disability and FMLA status
- **Procedural Posture:** Attorney demand sent February 12, 2018. EEOC charge filed on April 10, 2018. Mediation on May 21, 2018, ended in *impasse*. Settlement reached. Negotiations ongoing regarding terms of settlement documents.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. LSI intends to file a motion for summary judgment.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. LSI filed a cross-reply brief in January 2018. Oral argument took place on March 27, 2018. Decision of appellate court expected in latter half of 2018.

Bonati – In June 2012, Alfred Bonati, M.D., and certain of his related corporate entities (collectively, "Bonati"), initiated civil litigation against the Company and certain executives. Bonati alleges that the Company has engaged in specific practices he terms "bad acts" which damaged Bonati by diverting patients from Bonati's spine surgery practice to the Company. Bonati is well-known to the Company because of his association with the Company medical founders James St. Louis, D.O., Michael Perry, M.D., and Glenn Hamburg, M.D. and because of his prior litigation against the Company. Bonati has long harbored resentment over the decision

of the Company's medical founders to leave his practice years ago. Bonati has essentially acknowledged that he cannot currently prove the required causal link between the alleged "bad acts" and any financial damage to his practice, but has vowed to use the litigation to damage the Company. Bonati and/or his attorneys obtained emails through discovery in this litigation and then intentionally filed those emails in the public court file despite a court order making the emails confidential. The emails were subsequently the subject of a media story by Bloomberg News describing LSI's alleged use of "illegal incentives" to attract patients. Any value in the case emanates from the potential public disclosure of arguably unflattering emails about the Company's business practices and the potential risks associated with sworn deposition testimony of Company executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

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Report on Litigation as of September 30, 2018

- LSI currently has 19 filed medical negligence claims pending.
    - 17 of the filed claims are self-insured (LSI is self-insured up to $1 MM). 2 claims are covered by the Pennsylvania insurance structure pursuant to which there is a zero ($0) deductible for each individual physician and up to $1 million deductible for LSI as entity.
- LSI has 2 medical negligence claims in the pre-suit stage (LSI is self-insured).
- LSI has 2 potential medical negligence claims in which we have been communicating with opposing counsel in an attempt to explore resolution of those claims prior to any presuit or suit.
- LSI has 2 commercial litigation claims in which it is a defendant (Bailey and Bonati) and one in which it is a plaintiff (Global Aircraft).
- LSI has 1 bankruptcy adversary proceeding pending.
- LSI has 2 interpleader actions pending.
- LSI has 2 employment law claims pending.

Potential Medical Negligence Claims (no formal presuit or suit)

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Date of Care at Issue:** August 1, 2016
- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** James Sawyer
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar laminectomy and foraminotomy including partial facetectomy with decompression. DOCTOR encountered a dura leak during the surgery. The patient returned home to another state and contacted LSI to report incontinence of stool and saddle numbness since the surgery. Physicians at a hospital in PATIENT's home state performed an MRI and found a collection of fluid within the surgical site compatible with a postoperative seroma, hematoma or abscess, with compression on the cauda equina nerve roots. Otherwise, the physicians found the spinal cord intact without compression and had no concern for any spinal cord issues. They suspected a likely seroma with anticipated improvement. PATIENT allegedly continues to complain of some degree of bowel incontinence.
- **Procedural Posture:** Investigation of potential claim, including gathering of medical records and billing.

PATIENT (Ohio)

- **Target Physicians:** DOCTORS AND CRNA
- **Date(s) of Care at Issue:** December 15, 2017

- **Insurance Policy:** Self-Insured
- **Plaintiff's Attorney:** Thomas J. Misny
- **Defense Attorney:** Brad Longbrake (Hanna Campbell & Powell, LLP)
- **General Nature of Claim:** DOCTOR performed a laminotomy with foraminotomy and decompression of the nerve root at, right C4/5. Immediately following surgery, PATIENT complained of left arm and left leg numbness in the Post Anesthesia Care Unit. Anesthesiologist DOCTOR was called to the bedside. DOCTOR noted intact sensory functions but diminished motor skills on the left side. PATIENT was transferred to a local hospital. PATIENT was diagnosed with a spinal cord contusion and received physical therapy before being discharged home.
- **Procedural Posture:** Retained counsel to investigate potential claim.

Pre-Suit Medical Negligence Claims

PATIENT (Florida)

- **Target Physician:** DOCTOR
- **Dates of Care at Issue:** February 23, 2017, and February 27, 2017
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Heather Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed two lumbar decompression surgeries. PATIENT alleges that the surgeries performed do not match the patient's claimed symptoms and diagnostic test results.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received July 19, 2018.

PATIENT (Ohio)

- **Target Physicians:** DOCTOR
- **Date(s) of Care at Issue:** July 11, 2017, and September 28, 2017
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Frederick J. Johnson (Deters Law)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** Unknown.
- **Procedural Posture:** Pre-Suit Notice of Intent to Sue received September 13, 2018.

Pending Medical Negligence Cases

PLAINTIFF (Ohio)

- **Target Physician:** DOCTOR; other non-LSI defendants also named in suit
- **Date of Surgery:** August 14, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Thomas D. Robenalt (The Robenalt Law Firm, Inc.)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery, injured the dura causing a leak, and attempted to repair the leak. PLAINTIFF alleges that post-surgery she experienced severe stabbing pain in legs, was incontinent of bowel and bladder, and experienced numbness in her left ankle and toes. PLAINTIFF was transferred to Defendant Hospital where she had a severe reaction to medication and was unable to lay flat. PLAINTIFF alleges Defendants were negligent by failing to evaluate and treat PLAINTIFF, by damaging the dura sac, by failing to provide medical services, by failing to have appropriate staffing, by failing to have proper protocols in place, by failing to employ individuals who could treat PLAINTIFF, and by failing to establish appropriate standards for physicians, nurses, and aids.
- **Procedural Posture:** Discovery phase. Trial currently set for December 3, 2018. Continuance agreed upon. No new date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Kevin Sparkman (The Florida Law Group)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a lumbar decompression surgery. The PLAINTIFF claims negligence for performing unnecessary surgery on PLAINTIFF. The PLAINTIFF also faults LSI's method of marketing directly to patients.
- **Procedural Posture:** Complaint served; discovery phase. Motion to dismiss pending.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date(s) of Care at Issue:** December 13, 2013, May 15, 2014, and November 20, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Wil H. Florin (Florin Roebig)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Between December 13, 2013, and November 20, 2015, DOCTOR performed three lumbar surgeries on PLAINTIFF. PLAINTIFF claims that the multiple surgeries caused the formation of excessive scar tissue causing PLAINTIFF

significant symptoms not present prior to surgery, including back and leg pain and leg weakness.

- **Procedural Posture:** Complaint served February 1, 2018. Defendants filed a Motion to Dismiss for failure to comply with presuit. Settlement pending approval by bankruptcy court. PLAINTIFF filed for bankruptcy protection.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 23, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Steve Yerrid and Heather N. Barnes (The Yerrid Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges the lumbar fusion surgery performed by DOCTOR was below the standard of care. PLAINTIFF alleges that surgery performed was different than surgery for which PLAINTIFF consented. PLAINTIFF further alleges that his main complaints persisted after surgery and that DOCTOR failed to see or treat PLAINTIFF after surgery.
- **Procedural Posture:** Complaint served; discovery phase. Mediation on June 29, 2018, ended in an *impasse*. Trial set February 18, 2019. Continuance granted. No new date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** September 25, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Cameron Kennedy (Searcy Denney)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that he was not a cervical surgery candidate based on his condition and that the surgery performed by DOCTOR was not indicated and should not have been performed. The PLAINTIFF alleges that the cervical spine surgery worsened his condition and caused permanent injuries and damages. PLAINTIFF had two subsequent procedures by another LSI surgeon, but did not name that LSI surgeon in the lawsuit.
- **Procedural Posture:** Discovery phase. No trial date set.

PLAINTIFF (Florida)

- **Target Physicians:** DOCTORS
- **Dates of Surgeries**: August 12, 2013, and November 20, 2013
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorneys:** Kristi Neher Davisson (Kristi Neher Davisson, PLLC) and Adam Garcia (Kimm Law Firm)
- **Defense Attorney:** LSI Litigation Team

- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTORS deviated below the accepted standard of care by failing to properly diagnose, failing to properly treat, and using improper technique in her November 20, 2013, spine surgery.
- **Procedural Posture:** LSI filed motion to dismiss and motion to strike. Court granted the motion in part and plaintiff has until August 13, 2018, to file amended complaint. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physicians:** DOCTORS
- **Date of Surgery:** January 29, 2014
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Martin S. Kardon (Kanter, Bernstein & Kardon, P.C.)
- **Defense Attorney:** Kevin Wright (Kevin H. Wright & Associates)
- **General Nature of Claim:** PLAINTIFF alleged poor management of PLAINTIFF's post-surgery medications leading to fatal opioid overdose. According to LSI's January 29, 2014 operative report, PLAINTIFF tolerated the surgical procedure well and was transferred to the recovery room in stable condition. PLAINTIFF was stable and was discharged with caregiver. Later, PLAINTIFF was found unresponsive in hotel room. PLAINTIFF was subsequently pronounced deceased at hospital.
- **Procedural Posture:** Trial resulted in verdict for plaintiff on March 28, 2018; awaiting ruling on post-trial motions. Settlement discussions suspended.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 7, 2016 and March 8, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Donald J. Schutz (Schutz Litigation)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed a cervical decompression surgery, a lumbar decompression surgery, including repair of a dural leak, and surgery to explore lumbosacral postoperative wound. The PLAINTIFF reported urinary incontinence following surgery. DOCTOR re-explored the area and found no leak, but PLAINTIFF's complaints of incontinence continued and she was transported to a local hospital. PLAINTIFF continues to complain of partially unresolved urinary and fecal incontinence.
- **Procedural Posture:** Complaint served December 1, 2017. Motion for partial summary judgment filed by LSI which awaits ruling by Court. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** January 27, 2015, and January 29, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Jonathan T. Gilbert (Colling Gilbert Wright & Carter)

- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed cervical disc surgery after previously attempting and discontinuing the procedure 2 days before. The PLAINTIFF claims negligence for failure to cancel or reschedule cervical spine surgery on a patient who was a high-risk candidate for surgery, failure to perform surgery and perioperative treatment and monitoring in a hospital in-patient setting, failure to require post-operative monitoring with proper medical equipment, failure to review and/or sign post-operative discharge instructions, and failure to properly monitor PLAINTIFF's post operative status.
- **Procedural Posture:** Complaint served and answer filed. Discovery stage. Mediation scheduled for September 24, 2018. Trial set for April 22, 2019. Continuance agreed upon. No new date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Date of Surgery:** July 18, 2014
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Scott M. Miller (Law Offices of Scott M. Miller)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated from the accepted standard of care by improperly attempting to perform lumbar decompression surgery, utilizing an improper technique in attempt to remove large herniated disc, causing a dural tear, and failing to repair the dural tear.
- **Procedural Posture:** Discovery phase. Trial set for October 1, 2018. Continuance agreed upon. No new date set. Mediation on May 29, 2018, ended in *impasse*.

PLAINTIFF (Ohio)

- **Target Physician:** DOCTORS
- **Dates of Surgeries:** May 19, 2016, and May 25, 2016
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** Mitchell W. Allen (Allen Law Firm, LLC)
- **Defense Attorney:** David S. Lockemeyer (Calderhead, Lockemeyer & Peschke Law Office)
- **General Nature of Claim:** DOCTORS performed a lumbar decompression surgery and a cervical fusion surgery. The PLAINTIFF has not yet identified any specific allegations of medical negligence.
- **Procedural Posture:** Complaint filed November 15, 2017. The Court granted Defendants' Motion to Dismiss. PLAINTIFF has until January 31, 2019, to refile the claim, but has not yet done so.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: July 8, 2015, November 3, 2015, and November 20, 2015
- **Insurance Policy:** Self-insured (up to $1 million)

- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that the medical care rendered by DOCTORS fell below the standard of care because it represents a failure to properly diagnose and treat which ultimately led to PLAINTIFF's injury. No specific damages are alleged so the PLAINTIFF's complaints are unclear.
- **Procedural Posture:** Complaint filed May 30, 2017. Complaint was not served. LSI filed motion to dismiss which was granted. PLAINTIFF has until November 27, 2018, to refile the claim and serve the complaint. No trial date set.

PLAINTIFF (Oklahoma)

- **Target Physicians:** DOCTORS
- **Dates of Care at Issue:** July 15, 2016, July 20, 2016, and September 13, 2016
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiffs' Attorney:** Joel A. LaCourse (LaCourse Law, PLLC)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that, following his July 20, 2016, surgery, he experienced swelling, pain, and wound leakage from an infection in his back. DOCTOR performed exploration surgery with culture, incision, and debridement on September 13, 2016. The Complaint claims damages for severe and permanent injuries, emotional and mental trauma, as well as significant past and future medical expenses, loss of consortium, and economic loss.
- **Procedural Posture:** Complaint filed July 3, 2018. Complaint served September 7, 2018. Very early stage of case.

PLAINTIFF (Indiana)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: June 19, 2015, and June 25, 2015
- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** F. Harrison Green (F. Harrison Green Co., L.P.A.)
- **Defense Attorney:** None assigned
- **General Nature of Claim:** PLAINTIFF alleges that he suffered a heart attack while either in the operating room or in recovery. PLAINTIFF alleges that DOCTORS failed to meet the standard of care for clearance due to PLAINTIFF's medical history.
- **Procedural Posture:** Complaint filed January 22, 2018. Complaint served September 24, 2018. Very early stage of case.

PLAINTIFF (Oklahoma)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue**: October 26, 2015
- **Insurance Policy:** Self-insured (up to $1 million)

- **Plaintiff's Attorney:** Emmanuel E. Edem and L. Mark Bonner (Norman & Edem, P.L.L.C.)
- **Defense Attorney:** John Wiggins (Wiggins Sewell & Ogletree)
- **General Nature of Claim:** PLAINTIFF alleges that surgery he believed to be performed by one DOCTOR was performed by the other DOCTOR. PLAINTIFF alleges that DOCTOR negligently performed his surgery which caused a hematoma resulting in nerve damage and cauda equina syndrome. DOCTOR subsequently operated on PLAINTIFF at a local hospital, but failed to adequately treat for PLAINTIFF's hematoma.
- **Procedural Posture:** Complaint filed November 29, 2017. Discovery phase. No trial date set.

PLAINTIFF (Pennsylvania)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** May 29, 2015, December 9, 2015 and December 16, 2015
- **Insurance Policy:** MedPro under Pennsylvania MCARE System -- $0 deductible for physician; up to $1 million deductible for LSI as entity
- **Plaintiff's Attorney:** Anthony Baratta (Baratta, Russell & Baratta)
- **Defense Attorney:** Gregory S. Nesbitt
- **General Nature of Claim:** PLAINTIFF alleges it was a breach of the standard of care for LSI and DOCTOR to encourage her to have surgery, as she was not a candidate for spine surgery. PLAINTIFF also claims DOCTOR performed surgery below the standard of care resulting in a dural leak.
- **Procedural Posture:** Civil Cover Sheet and Writ of Summons filed December 7, 2017. Complaint filed January 23, 2018. Certificates of Merit filed March 22, 2018. No trial date set.

PATIENT (Missouri)

- **Target Physician:** DOCTORS
- **Dates of Care at Issue:** September 29, 2016
- **Insurance Policy:** Self-insured
- **Plaintiff's Attorney:** Eugene H. Fahrenkrog, Jr.
- **Defense Attorney:** Phillip Willman (Brown & James)
- **General Nature of Claim:** PATIENT underwent a left lumbar laminotomy and foraminotomy performed by DOCTOR 1. PATIENT alleges that she consented to a bilateral decompression surgery and that she suffered a lamina fracture. PATIENT also alleges that she had to undergo a subsequent surgery by DOCTOR 2 as the first decompression surgery was not bilateral.
- **Reserves:** None set.
- **Procedural Posture:** Complaint served August 21, 2018. Very early stage of case.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** March 4, 2014, and March 14, 2014

- **Insurance Policy:** Self-insured (up to $1 million)
- **Plaintiff's Attorney:** Michael Lewis Beckman (Viles & Beckman, LLC)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** PLAINTIFF alleges DOCTOR deviated from standard of care by failing to prevent and failing to treat an infection in the PLAINTIFF's lumbar spine following fusion surgery. PLAINTIFF underwent a transforaminal lumbar interbody fusion revision.
- **Procedural Posture:** Early stages of discovery. No trial date set.

PLAINTIFF (Florida)

- **Target Physician:** DOCTOR
- **Dates of Surgeries:** February 5, 2015, April 24, 2015, and July 17, 2015
- **Insurance Policy:** Self-Insured (up to $1 million)
- **Plaintiff's Attorney:** William E. Hahn (William E. Hahn, P.A.)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** DOCTOR performed three lumbar decompression surgeries at the same spinal level on PLAINTIFF in a 5 month time frame. PLAINTIFF alleges that Laser Spine Institute and DOCTOR deviated below the accepted standard of care because there was no medical justification for DOCTOR to perform any of the three operations on PLAINTIFF and the operations produced poor results and permanent damage, which necessitated a fusion surgery later performed by another physician.
- **Procedural Posture:** Discovery stage. Trial set November 26, 2018. Continuance agreed upon. No new date set.

Pending Bankruptcy Adversary Proceedings

DEBTOR (Florida)

- **Target:** LSI FL
- **Insurance Policy:** N/A
- **Debtor's Attorney:** Scott J. Goldstein, LLC (Law Offices of Scott J. Goldstein, LLC)
- **Defense Attorney:** Scott A. Underwood (Buchanan Ingersoll & Rooney PC)
- **General Nature of Claim:** Adversary proceeding alleging that LSI attempted to collect payments from the patient after the patient filed for bankruptcy.
- **Procedural Posture:** Parties have agreed to settle.

Pending Interpleader Proceeding

PETITIONER (Oklahoma)

- **Target:** LSI OK
- **Petitioner's Attorney:** Brian D. Blackstock (Sweet Law Firm)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.

- **Procedural Posture:** Petition served April 23, 2018.

PETITIONER (Florida)

- **Target:** LSI FL
- **Petitioner's Attorney:** Michael C. Robinett Simeone & Miller, LLP)
- **Defense Attorney:** LSI Litigation Team
- **General Nature of Claim:** Interpleader action seeking reduction of medical bills.
- **Procedural Posture:** Court dismissed LSI, and all other defendants, due to improper service. Plaintiff is challenging. LSI has no interest in matter and plaintiff agreed previously to dismiss LSI.

Pending Employment Cases

PLAINTIFF (Arizona)

- **Target:** LSI AZ
- **Insurance Policy:** RSUI
- **Plaintiff's Attorney:** None
- **Defense Attorney:** Gordon Lewis (Jones, Skelton & Hochuli, PLC)
- **General Nature of Claim:** Former registered nurse filed EEOC claim alleging improper termination due to disability.
- **Procedural Posture:** EEOC claim filed. LSI's position statement filed. No recent activity.

PLAINTIFF (Florida)

- **Target:** LSI
- **Insurance Policy:** None
- **Plaintiff's Attorney:** Scott A. Fisher (Fisher Law Group, P.A.)
- **Defense Attorney:** April Boyer (K&L Gates)
- **General Nature of Claim:** Former LSI physician alleges that he is owed distributions under the LSI Ownership Appreciation Plan and Award Agreement after he was terminated on September 29, 2009.
- **Procedural Posture:** This case has been largely dormant since it was filed. LSI intends to file a motion for summary judgment.

Pending Commercial Cases

Airplane – LSI filed a breach of contract claim and numerous other claims against Global Aircraft Acquisitions for violating its agreement with LSI. LSI is seeking title of the aircraft in dispute or repayment of the debt owed.

Bailey – In 2006, Joe Samuel Bailey and related individuals and entities (collectively, "Bailey") instituted civil claims against LSI and related individuals and entities (collectively, "LSI") alleging that LSI engaged in tortious business conduct which destroyed Bailey's minimally invasive spine

surgery business and facilitated the success of LSI. Bailey sought hundreds of millions of dollars in damages under theories of disgorgement of profits and destruction of Bailey's business. After extensive discovery and a lengthy non-jury trial, the trial judge rendered a detailed order in October 2012 and entered judgment against LSI in the amount of $1.6 million. Both parties appealed the court's order. The appellate court issued its ruling on February 3, 2016. In its decision, (1) the appellate court reversed the trial court's decision as to the amount of damages to be awarded; (2) the appellate court ordered that the trial court either clarify the basis for the amount of damages awarded for out of pocket damages or conduct a new trial on that issue; (3) the appellate court reversed the trial court's finding that there was no legal basis for an award of punitive damages, ruled that the "findings made by the trial court [clearly] support an award of punitive damages against Dr. St. Louis, Dr. Perry, EFO Holdings LP, and EFO Genpar LP", and ordered the trial court to "determine the appropriate amount of punitive damages, if any, to award [the Bailey parties]"; (4) the appellate court reversed the trial court's finding that the Bailey parties could not recover damages for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUPTA), and ordered the trial court to "determine the amount of damages that are appropriate for the violations by EFO Holdings and EFO Genpar of FDUPTA"; and (5) the appellate court otherwise affirmed all other aspects of the trial court's decision to which either set of parties objected.

The case then returned to the same trial judge for further proceedings as directed by the appellate court. Each side submitted briefs to the trial court regarding each side's contentions about the trial judge's further course of action. On January 30, 2017, the trial court entered an Amended Final Judgment against LSI in the amount of $7,350,000 and reserved jurisdiction to determine the amount of attorneys' fees and costs to be awarded. Bailey filed a notice of appeal on February 28, 2017. The appellate process is expected to last approximately one year. Bailey's initial brief was filed on July 17, 2017. LSI's answer brief was filed on October 9, 2017. Bailey filed a reply brief in December 2017. LSI filed a cross-reply brief in January 2018. Oral argument took place on March 27, 2018. Decision of appellate court expected in latter half of 2018.

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executives on sensitive topics. The substantive merit of the case on the facts as currently known is seen as quite limited. Mediation was unsuccessful. The Company plans an aggressive litigation strategy moving forward if the case continues. The case has remained dormant – with no activity in court or otherwise – for more than 18 months. The litigation will likely continue for some time. No trial date is set. Although the case has been ongoing for nearly four years, the case is still at an early stage. Evaluation is difficult because Bonati has not yet disclosed any evidence supporting any financial damages he allegedly suffered likely because scant evidence exists. Consequently, should this case proceed to trial, we do not currently anticipate a likelihood of a substantial plaintiffs' verdict which would be of material concern. Based upon current information, the upper limit of the value of this case is currently seen as less than $2 million, and that valuation is based solely upon the potential desire of LSI to pay a substantially inflated amount above Bonati's actual, provable damages solely to dispose of the case sooner rather than later. Settlement discussions resulting from the threat of LSI's counterclaim are theoretically ongoing, albeit at a halting pace.

LASER SPINE INSTITUTE®

LSI Holdco, LLC and Subsidiaries

Consolidated Balance Sheets

	June 2016	December 2015
Assets		
Current assets:		
Cash and cash equivalents	$ 1,555,027	$ 2,138,371
Accounts receivable	87,903,177	85,234,043
Less: Allowance for uncollectible accounts	(8,218,165)	(10,000,000)
Net accounts receivable	79,685,012	75,234,043
Notes receivable	9,974,236	98,313
Less: Allowance for uncollectible notes	(1,665,772)	(49,156)
Net notes receivable	8,308,464	49,157
Prepaid expenses and other current assets	12,386,265	13,764,037
Medical supplies inventory	912,028	1,036,152
Total current assets	**102,846,796**	**92,221,760**
Fixed assets		
Property and equipment	103,291,500	90,557,961
Less: accumulated depreciation	(42,318,200)	(37,358,748)
Net fixed assets	**60,973,300**	**53,199,213**
Restricted cash	10,000,000	10,000,000
Other long term assets	1,077,891	884,082
Total assets	**$ 174,897,987**	**$ 156,305,055**
Liabilities and members' equity (deficit)		
Current liabilities:		
Accounts payable	$ 19,914,520	$ 11,211,497
Accrued expenses	23,322,331	22,994,035
Patient reimbursements	511,277	420,203
Current portion of deferred lease expense	464,583	464,583
Current maturities of long-term debt	12,000,000	12,000,000
Total current liabilities	**56,212,711**	**47,090,318**
Long-term debt		
Line of credit	40,097,747	13,597,747
Term loan, less current maturities	126,000,000	135,000,000
Less: unamortized debt issuance costs	(2,833,227)	(3,187,380)
Long-term debt less unamortized debt issuance costs	**163,264,520**	**145,410,367**
Other long-term liabilities		
Deferred lease expense	5,896,689	4,682,189
Professional liability risks	5,497,219	5,800,000
Total other long-term liabilities	**11,393,908**	**10,482,189**
Total liabilities	**230,871,139**	**202,982,874**
Members' equity (deficit)	**(55,973,152)**	**(46,677,819)**
Total liabilities and members' equity (deficit)	**$ 174,897,987**	**$ 156,305,055**

LASER SPINE INSTITUTE®

LSI Holdco, LLC and Subsidiaries
(A Limited Liability Company)
Consolidated Statements of Cash Flows

	One Month Ended June 2016	Six Months Ended June 2016
Cash flows from operating activities:		
Net loss	$ (1,846,972)	$ (9,295,333)
Adjustment to reconcile net loss to net cash from operating activities:		
Depreciation and amortization	963,824	4,963,974
Amortization of deferred loan costs	59,025	354,153
Changes in assets and liabilities:		
(Increase) decrease in:		
Inventory	(50,427)	124,124
Accounts receivable	(361,703)	(4,450,969)
Notes receivable	(1,693,379)	(8,259,307)
Prepaid expenses and other current assets	923,915	1,179,442
Increase (decrease) in:		
Accounts payable	1,471,729	7,830,844
Patient reimbursements	104,338	91,074
Accrued expenses, including deferred lease expense	1,421,391	1,240,014
Net cash from operating activities	**991,741**	**(6,221,984)**
Cash flows from investing activities:		
Purchase of property and equipment	(653,001)	(11,862,628)
Net cash from investing activities	**(651,733)**	**(11,861,360)**
Cash flows from financing activities:		
Net borrowings on revolving credit agreements	-	26,500,000
Principal payments on long-term debt	(3,000,000)	(9,000,000)
Net cash from financing activities	**(3,000,000)**	**17,500,000**
Net change in cash	(2,659,992)	(583,344)
Cash and cash equivalents		
Beginning	4,215,019	2,138,371
Ending	$ 1,555,027	$ 1,555,027
Supplemental disclosures of cash flow information		
Cash paid for interest	$ 1,102,472	$ 3,514,575

LASER SPINE INSTITUTE®

Weekly AR Aging

6/30/2016

Days in AR

	0 - 30	%	31 - 60	%	61 - 90	%	91 - 120	%	121 - 150	%	151 - 180	%	181 - 210	%	211 - 240	%	241 - 270	%
AETNA	$ 301,022	2.9%	$ 384,617	3.4%	$ 151,129	1.5%	$ 290,346	3.4%	$ 171,221	2.4%	$ 300,703	5.4%	$ 147,957	2.6%	$ 248,003	8.1%	$ 108,635	2.4%
BCBS	$ 1,938,220	18.7%	$ 2,286,667	20.2%	$ 1,631,487	16.7%	$ 1,089,377	12.9%	$ 1,090,833	15.6%	$ 850,313	15.3%	$ 1,111,604	19.7%	$ 1,001,618	32.5%	$ 1,022,252	22.9%
BCBS Anthem	$ 2,365,787	22.8%	$ 1,665,331	14.7%	$ 1,834,812	18.8%	$ 1,983,146	23.5%	$ 1,926,005	27.5%	$ 1,279,899	23.0%	$ 444,799	7.9%	$ (249,115)	-8.1%	$ 130,505	2.9%
BCBS FEDERAL	$ 16,328	0.2%	$ 11,426	0.1%	$ -	0.0%	$ (2,388)	0.0%	$ 28,218	0.4%	$ 9,304	0.2%	$ 2,627	0.0%	$ -	0.0%	$ -	0.0%
CIGNA	$ 903,784	8.7%	$ 1,270,717	11.2%	$ 918,054	9.4%	$ 1,117,264	13.2%	$ 624,227	8.9%	$ 314,659	5.7%	$ 579,000	10.2%	$ 676,884	22.0%	$ 504,826	11.3%
HUMANA	$ -	0.0%	$ -	0.0%	$ (2,737)	0.0%	$ (8,871)	-0.1%	$ -	0.0%	$ (63,353)	-1.1%	$ (26,397)	-0.5%	$ (42,556)	-1.4%	$ -	0.0%
LOP	$ -	0.0%	$ 20,000	0.2%	$ 60,000	0.6%	$ 93,000	1.1%	$ 60,000	0.9%	$ 30,000	0.5%	$ (12,675)	-0.2%	$ 3,146	0.1%	$ 7,107	0.2%
MC	$ 184,966	1.8%	$ 111,309	1.0%	$ 30,061	0.3%	$ (17,058)	-0.2%	$ (23,752)	-0.3%	$ 12,810	0.2%	$ (19,281)	-0.3%	$ (631,695)	-20.5%	$ (127)	0.0%
OTHER	$ 600,987	5.8%	$ 1,198,988	10.6%	$ 1,137,701	11.6%	$ 1,191,306	14.1%	$ 787,350	11.2%	$ 518,706	9.3%	$ 227,940	4.0%	$ 128,841	4.2%	$ 288,803	6.3%
OTHER CONTRACTED	$ 1,072,051	10.3%	$ 961,630	8.5%	$ 883,540	9.0%	$ 658,612	7.8%	$ 824,314	11.8%	$ 812,554	14.6%	$ 710,007	12.6%	$ 491,265	16.0%	$ 350,708	7.8%
Patient Claim	$ 57,000	0.5%	$ 67,899	0.6%	$ 130,921	1.3%	$ 10,859	0.1%	$ (7,218)	-0.1%	$ (34,540)	-0.6%	$ (109)	0.0%	$ (252,927)	-8.2%	$ (73,456)	-1.6%
Tricare	$ 678,275	6.5%	$ 1,023,723	9.0%	$ 543,369	5.6%	$ 539,092	6.4%	$ 556,110	7.9%	$ 233,594	4.2%	$ 4,130	0.1%	$ (207,261)	-6.7%	$ 28,605	0.6%
UHC	$ 1,945,760	18.8%	$ 1,983,189	17.5%	$ 2,227,789	22.8%	$ 1,174,992	13.9%	$ 785,786	11.2%	$ 1,191,505	21.4%	$ 2,361,121	41.8%	$ 1,835,139	59.6%	$ 2,134,701	47.8%
UHC Affiliate	$ 177,728	1.7%	$ 271,840	2.4%	$ 89,131	0.9%	$ 221,700	2.6%	$ 125,809	1.8%	$ 94,944	1.7%	$ 62,858	1.1%	$ 46,638	1.5%	$ (30,889)	-0.7%
WC	$ 120,000	1.2%	$ 60,000	0.5%	$ 134,284	1.4%	$ 108,625	1.3%	$ 57,924	0.8%	$ 9,547	0.2%	$ 58,009	1.0%	$ 30,421	1.0%	$ 48,608	1.1%
Total	$ 10,363,908	12.0%	$ 11,317,334	13.1%	$ 9,769,543	11.3%	$ 8,450,004	9.8%	$ 7,006,825	8.1%	$ 5,560,146	6.5%	$ 5,651,590	6.6%	$ 3,078,463	3.6%	$ 4,470,278	

28200

	271 - 300	%	301 - 330	%	331 - 360	%	361 - 390	%	391 - 420	%	421 - 450	%	451 - 480	%	480 +	%	Total	%
AETNA	$ 173,059	1.7%	$ 10,447	0.1%	$ 55,255	0.6%	$ (31,204)	-0.4%	$ 80,897	1.2%	$ 53,208	1.0%	$ 108,843	1.9%	$ 141,617	4.6%	$ 2,695,752	60.3%
BCBS	$ 849,343	8.2%	$ 736,352	6.5%	$ 323,237	3.3%	$ 861,849	10.2%	$ 953,440	13.6%	$ 1,062,670	19.1%	$ 191,404	3.4%	$ 1,100,579	35.8%	$ 18,101,245	404.9%
BCBS Anthem	$ (563,462)	-5.4%	$ (796,604)	-7.0%	$ (575,817)	-5.9%	$ (163,058)	-1.9%	$ -	0.0%	$ -	0.0%	$ -	0.0%	$ -	0.0%	$ 9,282,229	207.6%
BCBS FEDERAL	$ -	0.0%	$ 7,184	0.1%	$ -	0.0%	$ (230,195)	-2.7%	$ (464,083)	-6.6%	$ (525,209)	-9.4%	$ 6,195	0.1%	$ (1,350,201)	-43.9%	$ (2,488,783)	-55.7%
CIGNA	$ 731,205	7.1%	$ 732,250	6.5%	$ 601,557	6.2%	$ 526,528	6.2%	$ 305,857	4.4%	$ 633,548	11.4%	$ 372,289	6.6%	$ 869,431	28.2%	$ 11,682,079	261.3%
HUMANA	$ (27,076)	-0.3%	$ (14,757)	-0.1%	$ (6,854)	-0.1%	$ (4,166)	0.0%	$ (41,533)	-0.6%	$ (30,112)	-0.5%	$ -	0.0%	$ (148,391)	-4.8%	$ (416,803)	-9.3%
LOP	$ -	0.0%	$ (40,604)	-0.4%	$ -	0.0%	$ 34,739	0.4%	$ -	0.0%	$ -	0.0%	$ -	0.0%	$ 20,833	0.7%	$ 275,547	6.2%
MC	$ 22,291	0.2%	$ (16,328)	-0.1%	$ (10,920)	-0.1%	$ (5,926)	-0.1%	$ (20,948)	-0.3%	$ (13,753)	-0.2%	$ 595,917	10.5%	$ (137,857)	-4.5%	$ 59,770	1.3%
OTHER	$ 354,818	3.6%	$ 515,695	4.6%	$ 321,165	3.4%	$ 247,284	2.9%	$ 179,040	2.6%	$ (72,859)	-1.3%	$ 313,440	5.5%	$ 706,323	22.9%	$ 8,605,021	192.5%
OTHER CONTRACTED	$ 605,975	5.8%	$ 590,451	5.2%	$ 593,111	6.1%	$ 466,343	5.5%	$ 177,904	2.5%	$ 100,189	1.8%	$ 355,830	6.3%	$ 434,051	14.1%	$ 10,088,537	225.7%
Patient Claim	$ (35,427)	-0.3%	$ (7,162)	-0.1%	$ (164,972)	-1.7%	$ (109,711)	-1.3%	$ (6,840)	-0.1%	$ 11,254	0.2%	$ 221,312	3.9%	$ (114,855)	-3.7%	$ (307,969)	-6.9%
Tricare	$ 75,989	0.7%	$ 81,975	0.7%	$ 45,246	0.5%	$ 104,838	1.2%	$ 42,723	0.6%	$ 8,150	0.1%	$ (207,729)	-3.7%	$ (639,725)	-20.8%	$ 2,911,104	65.1%
UHC	$ 1,748,031	16.9%	$ 1,352,499	12.0%	$ 1,193,209	12.2%	$ 1,492,743	17.7%	$ 798,950	11.4%	$ 1,056,757	19.0%	$ (259,808)	-4.6%	$ 1,735,146	56.4%	$ 24,757,511	553.8%
UHC Affiliate	$ 64,295	0.6%	$ (223,243)	-2.0%	$ (141,530)	-1.4%	$ (272,804)	-3.2%	$ 11,563	0.2%	$ (1,738)	0.0%	$ (54,541)	-1.0%	$ (104,952)	-3.4%	$ 336,909	7.5%
WC	$ -	0.0%	$ 36,686	0.3%	$ (5,506)	-0.1%	$ -	0.0%	$ 19,801	0.3%	$ (30,221)	-0.5%	$ 5,374	0.1%	$ (84,518)	-2.8%	$ 619,035	13.8%
Total	$ 3,999,136	4.6%	$ 2,964,852	3.4%	$ 2,237,183	2.6%	$ 2,917,260	3.4%	$ 2,036,772	2.4%	$ 2,251,883	2.6%	$ 1,648,526	1.9%	$ 2,477,482	2.9%	$ 86,201,183	100.0%

LASER SPINE INSTITUTE®

	2016 Jan	2016 Feb	2016 Mar	2016 Apr	2016 May	2016 Jun	2016 YTD
Surgical Volume	1,106	1,082	1,291	1,209	1,120	1,237	7,045
Operating Days	20	21	23	21	21	22	128
Surgeries Per Day	55	52	56	58	53	56	55
Rate per Surgery							
Patient Time of Service	5,244	5,202	5,311	6,015	5,471	5,320	5,432
Remaining Patient Responsibility	288	300	286	286	250	276	281
Insurance Revenue	13,425	14,570	13,587	12,465	13,135	12,872	13,323
Net Rate	$ 18,957	$ 20,073	$ 19,184	$ 18,766	$ 18,857	$ 18,468	$ 19,035
Patient Time of Service	5,799,448	5,629,101	6,856,808	7,272,621	6,128,061	6,581,236	38,267,275
Remaining Patient Responsibility	318,763	324,957	368,591	345,043	280,527	341,530	1,980,410
Insurance Revenue	14,847,916	15,764,675	17,541,248	15,069,921	14,711,364	15,922,109	93,857,233
Surgical Revenue	20,966,127	21,718,734	24,766,646	22,688,585	21,119,952	22,844,875	134,104,918
Other Revenue	2,863,091	25,168	98,401	19,946	49,252	510,590	3,566,449
Revenue	**$ 23,829,218**	**$ 21,743,902**	**$ 24,865,047**	**$ 22,708,531**	**$ 21,169,203**	**$ 23,355,465**	**$ 137,671,367**
Salaries and Wages	8,442,149	8,730,996	9,800,555	9,697,877	9,728,632	9,443,080	55,843,289
Benefits	1,571,571	1,670,968	1,443,429	1,358,513	1,577,146	1,515,049	9,136,677
Salaries and Benefits	$ 10,013,720	$ 10,401,964	$ 11,243,984	$ 11,056,391	$ 11,305,778	$ 10,958,129	$ 64,979,966
Medical Supplies	2,041,274	2,104,100	2,252,021	2,192,986	2,213,741	1,902,420	12,706,543
Equipment Rent And Maintenance	143,522	224,208	180,631	169,090	258,096	252,629	1,228,176
Building Rent, Utilities, And Maintenance	994,983	886,630	1,258,926	1,390,303	1,493,149	1,509,902	7,533,893
Advertising And Marketing	5,406,152	5,393,456	5,282,181	4,468,055	4,741,146	4,618,317	29,909,307
Professional Fees	468,446	612,992	987,711	794,268	626,191	640,011	4,129,619
Patient Fees	647,387	645,915	650,863	680,513	652,436	671,164	3,948,279
Bad Debt Expense	1,511,098	188,179	261,156	369,892	326,775	379,700	3,036,800
Other Operating Expenses	$ 1,794,379	$ 1,550,882	$ 1,548,963	$ 1,495,649	$ 1,273,257	$ 1,280,509	$ 8,943,640
Expenses	**$ 23,020,961**	**$ 22,008,327**	**$ 23,666,437**	**$ 22,617,148**	**$ 22,890,568**	**$ 22,212,782**	**$ 136,416,223**
EBITDA	**$ 808,257**	**$ (264,425)**	**$ 1,198,610**	**$ 91,383**	**$ (1,721,365)**	**$ 1,142,683**	**$ 1,255,144**
Restructuring Expenses							
Severance	-	13,397	12,780	72,092	13,393	622,878	734,540
Restructuring Pro Fees	-	-	-	-	245,441	473,402	718,843
Adjusted EBITDA	**$ 808,257**	**$ (277,822)**	**$ 1,185,830**	**$ 19,291**	**$ (1,980,199)**	**$ 46,403**	**$ (198,239)**
Interest Expense/ Income	563,352	525,508	613,060	601,603	604,920	870,526	3,778,968
Deferred Financing Costs Amortized	59,026	59,026	59,026	59,026	59,026	59,026	354,153
Depreciation & Amortization	901,404	766,787	784,133	778,584	769,240	963,824	4,963,973
Net Income	**$ (715,525)**	**$ (1,629,142)**	**$ (270,388)**	**$ (1,419,922)**	**$ (3,413,385)**	**$ (1,846,972)**	**$ (9,295,333)**
Per Surgery Metrics							
Medical Supplies	1,846	1,945	1,744	1,814	1,977	1,538	1,804
Advertising and Marketing	4,888	4,985	4,092	3,696	4,233	3,733	4,245
Patient Fees	585	597	504	563	583	543	560
Salary & Wages	7,633	8,069	7,591	8,021	8,686	7,634	7,927
Total Expenses	20,815	20,340	18,332	18,707	20,438	17,957	19,364

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RECEIVED 3/19/13

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LASER SPINE INSTITUTE®
THE LEADER IN ENDOSCOPIC SPINE SURGERY

March 15, 2013

Gary Emery
Senior Vice President
Texas Capital Bank
2000 McKinney Avenue, Suite 700
Dallas, TX 75201

Dear Gary:

Pursuant to the terms of the Loan Agreement dated as of November 30, 2011 between Laser Spine Institute, LLC and Texas Capital Bank, please find attached the Company's monthly Financial Reporting Package for the month of February 2013. These financial statements have been prepared in accordance with GAAP (except for the omission of notes and year-end adjustments)

Please do not hesitate to contact me with questions or concerns.

Sincerely,

Mark Andrzejewski
Chief Financial Officer

REVIEWED
BY
DATE 3-19-13

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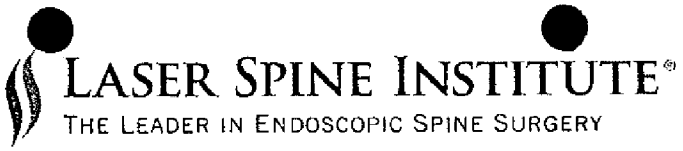
Laser Spine Institute, LLC and Subsidiaries

Consolidated Balance Sheets

	February 2013	January 2012
Current assets		
Cash and cash equivalents	$ 7,324,578	$ 6,372,164
Accounts receivable	20,436,452	21,957,924
Prepaid expenses and other current assets	2,474,860	1,750,713
Medical supplies inventory	389,028	389,028
Total current assets	**30,624,919**	**30,469,828**
Fixed assets		
Property & equipment	36,654,957	36,323,483
Less: accumulated depreciation	(21,679,396)	(21,295,831)
Net fixed assets	**14,975,561**	**15,027,652**
Other long term assets	1,917,337	1,927,842
Total assets	**$ 47,517,817**	**$ 47,425,322**
Liabilities and members' equity		
Current liabilities		
Accounts payable	$ 6,221,940	$ 6,013,439
Accrued expenses	7,722,515	7,071,958
Patient reimbursements	629,972	711,010
Current maturities of long-term debt	4,300,000	4,300,000
Total current liabilities	**18,874,427**	**18,096,406**
Line of credit	4,000,000	4,000,000
Long-term debt, less current maturities	7,800,000	7,800,000
Deferred lease expense	2,123,324	2,113,903
Other liabilities	**13,923,324**	**13,913,903**
Total liabilities	**32,797,751**	**32,010,310**
Members' equity	**14,720,066**	**15,415,012**
Total liabilities and members' equity	**$ 47,517,817**	**$ 47,425,322**

CONSOLIDATED FINANCIAL REPORTING PACKAGE
STATEMENTS OF OPERATIONS - CONSOLIDATED

Period of One Month Ended February 2013							Period of Two Months Ended February 2013					
Actuals	Rev %	Budget	Rev %	Variance		Actuals	Rev %	Budget	Rev %	Variance
572		645		(73)	Surgical Volume	1,178		1,265		(87)
20		20		-	Patient Days	42		42		-
28.6		32.3		(3.7)	Surgeries per Day	28.0		30.1		(2.1)
$ 20,728		$ 20,063		$ 665	Patient Revenue Rate	$ 21,010		$ 20,137		$ 874
$ 11,856,384	91%	$ 12,940,662	100%	$ (1,084,279)	Patient Revenue	$ 24,749,949	92%	$ 25,480,826	100%	$ (730,877)
1,134,701	9%	39,125	0%	1,095,576	Other Operating Revenue	2,044,317	8%	75,625	0%	1,968,692
12,991,085	100%	12,979,787	100%	11,298	**Total Revenue**	26,794,266	100%	25,556,451	100%	1,237,815
2,537,178	20%	2,807,001	22%	269,824	**Medical Operations Staffing**	5,245,886	20%	5,874,917	23%	629,031
340,433	3%	477,190	4%	136,758	Benefits	795,854	3%	998,736	4%	202,882
670,163	5%	992,982	8%	322,818	Medical Supplies	1,285,319	5%	2,008,216	8%	722,897
149,122	1%	211,800	2%	62,678	Equipment Expenses	268,071	1%	423,600	2%	155,529
380,391	3%	371,163	3%	(9,229)	Medical Facility Expense	734,072	3%	745,705	3%	11,633
516,235	4%	578,630	4%	62,395	Patient Fees	1,017,107	4%	1,136,598	4%	119,491
4,593,523	35%	5,438,766	42%	845,243	**Total Medical Expenses**	9,346,309	35%	11,187,772	44%	1,841,463
8,397,562	**65%**	**7,541,021**	**58%**	**856,541**	**Operating Margin**	**17,447,956**	**65%**	**14,368,678**	**56%**	**3,079,278**
879,030	7%	1,121,689	9%	242,659	Sales Staffing	1,943,180	7%	2,324,120	9%	380,939
980,298	8%	938,905	7%	(41,393)	Administrative Staffing	2,059,338	8%	1,972,575	8%	(86,763)
474,587	4%	376,879	3%	(97,708)	Staffing Benefits	1,061,170	4%	786,399	3%	(274,771)
188,881	1%	165,120	1%	(23,761)	Administrative Facility Expense	356,093	1%	328,140	1%	(27,953)
2,855,921	22%	2,866,303	22%	10,382	Marketing Expense	5,233,985	20%	5,471,051	21%	237,067
460,621	4%	364,943	3%	(95,678)	Professional Fees	861,820	3%	754,887	3%	(106,933)
735,899	6%	600,183	5%	(135,716)	Other Expenses	1,465,514	5%	1,201,734	5%	(263,781)
6,575,238	51%	6,434,022	50%	(141,216)	**Total Administrative Expenses**	12,981,100	48%	12,838,906	50%	(142,194)
1,822,324	**14%**	**1,106,998**	**9%**	**715,325**	**EBITDA**	**4,466,856**	**17%**	**1,529,773**	**6%**	**2,937,083**
71,592	1%	53,634	0%	(17,959)	Interest Expense / (Income)	158,432	1%	106,892	0%	(51,540)
385,985	3%	312,682	2%	(73,303)	Depreciation & Amortization	771,046	3%	622,538	2%	(148,508)
(0)	0%	-	0%	0	Intercompany Allocation	(0)	0%	-	0%	0
$ 1,364,747	**11%**	**$ 740,683**	**6%**	**$ 624,064**	**Net Income / (Loss)**	**$ 3,537,379**	**13%**	**$ 800,343**	**3%**	**$ 2,737,035**
					Key Performance Indicators					
538		612		(74)	Full Time Equivalent Employees	538		612		(74)
$ 24,163		$ 21,211		$ 2,952	Revenue per FTEE	$ 49,836		$ 41,763		$ 8,073
$ 2,538		$ 1,210		$ 1,328	Profit per FTEE	$ 6,579		$ 1,308		$ 5,271
94.8%		93.5%		1.3%	Patient Satisfaction	94.8%		93.5%		1.3%
					Per Surgery Metrics					
$ 4,436		$ 4,352		$ (84)	Medical Staffing	$ 4,453		$ 4,643		$ 190
$ 1,172		$ 1,540		$ 368	Medical Supplies	$ 1,091		$ 1,587		$ 496
$ 903		$ 897		$ (5)	Patient Fees	$ 863		$ 898		$ 35
$ 8,031		$ 8,432		$ 402	**Total Medical Expenses**	$ 7,934		$ 8,841		$ 907
$ 1,537		$ 1,739		$ 202	Sales Staffing	$ 1,650		$ 1,837		$ 187
$ 1,714		$ 1,456		$ (258)	Administrative Staffing	$ 1,748		$ 1,559		$ (189)
$ 4,993		$ 4,444		$ (549)	Marketing Expense	$ 4,443		$ 4,324		$ (120)
$ 11,495		$ 9,975		$ (1,520)	Total Administrative Expenses	$ 11,020		$ 10,146		$ (873)
$ 19,526		$ 18,407		$ (1,118)	**Total Expenses**	$ 18,954		$ 18,987		$ 34



Laser Spine Institute, LLC and Subsidiaries
(A Limited Liability Company)
Consolidated Statements of Cash Flows

	One Month Ended February 2013	Two Months Ended February 2013
Cash Flows From Operating Activities		
Net income	$ 1,364,747	$ 3,537,379
Adjustment to reconcile net income to net cash from operating activities:		
Depreciation and amortization	385,985	771,046
Changes in assets and liabilities:		
(Increase) decrease in:		
Inventory	-	-
Accounts receivable	1,521,471	4,316,597
Prepaid expenses and other current assets	(716,063)	(691,447)
Increase (decrease) in:		
Accounts payable	208,501	(445,533)
Patient reimbursements	(81,037)	(160,030)
Accrued expenses, including deferred lease expense	659,978	1,937,041
Net cash from operating activities	**3,343,581**	**9,265,052**
Cash Flows From Investing Activities		
Purchase of property and equipment	(331,474)	(553,480)
Net cash from investing activities	**(331,474)**	**(553,480)**
Cash Flows From Financing Activities		
Principal payments on long-term debt	-	(2,062,106)
Distributions to members	(2,059,693)	(4,135,956)
Net cash from financing activities	**(2,059,693)**	**(6,198,062)**
Net increase in cash	952,415	2,513,511
Cash:		
Beginning	6,372,164	4,811,068
Ending	$ 7,324,578	$ 7,324,578
Supplemental Disclosures of Cash Flow Information		
Cash payments for interest	$ 59,023	$ 133,459

Leon Shaffer Golnick Adver. v. Cedar

District Court of Appeal of Florida, Fourth District

December 29, 1982.

No. 82-192.

Reporter
423 So. 2d 1015 *; 1982 Fla. App. LEXIS 22203 **

LEON SHAFFER GOLNICK ADVERTISING, INC., d/b/a The Golnick Company, Appellant, v. Jerry CEDAR, Appellee.

Counsel: [**1] Charles H. Brodzki of F. Ronald Mastriana, P.A., Fort Lauderdale, for appellant.

John A. Friedman of Casoria, Goff & Friedman, P.A., Fort Lauderdale, for appellee.

Judges: Before GLICKSTEIN, Judge. DOWNEY and BERANEK, JJ., concur.

Opinion by: GLICKSTEIN

Opinion

[*1016] GLICKSTEIN, Judge.

This is an appeal from a final judgment, which we reverse and remand. In doing so, we wish to comment upon the misunderstanding and misuse of the Florida Rules of Civil Procedure; the necessity for consideration of amendments thereto because of what we believe to be other than isolated misuse; and a practice we would like to see terminated.

Appellee, who formerly was employed by appellant, brought this action against it to collect commissions, and to be reimbursed for expenses and compensated for vacation time. The employer's attorney filed only a "Notice of Appearance" within twenty days of service of process on his client. Appellee moved for default, and hearing was set on the motion. A week prior to the hearing, appellant's attorney filed an answer, affirmative defenses and a motion to dismiss. Appellant's attorney did not appear at the hearing on the motion; and the trial court noted [**2] this non-appearance in the default judgment which it entered and refused to vacate. At the hearing on the motion to vacate, both attorneys made unsworn

representations about the non-appearance of appellant's attorney at the hearing on appellee's motion for default. Final judgment was entered, and rehearing denied.

First, the misunderstanding was that of the trial court as to the effect of Florida Rule of Civil Procedure 1.500(b) and (c). [1] When appellant filed its answer, affirmative defenses and motion to dismiss . . . days prior to the hearing on the motion for default . . . it deprived the trial court of the authority to consider whether a default should be entered or to enter one. [2] The hearing on the motion was superfluous; and the attorney's non-appearance was legally justified, albeit rude if he was noticed and failed to contact the court.

[**3] Second, the misuse was that of appellant's attorney by filing a notice of appearance admittedly because he knew the clerk could not enter a default with the notice in the court file, and doing so for the purpose of getting additional time in which to plead. We believe this practice is used often by others, and we condemn it. [3]

Third, the amendment we urge is with respect to Florida Rule of Civil Procedure 1,500(a), [4] (b) and (c) wherein the word "paper" is being used by attorneys as their justification for filing notices of appearance . . . nothing more . . . to gain time for the filing of pleadings. We urge the elimination of such word and its substitution with the words "motion or responsive pleading."

Fourth, the practice we wish to see terminated is that of attorneys [**4] making unsworn [*1017] statements of fact at hearings which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.

DOWNEY and BERANEK, JJ., concur.

End of Document

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[1] Subsections (b) and (c) of Florida Rule of Civil Procedure 1,500, which deals with defaults and final judgments thereon, provide:

> (b) By the Court. When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; provided that if such party has filed or served any paper in the action, he shall be served with notice of the application for default.
>
> (c) Right to Plead. A party may plead or otherwise defend at any time before default is entered. If a party in default attempts to file any paper after a default is entered except under subdivision (d), the clerk shall return the paper to the party and notify him of the entry of the default. The clerk shall make an entry on the progress docket of the action taken.

[2] *See Travelers Ins. Co. v. Bryson,* 341 So.2d 1013 (Fla. 4th DCA 1977); and *Board of Regents v. Hardin,* 393 So.2d 1134 (Fla. 1st DCA 1981).

[3] *See Miami Steel Traders, Inc. v. Ryder Truck Lines, Inc.,* 401 So.2d 1146 (Fla. 3d DCA 1981).

[4] Florida Rule of Civil Procedure 1.500(a) provides for defaults:

> By the Clerk. When a party against whom affirmative relief is sought has failed to file or serve any paper in the action, the party seeking relief may have the clerk enter a default against the party failing to serve or file such paper.

USP Real Estate Inv. Trust v. Discount Auto Parts, Inc.

Court of Appeal of Florida, First District

November 16, 1990, Filed

Case No. 88-1081

Reporter
570 So. 2d 386 *; 1990 Fla. App. LEXIS 8780 **; 15 Fla. L. Weekly D 2859

USP REAL ESTATE INVESTMENT TRUST, a business trust, Appellant, v. DISCOUNT AUTO PARTS, INC., a Florida corporation, Appellee

Subsequent History: [**1] As Amended.

Prior History: An appeal from the Circuit Court for Clay County, William A. Wilkes, Judge.

Disposition: REVERSED AND REMANDED.

Counsel: Frederick R. Brock and Babette LaMaster Fletcher of Gartner, Phillips, Brock & Simon, Jacksonville, for Appellant.

Judith S. Beaubouef and William S. Graessle of Mahoney, Adams, Milam, Surface & Grimsley, P.A., Jacksonville, for Appellee.

Judges: Jehmer, J. Shivers, C.J., concurs; Barfield, J. dissents with opinion.

Opinion by: ZEHMER

Opinion

[*386] This is an appeal from a final judgment, entered pursuant to a bench trial, denying relief on the complaint of appellant, USP Real Estate Investment Trust (USP), that [*387] sought to hold appellee, Discount Auto Parts, Inc., (Discount), legally liable to pay a judgment against Discount's wholly-owned subsidiary, Discount Auto Parts #90 North Florida, Inc., (#90 North). We reverse, holding that the trial court erred in failing to pierce the corporate veil under the circumstances shown in this record, and remand for entry of judgment for USP.

I.

The evidentiary facts presented at trial are not materially in dispute. This case arose out of a 1981 agreement (the lease) between USP, as landlord, and Sunbelt Car Care Mart, Inc., (Sunbelt), as tenant, leasing retail store [**2] space in a shopping mall in Orange Park, Florida, for a term of five years commencing April 15, 1981. The nine-page agreement contained extensive terms, including the following provisions governing the use of the premises (article IV) and assignment or subletting of the lease (article XII):

IV. Tenant shall use and occupy the Premises for the purpose of operating an *auto parts retail store* and shall not use or occupy the Premises or permit the same to be used for any other purpose. Tenant agrees to maintain business hours in keeping with guidelines established by the Merchant's Association . . . . During the term hereof, Tenant shall be in continuous use and occupancy of the Premises and shall not vacate the same.

. . . .

XII. Tenant shall not, either voluntarily or by operation of law, sell, assign, hypothecate or transfer this lease, or sublet the Premises or any part thereof, or permit the Premises or any part thereof to be used for any purpose other than as set forth in Article IV hereof, without the prior written consent of Landlord in each instance, such consent will not be unreasonably withheld, but Landlord may attach such conditions to such consent as it deems appropriate. [**3] Any rentals collected by Tenant by virtue of an assignment or subletting consented to by Landlord, over and above the rentals due from Tenant under the provisions of this lease shall be, at the option of Landlord, payable to Landlord as additional rent hereunder. Any sale, assignment, mortgage, transfer or subletting of this lease or the Premises or any part hereof or thereof which is not in compliance with the provisions of this Article XII shall be void and shall, at the option of Landlord, terminate this lease. The consent by Landlord to an assignment or subletting shall not be construed as relieving Tenant from obtaining the express written consent of Landlord to any further assignment or subletting or as releasing Tenant from any Liability or obligation hereunder whether or not then accrued.

In January 1984, Sunbelt's lease with USP was assigned to #90 North as part of a transaction in which Discount acquired Sunbelt's auto parts business being operated on the leased premises. In September 1983, Discount and Sunbelt executed an agreement for the acquisition of Sunbelt's retail auto parts business entitled Contract for Sale and Purchase of Business (Contract), naming Discount [**4] as buyer and Sunbelt as seller. The terms of the Contract provided for the purchase of Sunbelt's entire business located at Orange Park and three other locations, including Sunbelt's business name, the inventory located

on the leased premises in Orange Park and other places, "fixtures, equipment, signs, shelving, leasehold improvements owned by [Sunbelt] at depreciated book value (3-31-83) & other leasehold & equipment assets." It provided that the transaction "shall be closed and the Bill of Sale and Possession shall be delivered on or before the 4 day of January, 1984; unless extended by other provisions of this contract," and set the closing in Sunbelt's offices on Baycenter Road in Jacksonville. The Contract required the seller to "convey ownership to the Buyer by Bill of Sale; the property being conveyed is according to the schedule hereto attached and made a part hereof." While the copy of the Contract in the record has no schedule attached, attached to the bill of sale ultimately executed by Sunbelt on January 4, 1984, conveying certain property to Discount, was a schedule describing the following: "All tangible assets [*388] including but not limited to: inventory; leasehold improvements; [**5] furniture, fixtures and equipment; *leases;* name 'Sunbelt Car Care Mart'; signs; but specifically excluding: cash; accounts receivable; consigned goods; [1] claims of Sunbelt" (emphasis added). There is no evidence that this schedule is any different from the schedule referred to in the Contract. The Contract also required the seller "to authorize buyer to interface with seller in all areas of operation after 10-4-83." As to the lease with USP, the Contract specifically provided: "THIS AGREEMENT in the contemplated sale is contingent upon the buyer approving the leases that seller has at [Orange Park and other locations] prior to closing, which is satisfactory to the buyer and/or executing an assignment of the seller's lease and/or the parties agreeing to execute a sublease." Matthew J. Ott signed the Contract as president of Sunbelt. Denis Fontaine, who was president of Discount and its subsidiary #90 North, signed the Contract as president of Discount.

[**6] The closing of the transaction occurred on January 4, 1984, as specified in the Contract. [2] At that time, the absolute bill of sale described above was executed by Ott for Sunbelt and by Denis Fontaine as president of Discount. The bill of sale was held by Sunbelt's attorney and later sent to Discount by letter dated January 13, 1984. Ott also executed the consignment agreement at the closing, transferring certain consignment goods to #90 North rather than to Discount, and this consignment agreement was executed by Denis Fontaine as president of #90 North.

Following the closing, a representative of Sunbelt, not otherwise identified in the record, obtained an assignment of the USP lease as required by the Contract. No representative of Discount or #90 North contacted USP [**7] regarding its consent to the assignment, and it does not appear that USP contacted anyone at Discount or #90 North about the assignment. The single page form of assignment contained three separate provisions: the top one effecting an assignment of the lease by Sunbelt to #90 North, executed by Ott on January 16, 1984; the middle one effecting an acceptance of the assignment by #90 North, executed by Denis Fontaine as president of #90 North on January 25; and the bottom provision effecting a consent to the assignment, executed on January 6, 1984, by Mr. Ronald R. Pitts on behalf of USP. [3] The executed assignment was transmitted to "USP Trust" in Cedar Rapids, Iowa, by letter dated January 31, 1984, bearing the business letterhead of "Discount Auto Parts," indicating corporate offices in Lakeland, Florida. The text of the letter read: "Please find enclosed a fully executed copy the the [sic] Assignment of Business Lease between USP Real Estate Investment Trust, Sun Belt [sic] Car Care Mart,

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[1] A subsidiary of Sunbelt, The Parts House, transferred certain consigned goods in its possession to Discount pursuant to the Contract of Purchase and a consignment agreement executed by Sunbelt and Discount on January 4, 1984.

[2] This date was established without dispute by Herman Paul, attorney for Sunbelt at the closing. We reject as not supported by the record Discount's construction of Paul's testimony as being that he was unable to recall when the closing occurred.

[3] Neither Mr. Ott nor Mr. Pitts testified at trial.

Inc., and Discount Auto Parts, Inc." It was signed by Denis Fontaine as president of Discount. Following the sale of its business to Discount, Sunbelt was dissolved as a Florida corporation.

[**8] After the assignment of the lease and completion of the transaction, Discount operated a retail auto parts business on the leased premises and made all the monthly rental payments due thereunder directly to USP through March 1985. By letter dated April 9, 1985, Clifford J. Wiley, real estate manager for Discount, notified USP's managing agent, Paul Steighner of Cury Properties, that Discount had closed its store in Orange Park, "is anxious to get the premises relet or sublet," and "would appreciate your company's assistance in finding a new tenant for this property." The letter stated that Wiley would "have the keys brought by to your office." The leased [*389] premises were immediately abandoned, and this litigation followed.

USP initially brought suit against Ott as a former director of Sunbelt, a dissolved corporation, and against #90 North. It obtained a judgment against both for damages for breach of the lease agreement. USP then undertook discovery in aid of execution of the judgment and, according to USP, it learned for the first time that Discount and #90 North were not the same, but were separate corporate entities. As a result, USP obtained a court order impleading Discount as [**9] a third party defendant. Its third party complaint alleged that Discount and #90 North should not be treated as separate corporate entities because Discount had persistently disregarded the separate corporate status of #90 North and, therefore, Discount should be held liable for USP's judgment against #90 North.

Testimony at trial established the following additional facts without dispute. Sunbelt's attorney understood that the lease was assigned to #90 North because that entity was going to be operating that location where the consigned merchandise was located; as a result, Sunbelt got #90 North as well as all other "Discounts" to execute UCC-1's. Delivery of the bill of sale executed on January 4, 1984, was withheld by him until a consent to assign each of the leases involved in the transaction had been obtained from the respective landlords.

Paul Steighner, who appeared at trial as USP's representative, managed the leasehold properties at USP's Orange Park shopping center but was not involved in any negotiations regarding the assignment and had no discussions about it with anyone from Discount or #90 North. He received the notice from Discount that it was leaving the premises [**10] and, after some delay, obtained the keys from Mr. Wiley. When the rent first became overdue, he contacted Mr. Wiley of Discount in an attempt to collect it. He never inquired why Discount was operating the store rather than #90 North because he was unaware that #90 North even existed. He was unaware of the distinction between Discount and #90 North, and explained that "to my knowledge, there was no one that knew that there was the distinction between 90 and Discount Auto Parts." He viewed them as one entity until much later, after Discount left. So far as he knew, however, no one from USP ever inquired of Discount or #90 North about their financial condition, and no representations concerning that subject were ever made to him by representatives of either corporation.

The evidence also established that #90 North was created in 1983 by Discount for the ostensible purpose of holding the lease to a premises to be used by Discount as a retail store. It was to be capitalized with 100 shares of stock having a par value of $ 1.00 each, all owned by Discount. Its officers were the same as Discount's. Danny Crow, the chief financial officer for Discount, described the operation of #90 North [**11] and its relationship to Discount. He testified that #90 North was "in the rental business" and had received a lease by assignment from Sunbelt, which it then leased or subleased to Discount to operate its retail auto parts store on the premises. He explained that #90 North never had a bank account; it reported

no income for the two years that it filed federal and state corporation income tax returns; it never had any inventory; it never had any receipts or expenditures, and its general ledger reflected no entries for rental payments; there were no invoices or bills from #90 North to Discount in connection with the alleged rental arrangement, and #90 North had no written lease or sublease agreement with Discount; it never paid any sales tax on the alleged rentals it was supposed to have received from Discount, although such would have been due had it received rental income; the $ 100 subscription for the capital stock was never paid, but was shown on #90 North's ledger as a receivable; and this 1983 entry is the only entry in #90 North's accounting ledger.

Denis Fontaine's testimony on behalf of Discount affirmed that the Contract for Sale and Purchase was made by Discount and was [**12] never assigned to any subsidiary corporation, that the bill of sale was never [*390] amended by any written document, and that #90 North was formed in 1983 for the sole purpose of holding a shopping center lease for a retail store to be operated by Discount. He served as president of both Discount and #90 North, and his brother, Peter, was secretary-treasurer of both corporations. Discount owned all the stock of #90 North. Discount was the operating arm of the auto parts business, and #90 North held the lease assigned by Sunbelt in the purchase and sale transaction. However, #90 North never had any employees, and the $ 100 was never paid for the stock capitalization. Discount provided the financing for everything at #90 North. There was never a sublease agreement between #90 North and Discount, and Discount paid the monthly rental payments directly to USP during the entire time that rental payments were made. The purpose of placing the lease in #90 North was to insulate Discount from liability to the landlord. As a result, Fontaine explained, when Discount decided to close the store, there was no responsible party to pay rents for the balance of the lease except the prior tenant, Sunbelt. [**13] Fontaine agreed that Clifford Wiley notified USP about cancelling the lease in his capacity as real estate manager for Discount. Neither Fontaine nor any other representative of Discount or #90 North had any contact or discussions with USP regarding the assignment of the lease.

The trial court declined to pierce the corporate veil and hold Discount liable for USP's judgment against #90 North. Among the specific findings of fact recited in the final judgment are the following: USP proved that #90 North "is a mere instrumentality of Discount Auto Parts, Inc."; but USP failed to prove by the greater weight of the evidence that #90 North "was organized or used to mislead creditors or to perpetuate [sic] a fraud upon creditors"; USP "consented to the assignment of a lease" from Sunbelt to #90 North and "said assignment actually transpired"; USP "neither sought nor received any information concerning the financial condition or status of" #90 North or Discount, and, therefore, "there were no misrepresentations which would have misled the Plaintiff nor was there any fraud involved in the obtaining of the assignment of the lease"; USP "was aware of the assignment of lease to" #90 North; #90 [**14] North "was established to limit liability and serve a business convenience"; and this "is a proper utilization of the laws of the State of Florida and the corporate veil will not be pierced absent a showing of some illegal, fraudulent, or other unjust purpose."

II.

We conclude that the trial court's judgment is in error because the court has misinterpreted the undisputed evidence and its legal effect.

The parties are in agreement that the applicable legal principles are set forth in *Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So. 2d 1114 (Fla. 1984). In that case, the supreme court made it clear that to pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere

instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them. Since the trial court found that #90 North was a mere instrumentality of Discount and Discount agrees with that finding on this appeal, the critical issue before us is whether the record will support the trial court's conclusion that Discount did not use #90 North to mislead creditors or perpetrate [**15] a fraud on them.

In addressing this issue, it is important to understand the theory underlying piercing the corporate veil and the type of conduct described in the supreme court's *Dania* decision as sufficient to constitute misleading or improper conduct that will warrant holding the subsidiary to be the alter ego of the parent. The court, in discussing its decision in *Mayer v. Eastwood-Smith & Co.,* 122 Fla. 34, 164 So. 684 (1935), noted reliance on *Biscayne Realty & Insurance Co. v. Ostend Realty Co.,* 109 Fla. 8, 148 So. 560, 564 (1933), and quoted as follows from its opinion in *Mayer*:

[*391] "So long as proper use is made of the fiction that corporation is entity apart from stockholders, fiction will not be ignored . . . . Where stockholders enter into a transaction in individual interests and utilize corporate name merely to mislead creditors or perpetrate fraud, legal entity will be ignored and stockholders held individually liable . . . . The rule that corporate entity will be disregarded where name of corporation is used by stockholders in transactions to mislead creditors or perpetrate fraud on them is but a logical [**16] sequence of the principle that a corporation cannot be formed for the purpose of accomplishing fraud or other illegal act, under the guise of fiction that the corporation is legal entity separate and distinct from its members, since when fraud or illegal act is attempted, fiction will be disregarded by the court and the acts of the real parties dealt with as though no corporation had been formed."

Mayer, 122 Fla. at 42-43, 164 So. at 687. We then went on:

"The overwhelming weight of authority is to the effect that courts will look through the screen of corporate entity to the individuals who compose it in cases in which the corporation was a mere device or sham to accomplish some ulterior purpose, *or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock,* or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose."

Dania, 450 So. 2d at 1117. The court then discussed its decision in *Barnes v. Liebig,* 146 Fla. 219, 1 So. 2d 247 (1941), making the following pertinent observations:

Looking more closely at the [**17] Alabama case *[Jefferson County Burial Soc'y v. Cotton,* 222 Ala. 578, 133 So. 256 (1930)] on which the *Barnes* court relied, we see that the two corporations were a sham, that the negligent employees worked for both corporations, and that the ambulances, hearses, and other properties of the two corporations were used interchangeably without regard to corporate identity. *In other words, the stockholders and the corporations improperly disregarded the corporate identities.*

Dania, 450 So. 2d at 1118 (emphasis added). The court then quoted from its decision in *Riley v. Fatt,* 47 So. 2d 769, 773 (Fla. 1950):

The rule is that the corporate veil will not be pierced, either at law or in equity, unless it be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them . . . . In the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the corporation as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate, Fatt cannot be heard to question the corporate [**18] existence but must confine his efforts to the remedies provided by law for satisfying his judgment from the assets of the corporation, if any can be found.

Dania, 450 So. 2d at 1119-20. The court then discussed its decision in *Advertects, Inc. v. Sawyer Industries, Inc.,* 84 So. 2d 21 (Fla. 1955):

In [Advertects, Inc.] we rejected the proposition that a rule could be issued against individual stockholders to show cause why they should not be personally responsible for corporate debts absent a preliminary showing

that the corporation is in actuality the alter ego of the stockholders and that it was organized or after organization was employed by the stockholders for fraudulent or misleading purposes, or in some fashion that the corporate property was converted or the corporate assets depleted for the personal benefit of the individual stockholders, or that the corporate structure was not bona fidely established or, in general, that property belonging to the corporation can be traced into the hands of the stockholders.

It isn't sufficient merely to show that the corporation exists and that there are a limited number of stockholders doing [**19] business in good faith through the corporate entity. From a procedural standpoint we hold that a [*392] showing similar to that suggested in summary above be made before the rule nisi is issued and directed against the individual stockholders. If this requirement were not made then every judgment against a corporation could be exploited as a vehicle for harassing the stockholders and entering upon a fishing expedition into their personal business and assets.

Id. at 24. In so holding we stated the controlling law on piercing the corporate veil and delineated why it was so.

The corporate veil will not be penetrated either at law or in equity unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud upon them.

Every corporation is organized as a business organization to create a legal entity that can do business in its own right and on its own credit as distinguished from the credit and assets of its individual stockholders. The mere fact that one or two individuals own or control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud or that it is necessarily [**20] the alter ego of its stockholders to the extent that the debts of the corporation should be imposed upon them personally. If this were the rule, it would completely destroy the corporate entity as a method of doing business and it would ignore the historical justification for the corporate enterprise system.

Id. at 23-24.

Dania, 450 So. 2d at 1120.

Testing the undisputed circumstances shown in the case before us against the supreme court's analysis in the *Dania* decision, it is readily apparent that Discount, as the parent corporation, organized and used #90 North as a mere instrumentality to mislead USP in respect to the assigned lease on the shopping center property and thereby avoid any liability for rent should it elect to abandon the leasehold. #90 North was never operated as a bona fide corporation; its capital stock was never paid; it never had any assets other than the assigned lease; it never opened a bank account or had any funds of its own, but was at all times dependent on the credit of its parent, Discount; it never had any employees, but shared the same officers with Discount; it had no income and never recorded any financial [**21] transactions after the initial entry in the ledger posting the capital stock as a receivable; it never billed Discount for subleasing the property from #90 North although Discount always paid the rental directly to USP; and it simply had no business purpose other than to act as an insulating entity between Discount, as the real operating arm of the business, and the landlord, USP. Discount was the party that used the leased premises and at all times dealt with the leased premises as its own. It was Discount, not #90 North, that abandoned the leasehold and gave notice thereof. Both Discount and #90 North were operated interchangeably, as Discount took title and possession to the assets transferred by the bill of sale, while #90 North ostensibly took possession to the consigned goods, although #90 North had no financial or inventory record of its own to reflect that it actually did so.

While it may be argued that these recited facts, admittedly undisputed, establish only that #90 North was a mere instrumentality of Discount, these facts must also be viewed in light of the operative provisions of the assigned lease that both Discount and #90 North violated in accomplishing the stated [**22] purpose of insulating Discount's liability while keeping USP completely uninformed. The lease, assigned by Sunbelt with USP's consent and ostensibly accepted by #90 North, required that the *tenant,* that is, #90 North, actually occupy the premises and operate the retail auto parts business therein. The obvious purpose of this provision was to require that the tenant be an operating company, not a mere passive entity created solely to hold the lease. Neither Discount nor #90 North ever informed USP that the operating entity in possession of the leased premises was a different entity from #90 North. Moreover, even if the transaction were to be treated as a sublease by #90 North to Discount, as suggested by Discount's chief [*393] financial officer, there was no evidence of any such sublease, and, more importantly, no attempt was made by either #90 North or Discount to obtain USP's consent to such sublease, although this was clearly required by the explicit terms in article XII of the lease. Such intentional violation of the clear provisions of the lease, viewed in context with the facts recited above, can legally support no inference other than that Discount was using #90 North, in total [**23] disregard of the separate corporate entity, for the sole purpose of misleading USP as to the true nature and relationship of the two corporations. We hold that the undisputed facts shown in this record require, as a matter of law, that the corporate veil be pierced and #90 North be treated as the alter ego of its parent, Discount.

Discount argues that the appealed order should be affirmed because the record lacks evidence of fraud or misleading conduct in that USP never made any inquiry as to the financial condition of either corporation, neither Discount nor #90 North ever made any misrepresentations of material fact concerning the corporate entities or their financial condition, and USP at all times knew that #90 North held the lease and was distinct from Discount. The final judgment reflects that the trial court relied heavily on this argument. We find it unavailing for the following reasons. USP was entitled to rely on the terms of its lease and assume that the tenant would comply with its provisions without making further inquiry. Thus, USP was entitled to assume that the corporate entity holding its lease would be the operating arm of the retail business owning and holding the [**24] assets used in that business. It was not incumbent upon USP to

prove that Discount or #90 North made any fraudulent representations to it in connection with its financial condition. Discount's use of the lease in violation of its terms and without USP's knowledge and consent is sufficiently improper and misleading under all the circumstances shown in this case to warrant piercing the corporate veil. The record contains no evidence establishing that USP had knowledge of the ostensible relationship and business dealings between Discount and #90 North; the testimony of USP's representative established the contrary, that it was believed Discount and #90 North were one and the same. The record simply fails to contain competent, substantial evidence to support the trial court's findings and conclusions in this regard.

This is not to say that a subsidiary corporation could not be validly organized and used to hold a leases to premises operated by Discount, as was the purpose stated by its president, Denis Fontaine. Had #90 North been properly capitalized in accordance with the law and operated as a corporate entity separate and apart from Discount, and had Discount and #90 North complied [**25] with the provisions in the assigned lease and made full disclosure thereof to USP, the result in this case might well have been that found by the trial court. However, on this record, we find it necessary to reverse the judgment and remand for entry of judgment for USP in accordance with this opinion.

III.

In view of the above disposition, we find it unnecessary to discuss any of the remaining arguments made by the parties.

REVERSED AND REMANDED.

Dissent by: BARFIELD

Dissent

BARFIELD, J., dissenting.

I must disagree with the majority in its conclusion that the trial court misinterpreted the undisputed evidence and its legal effect. Quite to the contrary, the majority has read into the facts an inference that could only have been drawn by the trial judge and was not drawn, i.e., "that Discount, as the parent corporation, organized and used #90 North as a mere instrumentality to *mislead* in respect to the assigned lease on the shopping center property". (emphasis added). The majority recited quite correctly that USP executed the assignment of lease, consenting thereto, [*394] without questioning anybody concerning the identity of the participants in this transaction. USP may have been outsmarted, but it wasn't [**26] defrauded or misled except by its own ineptness and inattention. A simple inquiry by USP as to the identity and status of the parties and their financial responsibility would have allowed it to make an informed judgment on its consent to the lease assignment. Such inquiry would be a normal prudent business practice. The result could have been the acceptance of the shell corporation, the requirement of a guarantee by the parent corporation, or refusal to consent to the assignment. This court has no business protecting USP or anyone else from its exercise of poor judgment. Neither should we reinterpret facts clearly understood, considered, and interpreted reasonably by the trial court.

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USP Real Estate Inv. Trust v. Discount Auto Parts, Inc., 570 So. 2d 386

SCHUTZ, DONALD

Mere instrumentality
April 30, 2016 05:29:34 pm

Baillie Lumber Co. v. Thompson

Supreme Court of Georgia

April 26, 2005, Decided

S05Q0587.

Reporter
279 Ga. 288 *; 612 S.E.2d 296 **; 2005 Ga. LEXIS 300 ***; 2005 Fulton County D. Rep. 1378

BAILLIE LUMBER COMPANY v. THOMPSON et al.

Subsequent History: Subsequent appeal at Baillie Lumber Co., LP v. Thompson, 413 F.3d 1293, 2005 U.S. App. LEXIS 12126 (11th Cir. Ga., June 23, 2005)

Prior History: [***1] Certified question from the United States Court of Appeals for the Eleventh Circuit.

Baillie Lumber Co. v. Thompson, 391 F.3d 1315, 2004 U.S. App. LEXIS 24841 (11th Cir. Ga., 2004)

Disposition: Questions answered.

Counsel: *Sell & Melton, Ed S. Sell III, Tilman E. Self III*, for appellant.

Jones, Cork & Miller, Hubert C. Lovein, Jr., Alston & Bird, Grant T. Stein, Sean C. Kulka, Troy J. Aramburu, for appellees.

Stone & Baxter, Ward Stone, Jr., George H. McCallum, Jr., amici curiae.

Judges: Thompson, Justice. All the Justices concur.

Opinion by: THOMPSON

Opinion

[*288] [**298] THOMPSON, Justice.

This case is before the Court on certified questions from the United States Court of Appeals for the Eleventh Circuit, as follows: (1) Will Georgia law allow the representative of a debtor corporation to bring an alter ego claim against the corporation's former principal? (2) If so, what is the measure of recovery? (1) For the reasons which follow, we conclude that Georgia law does allow such a suit and that the measure of recovery against the corporation's former principal, upon a finding of liability, is the total of all debts of the corporation.

Bert F. Thompson ("Thompson") was the manager and sole shareholder of Piedmont Hardwood Flooring, LLC ("Piedmont"), a national manufacturer and distributor of hardwood flooring. Baillie Lumber ("Baillie") is an unsecured trade creditor of Piedmont that had sold lumber to the company but has not been paid.

After allegations surfaced that Thompson misappropriated Piedmont's assets to his own use, Thompson relinquished control of the company [***2] and divested himself from its management. [1] Shortly thereafter, Piedmont filed for bankruptcy protection under Chapter 11. Under the provisions of the Bankruptcy Code, Piedmont was allowed to operate its business as a debtor in possession, [2] and Icarus Holding LLC ("Icarus") was created to wind up the proceedings and to be a suable entity.

Following the bankruptcy filing, Icarus filed a complaint against Thompson in bankruptcy court asserting that Thompson's use of the company's assets constituted fraudulent transfers, and it sought to recover the misappropriated money. Soon after, Baillie filed suit against Thompson in Bibb County State Court alleging that Thompson [***3] is the alter ego of Icarus and thus personally liable for the debts owed to Baillie. Thompson sought injunctive relief in bankruptcy court to restrain Baillie from continuing the Bibb County action on the basis that the alter ego claim against him is the property of the [*289] bankruptcy estate; that, therefore, only Icarus has standing to bring such a claim; and that Baillie has violated the automatic stay by prosecuting the state court action. [3] In support of these contentions, Thompson argued that Baillie is attempting to circumvent the bankruptcy laws by depriving other unsecured creditors of their pro rata share of any recovery from Thompson. The bankruptcy court agreed with Thompson and ruled that any alter ego claims by an unsecured creditor against the principal of a corporation were property of the bankruptcy estate, and therefore, subject to the automatic stay. [4] The district court adopted

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[1] Thompson allegedly engaged in financial irregularities that harmed the company's liquidity, such as the use of company assets and resources to make improvements to his personal hunting lodge, and to fund a separate company.

[2] A debtor in possession has essentially the same rights and duties as a trustee. 11 USC § 1107.

[3] See 11 USC § 362 (a) (3) (petition operates as a stay of any act to obtain possession of property of the bankruptcy estate or to exercise control of property of the estate).

[4] Because the bankruptcy court determined that Baillie's state court suit was subject to the automatic stay, it found it unnecessary to issue a separate injunction.

the decision and analysis of the bankruptcy court, concluding that under Georgia law, an alter ego claim may be asserted by a corporation, and when a corporation files for bankruptcy, any alter ego claims become property of the estate. Baillie appealed to the United States Court of Appeals for [***4] the Eleventh Circuit.

In certifying its questions to this Court, the Eleventh Circuit noted that Icarus must have standing to bring its own alter ego action in order to stay Baillie's state court proceeding. The Eleventh Circuit further determined that "in order to bring an exclusive alter ego action under section 541 [of the Bankruptcy Code], a bankruptcy trustee's claim should (1) be a general claim that is common to all creditors and (2) be allowed by state law." The Eleventh Circuit acknowledged that the first factor was satisfied here. However, the Court questioned the conclusion reached by the district court that [***5] Georgia [**299] courts would allow a corporation to bring an alter ego action against itself, and it certified that question of Georgia law to this Court.

1. Under the alter ego doctrine in Georgia, the corporate entity may be disregarded for liability purposes when it is shown that the corporate form has been abused.

> In order to disregard the corporate entity because a corporation is a mere alter ego or business conduit of a person, it should have been used as a subterfuge so that to observe it would work an injustice. To prevail based upon this theory it is necessary to show that the shareholders disregarded the corporate entity and made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the [*290] corporation and the owners no longer exist. [Cit.] The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetuate fraud or to evade contractual or tort responsibility.

(Citation and punctuation omitted.) *Heyde v. Xtraman, Inc.*, 199 Ga. App. 303, 306 (404 SE2d 607) (1991). [***6] See also *Kissun v. Humana, Inc.*, 267 Ga. 419, 419-420 (479 SE2d 751) (1997) (one type of abuse is when the corporate entity serves "as a mere alter ego or business conduit of another"); *Farmers Warehouse of Pelham v. Collins*, 220 Ga. 141, 150 (137 SE2d 619) (1964). "Plaintiff must show that the defendant disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records or control. [Cits.]" (Punctuation omitted.) *Heyde*, supra at 306. See also *Paul v. Destito*, 250 Ga. App. 631, 639 (550 SE2d 739) (2001).

In general, equitable principles govern the alter ego doctrine. *Acree v. McMahan*, 276 Ga. 880, 882 (585 SE2d 873) (2003); *Kissun*, supra; *Hester Enterprises v. Narvais*, 198 Ga. App. 580, 581 (402 SE2d 333) (1991). "As a consequence, [a claim for piercing the corporate veil] is appropriately granted only in the absence of adequate remedies at law." *Acree*, supra at 883 (quoting *Floyd v. Internal Revenue Svc.*, 151 F3d 1295, 1300 (10th Cir. 1998)).

With [***7] these principles in mind, we turn to whether a corporation is entitled to recover from a principal under a veil-piercing theory. In *Pickett v. Paine*, 230 Ga. 786, 791 (199 SE2d 223) (1973), this Court stated a

> reluctan[ce] to disregard the corporate entity except where third parties were involved in dealing with the corporation and director or shareholder liability was in question, *or* where public policy might require looking beyond the corporate structure in the public interest.

(Emphasis supplied.) The Court also acknowledged that the consequences of malfeasance on the part of a majority shareholder "may result in a loss of limited liability and render the participants personally liable for the obligations of the corporation." Id. However, the *Pickett* Court preserved the fiction of the corporate entity in that case because it concluded that a minority shareholder plaintiff had an adequate remedy by means of a shareholder's derivative action. Id. at 792 (1).

[*291] In subsequent decisions, our Court of Appeals has been reluctant to confine the doctrine of veil-piercing to third parties. For example, in *Paul v. Destito*, supra at 639, [***8] the Court of Appeals rejected a broad assertion that "in all cases, Georgia law prohibits a director, officer, or shareholder from piercing the corporate veil." See also *Cheney v. Moore*, 193 Ga. App. 312 (387 SE2d 575) (1989) (upholding trial court's directed verdict in favor of a 50 percent shareholder who sought to pierce the veil of a corporation that she had co-founded). Thus, it is clear that Georgia courts have extended the veil-piercing doctrine beyond traditional suits by a third-party creditor, to cases where application of the doctrine is necessary "to remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or evade contractual or tort responsibility." (Punctuation omitted.) [**300] *Cheney*, supra at 312-313.

Through its automatic stay provisions, federal bankruptcy law seeks "to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse." *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F2d 711, 716 (5th Cir. 1985). If the alter [***9] ego claim is property of the estate, all creditors are prevented by the automatic stay from prosecuting individual alter ego claims, thus affording equal treatment to all. To rule otherwise would allow a creditor to circumvent the bankruptcy process and would "undercut the general bankruptcy policy of ensuring that all similarly-situated creditors are treated fairly." *In the Matter of S. I. Acquisition*, 817 F2d 1142, 1153 (5th Cir. 1987).

Additionally, the usual requirement of third-party benefit for a veil-piercing claim is, in fact, met in the case of an insolvent corporation under federal bankruptcy law. In those circumstances, any alter ego claim asserted by the corporation itself will necessarily benefit third parties by providing more money with which to satisfy unsecured claims. See, e.g., *Corcoran v. Frank B. Hall & Co.*, 149 AD2d 165, 545 N.Y.S.2d 278 (S. Ct. N.Y. 1989) (where corporation is insolvent, any suit by corporation's representative necessarily benefits creditors and not the company's shareholders).

The Court of Appeals for the Third Circuit explained the rationale for allowing a corporation to pierce its own veil:

> It may seem strange to allow a corporation [***10] to pierce its own veil, since it cannot claim to be either a creditor that was deceived or defrauded by the corporate fiction, or an involuntary tort creditor. In some states, however, piercing the corporate veil and alter ego actions are allowed to prevent unjust or inequitable results; they are not based solely on a [*292] policy of protecting creditors. [Cits.] Because piercing the corporate veil or alter ego causes of action are based upon preventing inequity or unfairness, it is not incompatible with the purposes of the doctrines to allow a debtor corporation to pursue a claim based upon such a theory.

Phar-Mor, Inc. v. Coopers & Lybrand, 22 F3d 1228, 1240, n. 20 (3rd Cir. 1994). Also persuasive are the decisions of the federal bankruptcy courts within Georgia which have upheld a corporation's ability to assert an alter ego action. These decisions are predicated on the finding that equitable principles espoused

in Georgia alter ego decisions merit the allowance of such a claim. See, e.g., *In re City Communications*, 105 B.R. 1018, 1022 (Bankr. N.D. Ga. 1989) ("emphasis under Georgia law appears to be equitable concerns rather that [sic] the specific [***11] relationships between the alter-ego and the creditors"); *In re Adam Furniture Indus.*, 191 B.R. 249, 254 (Bankr. S.D. Ga. 1996) (noting that under *City Communications*, supra and *Phar-Mor*, supra, Georgia courts would allow these claims). See also *In the Matter of S. I. Acquisition, supra* (under Texas law, an alter ego action was property of the bankruptcy estate, and any such suits by creditors ran afoul of the automatic stay). Compare *In re Rehabilitation of Centaur Ins. Co.*, 158 Ill.2d 166 (632 NE2d 1015, 198 Ill. Dec. 404) (1994) (holding that a corporation may not assert alter ego claim against its own shareholders but also reasoning that rehabilitator, unlike bankruptcy trustee, was not permitted by Illinois law to assert creditors' claims).

As we noted previously, Georgia alter ego law is not focused solely on the relationships between parties, but also is premised on equitable principles designed to prevent unjust treatment in appropriate circumstances. *Farmers Warehouse*, supra. We are convinced that this reasoning, when viewed in combination with the discussion above, compels that we recognize that in these circumstances, a corporation [***12] has a right to pursue an alter ego action. To fail to do so would result in potentially inequitable treatment of creditors under federal bankruptcy law.

Our conclusion is bolstered by two additional points. First, it is extremely unlikely that a corporation, outside of the bankruptcy context, would conclude that it is necessary to institute an alter ego action. Second, we are guided by the principle, as discussed above, that a claim for piercing the corporate veil is appropriately granted [**301] only in the absence of adequate remedies at law. *Acree*, supra. (2) Thus, while an alter ego claim may be asserted by a corporation in an action against its principals, trial courts must not allow such claims when there are other appropriate remedies available to the corporation.

[*293] 2. Baillie also argues that OCGA § 23-1-22 provides grounds for refusing to allow a corporation to assert an alter ego cause of action. That Code section provides that "[a] diligent creditor shall not needlessly be interfered with in the prosecution of his legal remedies." Baillie's assertion is that by recognizing that a corporation may pursue an alter ego action, its ability to [***13] assert the same cause of action is "interfered with" because it is taken away by the bankruptcy court. We find this argument unpersuasive. Key to this determination is the legislature's use of the word "needlessly." Baillie's remedy is not "needlessly" interfered with in the current situation. To the contrary, as discussed above, Baillie's remedy is only interfered with for the valid reason that in bankruptcy, all unsecured creditors are to be treated equally with regard to like claims. Baillie chose to deal with Piedmont on an unsecured basis. To allow Baillie to circumvent the bankruptcy process to the detriment of other unsecured creditors in like positions would be inequitable.

3. Having answered the Eleventh Circuit's first question in the affirmative, we now address the appropriate measure of recovery. An alter ego claim is an assertion that "there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist." *Farmers Warehouse*, supra at 150 (quoting Fletcher Cyclopedia Corporations, Vol. 1 § 41.1). Thus, it is readily apparent that where the corporate entity is disregarded, a principal found liable [***14] under an alter ego theory should be liable for the entirety of the corporation's debt.

Questions answered. All the Justices concur.

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Gil v. Winn-Dixie Stores, Inc.

United States Court of Appeals for the Eleventh Circuit

April 7, 2021, Decided

No. 17-13467

Reporter
2021 U.S. App. LEXIS 10024 *; __ F.3d __; 2021 WL 1289906

JUAN CARLOS GIL, Plaintiff - Appellee, versus WINN-DIXIE STORES, INC., Defendant - Appellant.

Prior History: [*1] Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:16-cv-23020-RNS.

Disposition: VACATED and REMANDED.

Counsel: For JUAN CARLOS GIL, Plaintiff - Appellee: David Ferleger, Law Office of David Ferleger, JENKINTOWN, PA; Joshua Michael Entin, Entin & Della Fera, PA, FORT LAUDERDALE, FL.

For WINN-DIXIE STORES, INC., Defendant - Appellant: Susan Virginia Warner, FisherBroyles, LLP, MIAMI, FL.

For THE RESTAURANT LAW CENTER, AMERICAN BANKERS ASSOCIATION, AMERICAN HOTEL & LODGING ASSOCIATION, ASIAN AMERICAN HOTEL OWNERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL ASSOCIATION OF THEATRE OWNERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF REALTORS, NATIONAL RETAIL FEDERATION, AMERICAN RESORT DEVELOPMENT ASSOCIATION, Amicus Curiae: Joyce Ackerbaum Cox, Kevin W. Shaughnessy, Baker & Hostetler, LLP, ORLANDO, FL.

For FLORIDA JUSTICE REFORM INSTITUTE, Amicus Curiae: Carol Celeiro Lumpkin, Stephanie N. Moot, K&L Gates, LLP, MIAMI, FL.

For NATIONAL FEDERATION OF THE BLIND, AMERICAN COUNCIL OF THE BLIND, [*2] AMERICAN FOUNDATION FOR THE BLIND, AMERICAN FOUNDATION FOR THE BLIND, ASSOCIATION OF LATE DEAFENED ADULTS, DISABILITY INDEPENDENCE GROUP, INC., DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS FLORIDA, FLORIDA COUNCIL OF THE BLIND, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL FEDERATION OF THE BLIND OF FLORIDA, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, WORLD INSTITUTE ON DISABILITY, Amicus Curiae: Gregory Prescott Care, Brown Goldstein & Levy, LLP, BALTIMORE, MD.

Judges: Before JILL PRYOR and BRANCH, Circuit Judges, and REEVES,[*] District Judge.

Opinion by: BRANCH

Opinion

BRANCH, Circuit Judge:

Appellant Winn-Dixie Stores, Inc. ("Winn-Dixie"), a grocery store chain, operates a website for the convenience of its customers but does not offer any sales directly through the site. Appellee Juan Carlos Gil ("Gil") is a long-time customer with a visual disability who must access websites with screen reader software, which vocalizes the content of the web pages. Unable to access Winn-Dixie's website with his software, Gil filed suit against Winn-Dixie under Title III of the Americans with [*3] Disabilities Act ("ADA").[1] After a bench trial, the district court found that Winn-Dixie's website violated the ADA. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1345 (S.D. Fla. 2017). Winn-Dixie timely appealed. After the benefit of oral argument and careful consideration, we vacate and remand.

I.

Winn-Dixie owns and operates grocery stores in the Southeastern United States. It is undisputed that Winn-Dixie only sells goods in its physical stores and does not offer any sales directly through its limited use website. The website's primary functions at issue in this appeal are the ability to re-fill existing

[*] Honorable Danny C. Reeves, United States District Chief Judge for the Eastern District of Kentucky, sitting by designation.

[1] This opinion addresses the functionality and accessibility of Winn-Dixie's website as of the time that Gil filed the underlying complaint in July 2016. Any changes to the website that may have occurred since then are not within the scope of this appeal.

prescriptions for in-store pickup, and to link digital manufacturer coupons to the customer's Winn-Dixie rewards card so that the coupons are applied automatically upon check out at a physical store.[2]

For over fifteen years, Gil, who is legally blind, frequented Winn-Dixie's physical grocery stores to shop and occasionally to fill his prescriptions. Upon learning of the existence of Winn-Dixie's website, Gil visited the site and discovered that it was incompatible with screen reader software, which he uses to access websites and vocalize the site's content.[3]

On July 1, 2016, Gil brought this action in the form of a single claim under Title III of the [*4] ADA, 42 U.S.C. §§ 12181-12189, alleging in his complaint that he was a Winn-Dixie customer, and that he was "interested in filling/refilling pharmacy prescriptions on-line," but was unable to access the website because it was incompatible with screen reader software. Gil alleged that the website itself was "a place of public accommodation under the ADA," and that the website had "a direct nexus to Winn Dixie grocery stores and on-site pharmacies." Thus, he asserted that Winn-Dixie violated the ADA because the website was inaccessible to visually impaired individuals, and, therefore, Winn-Dixie "ha[d] not provided full and equal enjoyment of the services, facilities, privileges, advantages and accommodations provided by and through its website www.winndixie.com." Gil sought declaratory and injunctive relief, attorney's fees, and costs. In particular, Gil requested an order requiring Winn-Dixie to update its website "to remove barriers in order that individuals with visual disabilities can access the website to the full extent required" by Title III.[4]

Winn-Dixie answered the complaint, admitting that "its physical grocery stores and pharmacies are places of public accommodation," but denying the complaint's [*5] allegations that its website was a place of public accommodation and in violation of the ADA. The parties then engaged in discovery, and on October 24, 2016, Winn-Dixie filed a motion for judgment on the pleadings under Federal Rule of Civil

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[2] Many of the various informational services on Winn-Dixie's website (including those not at issue) are provided by third-party vendors. Winn-Dixie's website also includes a store locator function, which Gil was unable to access with his screen reader software. However, at trial, he testified that he had no problem finding businesses (including Winn-Dixie stores) without using Winn-Dixie's website—he instead used Google. And in his response brief and at oral argument, Gil focused on his inability to access the prescription refill feature and the coupon-linking tool as the primary violations of the ADA. Accordingly, this opinion will focus on those features as opposed to the store locator feature.

[3] Gil uses two of the variety of screen reader software available. After making several attempts to access Winn-Dixie's website using two different screen reader software programs, Gil determined that "90 percent" of the Winn-Dixie website was incompatible with screen reader software. In their joint pre-trial stipulation, the parties agreed that Winn-Dixie's website "was not designed specifically to integrate with screen reader software."

[4] Gil did not indicate in his pleadings which provision of Title III of the ADA Winn-Dixie was violating, and the district court focused on the general discrimination provision, 42 U.S.C. § 12182(a), which provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." However, Title III also provides more specific examples of what constitutes discrimination by a place of public accommodation, including where an operator of a place of public accommodation "fail[s] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id.* § 12182(b)(2)(A)(iii). Based on the briefing of the parties in this appeal and the arguments made at the bench trial, we conclude that the gravamen of Gil's argument was that Winn-Dixie was in violation of Title III of the ADA because it discriminated against him on account of his visual disability when it failed to provide auxiliary aids and services to make its website accessible with screen reader software, which prevented him from fully and equally enjoying the "goods, services, privileges, or advantages" of Winn-Dixie, in violation of 42 U.S.C. §§ 12182(a) and (b)(2)(A)(iii).

Procedure 12(c), arguing that the ADA's "public accommodation" provisions do not apply to its website because the site is not a physical location and lacks a sufficient "nexus" to any physical location.

On March 15, 2017, the district court denied the motion for judgment on the pleadings. *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1316 (S.D. Fla. 2017). The court acknowledged that the circuit courts are split on the issue of whether the ADA limits places of public accommodation to physical locations. *Id.* at 1318. It noted that this Circuit has not specifically determined whether websites are public accommodations under the ADA, but cited *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002) as offering guidance. The court reasoned that *Rendon* extends the ADA's coverage to "intangible barriers" that restrict a disabled person's enjoyment of the "goods, services, and privileges" of a public accommodation. *Gil*, 242 F. Supp. 3d at 1319. It agreed with other district courts within this Circuit that have held that websites are subject to the ADA if a plaintiff shows a sufficient "nexus" between the website and physical premises. *Id.* at 1319-20. Ultimately, [*6] the court concluded that "Winn-Dixie's website is heavily integrated with, and in many ways operates as a gateway to, Winn-Dixie's physical store locations." *Id.* at 1321. The court thus found that Gil had shown a sufficient nexus between the website and Winn-Dixie's physical stores such that Winn-Dixie was not entitled to judgment as a matter of law. Viewing the facts in a light most favorable to Gil, the district court held that the website's inaccessibility denied Gil "equal access to the services, privileges, and advantages of Winn-Dixie's physical stores and pharmacies." *Id.* at 1321. The court also concluded that it "need not determine whether Winn-Dixie's website is a public accommodation in and of itself." *Id.*

At the bench trial, Gil testified that in the fifteen years during which he shopped in Winn-Dixie stores, when he needed to re-fill a prescription, he would ask an associate to guide him to the pharmacy area where he would tell the pharmacist what he needed, and he would wait anywhere from 20 to 30 minutes for the prescription. He explained that he was uncomfortable requesting his prescription refills in person because he did not know who might be standing near him and could overhear his conversation. [*7] Therefore, when he learned Winn-Dixie had a website, he was interested in utilizing its potential online capabilities so that he would not have to request help from Winn-Dixie employees in refilling his prescriptions. Upon determining that he was unable to use much of the website's functionality, however, Gil decided to discontinue shopping at Winn-Dixie's physical stores entirely. He testified at trial that he was "deterred" from going to the physical store, not by any change in the physical access available to him at the physical store, but due to his frustration with the lack of functionality on the website. He last shopped there in the summer of 2016 but testified that he will return to shopping at Winn-Dixie's physical stores when the website is accessible to him.

Gil also mentioned for the first time at trial that he was interested in using the coupon linking option of the website, which permits customers to use the website to link manufacturer's digital coupons to the customer's Winn-Dixie rewards card for automatic application at checkout.[5] He explained that he used coupons before when he shopped in the physical stores, but due to his visual impairment, the only way for him to [*8] get coupons was to ask a friend to read the newspaper coupons to him or ask Winn-Dixie employees for assistance.

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[5] All of Gil's pleadings leading up to trial focused solely on his inability to access the prescription refill tool on the website. At trial, however, Gil for the first time asserted that he also sought to access the coupon linking feature, and the parties litigated this issue as though Gil raised it in his pleadings. Thus, there is no indication that Winn-Dixie suffered any prejudice from the addition of this belated claim.

After a bench trial, the district court entered judgment in favor of Gil, finding that Winn-Dixie had violated Gil's rights under Title III of the ADA. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017). Specifically, the court noted again that it need not decide whether Winn-Dixie's website is a public accommodation "in and of itself," because the website is "heavily integrated" with Winn-Dixie's physical stores—so much so that it "operates as a gateway to the physical store locations," *id.* at 1348-49. It held that, as the ADA "requires that disabled people be provided 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . .,'" the fact that the website is "inaccessible to visually impaired individuals who must use screen reader software" means that Winn-Dixie has violated the ADA. *Id.* at 1349 (quoting 42 U.S.C. § 12182(a)). The district court issued an injunction that, among other terms, required Winn-Dixie to make its website accessible to individuals with disabilities, specifically by conforming its website—including "third party vendors who participate on its website—to Web [*9] Content Accessibility Guidelines 2.0 ("WCAG 2.0"), which is a set of accessibility standards generated by a private consortium.[6] *Id.* at 1351. The injunction also required Winn-Dixie to implement a publicly available Web Accessibility Policy, "provide mandatory web accessibility training to all employees who write or develop programs or code for, or who publish final content to" its website on an annual basis, and conduct accessibility tests of the website every three months. *Id.* Winn-Dixie appealed.

II.

Winn-Dixie raises three key issues on appeal: (1) whether Gil has standing to bring this case, (2) whether websites are places of public accommodation under Title III of the ADA, and (3) whether the district court erred in its verdict and judgment in favor of Gil, including the court's injunction. After first addressing the standing issue, we turn to whether websites are (in and of themselves) places of public accommodations under the ADA.[7] We then determine whether Winn-Dixie's website violates the ADA.

"We review standing determinations *de novo*." *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019).

Following a bench trial, we review the district court's conclusions of law *de novo*, and its factual findings for clear error. *AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296, 1301 n.4, 1308 (11th Cir. 2015). We review the grant of [*10] an injunction for abuse of discretion. *Simmons v. Conger*, 86 F.3d 1080, 1085 (11th Cir. 1996).

A. Standing

As an initial matter, we address Winn-Dixie's argument that Gil lacks standing to bring this action—in particular, that Gil has suffered no injury in fact. Gil argues that his inability to access Winn-Dixie's website is a particularized injury in fact.

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[6] There is some dispute as to how much it would cost to bring the website into compliance, but Winn-Dixie represents that it would cost $250,000.

[7] Winn-Dixie also argues that the district court erred in denying its motion for judgment on the pleadings. Because we vacate the final judgment, we do not address the judgment on the pleadings issue.

The Constitution limits the jurisdiction of federal courts to "cases" and "controversies," U.S. Const. Art. III § 2, and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). The elements of standing are (1) "injury in fact," (2) a causal connection between the injury and the conduct complained of, and (3) that the injury "is likely to be redressed by a favorable judicial decision." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)). The "injury in fact" element requires a plaintiff to demonstrate a personal stake in the litigation and an "[a]bstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). In addition, when seeking injunctive relief, a plaintiff "must show past injury and a real and immediate threat of future injury" that is not "conjectural" or "hypothetical." *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329 (11th Cir. 2013). Further, if a party seeks an injunction under Title III, the party "either must have attempted to return to the non-compliant building" [*11] or "intend to do so in the future." *Houston*, 733 F.3d at 1336 (citations omitted).

Of the required elements of standing, Winn-Dixie disputes only whether Gil has suffered an injury in fact, given that he was able to use the physical stores for years before he knew the website existed. While Gil does not dispute that he was able to access the physical store without impediment, he argues that he suffered an injury both when "he was unable to avail himself of the goods and services" on the website and when the website interfered with his "ability to equally enjoy the goods and services of Winn-Dixie's stores." The difficulties caused by his inability to access much of the Winn-Dixie website constitute a "concrete and particularized" injury that is not "conjectural" or "hypothetical," and will continue if the website remains inaccessible. *See Muransky*, 979 F.3d at 925; *Lujan*, 504 U.S. at 560-61. Accordingly, Gil has Article III standing to bring the case.

B. Websites and Public Accommodations

Turning to the merits, this case presents two primary issues: (1) whether Winn-Dixie's website is a place of public accommodation in and of itself, such that its inaccessibility violates Title III; and (2) if it is not a place of public accommodation, whether the website otherwise [*12] violates Title III.

1. Is the website, in and of itself, a place of public accommodation under Title III?[8]

We must first determine whether Winn-Dixie's website is considered a place of public accommodation under Title III of the ADA.

Congress passed the ADA in 1990 and amended it in 2008. "[T]he ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public

[8] As noted above, the main premise of Gil's complaint was that Winn-Dixie's website itself was a place of public accommodation under Title III, but the district court twice declined to reach this issue. Because, as discussed further in this opinion, we reverse the district court's holding related to the website being an intangible barrier to Winn-Dixie's physical stores, we necessarily must reach this issue in order to determine whether there is another basis for affirming the judgment. We also note that, although Gil did not advance this theory in his response brief or at oral argument, he was on notice that it was a potential issue before this Court because he raised the issue in his complaint and the appellant Winn-Dixie raised the issue in its briefing on appeal.

services (Title II), and public accommodations (Title III). *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001).

Our analysis in this place of public accommodation case begins with the text of Title III. Under Title III, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added).

Title III then provides more specific examples of what constitutes discrimination for purposes of § 12182(a). *Id.* § 12182(b)(2)(A)(i)-(v).[9] The only provision relevant to this appeal is § 12182(b)(2)(A)(iii), which provides that discrimination occurs when an operator of a place of public accommodation "fail[s] to take such [*13] steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id.* § 12182(b)(2)(A)(iii). A place of public accommodation does not have to provide auxiliary aids or services if "taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." *Id.*

So what is a "a public accommodation" under Title III of the ADA? It is defined as follows:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

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[9] Specifically, Title III provides that:

For purposes of subsection (a) of this section, discrimination includes—

> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity [*14] can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;
>
> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;
>
> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and
>
> (v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, [*15] a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

42 U.S.C. § 12182(b)(2)(A).

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of [*16] an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
> (G) a terminal, depot, or other station used for specified public transportation;
> (H) a museum, library, gallery, or other place of public display or collection;
> (I) a park, zoo, amusement park, or other place of recreation;
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7). This section provides an expansive list of physical locations which are "public accommodations," including, as is relevant here, a "grocery store." *Id.* The list covers most physical locations in which individuals will find themselves in their daily lives. Notably, however, the list does not include websites.

The Department of Justice, responsible for promulgating regulations to implement the ADA, 42 U.S.C. § 12186(b),[10] has provided a detailed explanation of the meaning of "public accommodation." 28 C.F.R. § 36.104. The [*17] regulation echoes the language of the statute, listing a plethora of physical spaces including "[a] bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment," not including websites.[11] *Id.*

Our analysis is straightforward. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). "When the words of a statute are unambiguous . .

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[10] The section provides:

> Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 12182 of this title.

42 U.S.C. § 12186(b).

[11] Gil points to historical statements made by the Department of Justice to imply that the Department of Justice supports his position that websites should be subject to Title III. The Department of Justice, however, has never issued a final ADA regulation concerning whether websites are places of public accommodation.

. [our] 'judicial inquiry is complete.'" *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016) (quoting *Conn. Nat'l Bank*, 503 U.S. at 254).

The statutory language in Title III of the ADA defining "public accommodation" is unambiguous and clear.[12] It describes twelve types of locations that are public accommodations. All of these listed types of locations are tangible, physical places. No intangible places or spaces, such as websites, are [*18] listed. Thus, we conclude that, pursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places.[13] Necessarily then, we hold that websites are not a place of public accommodation under Title III of the ADA.[14] Therefore, Gil's inability to access and communicate with the website itself is not a violation of Title III.

2. Does Winn-Dixie's website otherwise violate Title III?

Our analysis does not end with the conclusion that a website is not a place of public accommodation as Gil does not take the position that websites must be declared places of public accommodation for him to be afforded relief. Instead, he argues that, pursuant to this Circuit's precedent, the ADA forbids not just physical barriers, but also "intangible barriers," that prevent an individual with a disability from fully and equally enjoying the goods, services, privileges, or advantages of a place of public accommodation. Thus, he contends that the website violates Title III because its inaccessibility serves as an intangible barrier to

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[12] Gil relies on legislative history to support the notion that Congress intended an expansive definition of "public accommodation" in the ADA that would change with evolving technologies. But we have previously held that "Congress has provided, in Title III of the ADA, a comprehensive definition of 'public accommodation'" and "[b]ecause Congress has provided such a comprehensive definition of 'public accommodation,' we think that the intent of Congress is clear enough." *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) (construing the definition of "public accommodation" in Title III). And, to put it plainly, "legislative history is not the law." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814, 204 L. Ed. 2d 139 (2019) (quotation marks omitted). "The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it." *Conroy v. Aniskoff*, 507 U.S. 511, 528, 113 S. Ct. 1562, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring).

[13] In so holding, we join several of our sister circuits. The Third Circuit held that "[t]the plain meaning of Title III is that a public accommodation is a place." *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998). Similarly, the Sixth Circuit held that "the plaintiffs' argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute." *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995). Specifically, the hearing-impaired plaintiffs in *Stoutenborough* challenged the National Football League's "blackout rule," which prohibited live broadcast of home football games when the games were not sold out, leaving live radio broadcast as the only alternative. *Id.* at 582. The court held that "[a]lthough a [football] game is played in a 'place of public accommodation' and may be viewed on television in another "place of public accommodation," the "service" of a televised broadcast "does not involve a 'place of accommodation." *Id.; see also Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) ("As is evident by § 12181(7), a public accommodation is a physical place."). The Ninth Circuit has also held that under the principle of *noscitur a sociis*, "place of public accommodation" should be interpreted within the context of the accompanying words, which are all "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

We note, however, that, other circuits have disagreed. The First Circuit has determined that that the phrase "public accommodation" "is not limited to actual physical structures." *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994). And in *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999), the Seventh Circuit cited *Carparts* approvingly, writing that "[t]he core meaning of [the public accommodation] provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) . . . that is open to the public cannot exclude disabled persons."

[14] Notably, the dissent does not challenge this holding.

his "equal access to the services, privileges, and advantages of Winn-Dixie's physical [*19] stores," which are a place of public accommodation.

As discussed in section one, Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). For purposes of this general discrimination prohibition, discrimination includes instances where a place of public accommodation "fail[s] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *See id.* § 12182(b)(2)(A)(iii). And in *Rendon v. Valleycrest Productions, Ltd.*, we held that the

> plain and unambiguous statutory language . . . reveals that the definition of discrimination provided in Title III covers both tangible barriers, that is physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, *see* 42 U.S.C. § 12182(b)(2)(A)(iv), and [*20] *intangible barriers*, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges, *see* 42 U.S.C. § 12182(b)(2)(A)(i)-(ii).

294 F.3d 1279, 1283 (11th Cir. 2002) (emphasis added). We also noted in dicta that "an intangible barrier may result as a consequence of a defendant entity's failure to act, that is, when it refuses to provide a reasonable auxiliary service that would permit the disabled to gain access to or use its goods and services," which would violate 42 U.S.C. § 12182(b)(2)(A)(iii).[15] *Rendon*, 294 F.3d at 1283 n.7. Gil relies upon this intangible barrier discussion in *Rendon* to argue that, even though Winn-Dixie's website is not itself a place of public accommodation, its inaccessibility to individuals who are visually disabled nevertheless violates Title III because it operates as an "intangible barrier" to accessing the goods, services, privileges, or advantages of Winn-Dixie's physical stores.[16]

But at a fundamental level, Winn-Dixie's limited use website is unlike the intangible barrier asserted in *Rendon*. Specifically, the *Rendon* plaintiffs brought a Title III ADA claim against the production companies of the television [*21] game show "Who Wants To Be A Millionaire." 294 F.3d at 1280. The producers of the show conducted contestant selection by using an automated hotline that provided a series of questions. Callers could use their telephone keypads to respond to the questions, and those who answered correctly could proceed through multiple rounds of the selection process and ultimately have a

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[15] Admittedly, our use of the term "*reasonable* auxiliary service" in *Rendon* was imprecise and did not track the statutory language. To be clear, discrimination under Title III occurs where a place of public accommodation "fail[s] to take such steps as may be *necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," not where a place of public accommodation simply fails to provide auxiliary services that may be "reasonable" to ensure discrimination does not occur. 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added); *see also* 28 C.F.R. § 36.303(c)(1) ("A public accommodation shall furnish appropriate auxiliary aids and services where *necessary* to ensure effective communication with individuals with disabilities." (emphasis added)); *PGA Tour*, 532 U.S. at 682 (distinguishing in *dicta* between a "reasonable" and a "necessary" ADA modification).

[16] The services or privileges of the place of public accommodation, *i.e.*, Winn-Dixie's physical stores, that are at issue in this case are the ability to refill a prescription and the redemption of coupons.

chance of appearing on the show. *Id.* Notably, this hotline was the only method of contestant selection. The *Rendon* plaintiffs' disabilities included lack of hearing and "upper-body mobility impairments," such that they "could not register their entries, either because they were deaf and could not hear the questions on the automated system, or because they could not move their fingers rapidly enough to record their answers on their telephone key pads." *Id.* at 1280-81. The system lacked Telecommunications Devices for the Deaf ("TDD") services, which allow deaf people to communicate with each other via text sent from each user's TDD machine, or between a deaf person and a hearing person using a relay operator provided by the telecommunication carrier. *Id.* at 1281 n.1. Accordingly, the plaintiffs alleged that the automated contestant hotline was a discriminatory [*22] procedure that screened out disabled hearing-impaired and mobility-impaired individuals who sought to be contestants on the show. *Id.* at 1281. The district court dismissed the complaint, concluding that Title III did not apply to the contestant hotline because it was not administered in a place of public accommodation. *Id.* We reversed on appeal based on our holding that the ADA's discrimination provisions applied not just to physical barriers but also to "intangible barriers." *Id.* at 1283-84. And we concluded that the plaintiffs had "stated a valid claim under Title III by alleging that the . . . telephone selection process is a discriminatory screening mechanism, policy or procedure, which deprives them of the opportunity to compete for the privilege of being a contestant" on the gameshow. *Id.* at 1286.

Because the phone system in *Rendon* provided the sole access point for individuals to compete for the privilege of being a contestant on the game show and that same phone system was inaccessible by individuals with certain disabilities, it necessarily acted as an "intangible barrier" that prevented the plaintiffs from "accessing a privilege" of a physical place of public accommodation (the game show). In the case at hand, [*23] however, Winn-Dixie's limited use website, although inaccessible by individuals who are visually disabled, does not function as an intangible barrier to an individual with a visual disability accessing the goods, services, privileges, or advantages of Winn-Dixie's physical stores (the operative place of public accommodation). Specifically, Winn-Dixie's website has only limited functionality.[17] Most importantly, it is not a point of sale; all purchases must occur at the store. Further, all interactions with Winn-Dixie which can be (although need not be) initiated on the website must be completed in-store: prescription pick-ups and redemption of coupons. And nothing prevents Gil from shopping at the physical store. In fact, he had done so for many years before he freely chose to stop shopping there. Although Gil was not always happy with the speed or privacy of the service he received at the pharmacy, nothing prevented Gil from refilling his prescriptions during his time as a Winn-Dixie customer.[18] And for years, Gil used paper coupons at Winn-Dixie's stores, despite any inconveniences such use entailed. Accordingly, we hold that Winn-Dixie's website does not constitute an "intangible barrier" [*24] to Gil's ability to access and enjoy fully and equally "the goods, services, facilities, privileges, advantages, or accommodations of" a place of public accommodation (here, a physical Winn-Dixie store). Consequently, Gil's inability to access the website does not violate Title III of the ADA in this way.

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[17] At oral argument, Gil agreed that Winn-Dixie is not required to have a website, and that it could simply remove the site.

[18] We note that at trial, Winn-Dixie's representative testified that new prescriptions could not be submitted and filled through the website. Rather, "the doctor actually has to call [the new prescription] in and then [the customer] ha[s] to pick it up in the store." While presumably customers could also call the pharmacy to request refills of prescriptions in advance of arriving at the physical store, there is nothing in the record to indicate that this option was available.

The dissent reaches the opposite conclusion, reasoning that because Gil is not able to access the services or privileges offered on the website, he is therefore "treated differently" than sighted customers because of the absence of an auxiliary aid on the website in violation of 42 U.S.C. § 12182(b)(2)(A)(iii). As the dissent points out, the term "auxiliary aid" refers to a tool or service that ensures "effective communication" with a person who has a hearing, vision, or speech disability and the place of public accommodation. *See* 28 C.F.R. § 36.303(c)(1). Thus, the dissent concludes that Winn-Dixie is in violation of § 12182(b)(2)(A)(iii) because its website is incompatible with screen reader software (an auxiliary aid), which prevents Gil and other visually disabled patrons from accessing the services, privileges, and advantages offered on the website which "'improve[s] [the] position or condition' of Winn-Dixie's [sighted] customers." The problem with the [*25] dissent's conclusion in this case is that, as we explained above, the website itself is not a place of public accommodation; rather places of public accommodation are limited to actual, physical spaces. Therefore, Gil's mere inability to communicate with and access the services available on the website does not mean that Winn-Dixie necessarily is in violation of 42 U.S.C. § 12182(b)(2)(A)(iii). Rather, in order for there to be a violation of § 12182(b)(2)(A)(iii), the inaccessibility of the website must serve as an "intangible barrier" to Gil's ability to communicate with Winn-Dixie's physical stores, which results in Gil being excluded, denied services, segregated, or otherwise treated differently from other individuals in the physical stores.[19] *See Rendon*, 294 F.3d at 1283-84. And while Gil asserted that he could not "comprehend [Winn-Dixie's] *website* in an effective manner" due to the absence of an auxiliary aid, he never asserted that he was not able to communicate effectively with, or access the services offered in, the physical stores. Nor could he, because as explained previously the record clearly establishes that for at least fifteen years, Gil was able to enjoy fully and equally the services in question—filling prescriptions and using coupons—in Winn-Dixie's [*26] physical stores. Consequently, there is no basis for concluding that Winn-Dixie violated § 12182(b)(2)(A)(iii).

Gil erroneously assumes in his arguments that *Rendon* established a "nexus" standard, whereby a plaintiff only has to demonstrate that there is a "nexus" between the service and the physical public accommodation. In other words, the gravamen of Gil's argument is that the website is in violation of Title III because it "augments" the physical store's services or privileges in various ways. But we did not adopt or otherwise endorse a "nexus" standard in *Rendon*. Indeed, the only mention of a "nexus" in *Rendon* is a footnote acknowledging that certain precedent from *other* circuits "*[a]t most*, . . . can be read to require a nexus between the challenged service and the premises of the public accommodation." *Id.* at 1284 n.8 (emphasis added). And we decline to adopt a "nexus" standard here, as we find no basis for it in the statute or in our precedent.

While acknowledging that the ADA does not require that places of public accommodation provide identical experiences for disabled and non-disabled patrons, *see A.L. by and through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1294-95 (11th Cir. 2018); *Silva v. Baptist Health S. Fla., Inc.*,

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[19] Contrary to the dissent's contention, we do not contend that the ADA limits discrimination solely to conduct that results in a disabled person's physical exclusion from a place of public accommodation. Rather, our only contention is that Title III's requirements are applicable to places of public accommodation, which are only tangible, physical spaces. And, as explained above, this conclusion results from a straightforward application of the cardinal rules of statutory interpretation. We agree with the dissent that our caselaw holds that Title III applies to "intangible barriers" that serve to restrict a disabled individual's ability to access the goods, services, and privileges of a place of public accommodation. *See Rendon*, 294 F.3d at 1283-84. We also agree with the dissent that under § 12182(b)(2)(A)(iii), the ADA may be violated if, in a place of public accommodation, a disabled individual is "excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids," but we disagree that under the unique facts of this case any such exclusion, denial of services, segregation, or otherwise different treatment occurred.

856 F.3d 824, 834 (11th Cir. 2017), the dissent argues that the lack of accessibility of the website nevertheless violated [*27] the ADA because it failed to provide comparable or "like" experiences to disabled and non-disabled Winn-Dixie customers. Specifically, noting that the ADA does not define what constitutes "goods, services, privileges, or advantages," the dissent invokes a broad definition to conclude that Winn-Dixie's website's content itself (*i.e.*, the prescription refill and coupon-linking tools) constitute a "service," "privilege," and an "advantage" because those tools offer customers the benefit of obtaining goods or services through "a streamlined, faster process that offered greater privacy." Thus, the dissent concludes that because visually disabled individuals cannot access the website's content, they are not receiving a "comparable" or "like" experience to that of sighted customers as required by the ADA. But under such an expansive interpretation, virtually anything—from the tangible to the intangible—might be deemed a "service," "privilege," or "advantage" for purposes of Title III. In turn, the place of public accommodation would then be required to provide "full and equal enjoyment" to not only tangible services—in this case the filling of prescriptions and redemption of coupons—but intangible [*28] "privileges" or "advantages" such as increased privacy and time saving benefits.[20] When the text of Title III is read in context and with a view to the overall statutory scheme, it is clear that Title III will not bear such a sweeping interpretation. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000))).

Furthermore, any convenience or time saving benefits afforded through the website might make the provision of "auxiliary aids and services" *reasonable* but is not dispositive of whether such "auxiliary aids and services" are in fact "*necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids." *See* 42 U.S.C. § 12182(b)(2)(A)(iii) (providing that discrimination for purposes of 42 U.S.C. § 12182(a) includes "a failure to take such steps as may be *necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids" (emphasis added)). And [*29] it is only the latter that places of public accommodation are required to provide pursuant to Title III. *Id.; see also PGA Tour*, 532 U.S. at 682 (distinguishing in *dicta* between a "reasonable" and a "necessary" ADA modification and noting that, where a disabled individual is able to participate, even if under "uncomfortable or difficult" conditions, "an accommodation might be reasonable but not necessary").[21] As discussed previously, Gil

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[20] The ADA "focus[es] on equal opportunity [for the disabled] to participate in or benefit from the defendant's goods and services," *A.L.*, 900 F.3d at 1295, it does not regulate the content of the goods and services provided by a place of public accommodation and it does not require identical experiences. No one disputes Gil could fill prescriptions in Winn-Dixie's stores and redeem coupons (and he did so for over 15 years). Contrary to the dissent's conclusion, the fact that Gil could not take advantage of the more streamlined, time-saving process of the website's tools to procure these same services does not mean that he was not afforded a "comparable" or "like" experience to that of sighted customers. Gil is at no less of a disadvantage than a sighted customer who does not have internet access and therefore cannot access the streamlined online process. In sum, although the dissent acknowledges that all that the ADA requires of a place of public accommodation is a "like" or "comparable" experience to that of sighted customers, in practice, the dissent advances what the ADA does not mandate—that in order to have "full and equal enjoyment" of Winn-Dixie's physical store's goods and services, visually disabled customers must be afforded a virtually identical experience to that of sighted customers. "But such a reading [of Title III] is plainly unrealistic, and surely unintended, because it makes an unattainable demand." *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000); *see also Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (holding that "[u]nder a 'meaningful access' standard, . . . aids and services are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but they nevertheless must afford handicapped persons equal opportunity . . . to gain the same benefit" (quotations omitted)).

has not asserted that the absence of auxiliary aids prevents him from effectively communicating with, or accessing the services of, Winn-Dixie's physical stores—the operative place of public accommodation.

Gil and to some extent the dissent urge us to reach the opposite conclusion by following the Ninth Circuit in *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir.), *cert. denied*, 140 S. Ct. 122, 205 L. Ed. 2d 41 (2019), but *Robles* is both factually and legally distinguishable. In *Robles*, the plaintiff, who is blind, was unable to order pizza over the internet from his local Domino's Pizza ("Domino's") because the Domino's app and website were incompatible with his screen reader software. He brought an action under Title III, seeking damages and a permanent injunction requiring Domino's to comply with a specific private [*30] industry standard for website accessibility. *Id.* at 902. The district court granted Domino's motion to dismiss, reasoning that although "the ADA's 'auxiliary aids and services' section, 42 U.S.C. § 12182(b)(2)(A)(iii)," applied to the website and app, due process concerns prevented the court from "imposing the [specific private industry] standards on Domino's without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic" because to do so would "fl[y] in the face of due process." *Id.* at 903 (quotation omitted). The Ninth Circuit reversed. Noting that it did not have to address whether a website is itself a public accommodation, *id.* at 905 n.6, it explicitly embraced a "nexus" standard: "Customers use the website and app to locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup. This nexus between Domino's website and app and physical restaurants—which Domino's does not contest—is critical to our analysis." *Id.* at 905. The court went on to find that "the ADA applies to Domino's website and app, which connect customers to the goods and services of Domino's physical restaurants."[22] *Id.* at 905-06. The court also disregarded the district court's due process concern, concluding that [*31] the plaintiff was not seeking to "impose liability based on [the private industry standard]," but rather based on the more general statutory provisions of Title III of the ADA and its related regulations. *Id.* at 907. The court reasoned that compliance with the private industry standard was simply an equitable remedy that the district court had the power to impose for a Title III violation. *Id.* at 907-09.

While the underlying general difficulty for the plaintiff in *Robles*—the incompatibility of Domino's website and app with the plaintiff's screen reader software—is similar to Gil's frustrations with Winn-Dixie's website, the particular facts of *Robles* are distinctly and materially different from the facts of this case. Domino's made pizza sales through its website and app; here, Winn-Dixie makes no sales of its products on its site. *Compare Robles*, 913 F.3d at 902, *with Gil*, 257 F. Supp. 3d at 1345. The *Robles*

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[21] Although the Supreme Court's discussion in *PGA Tour* of the difference between a "reasonable" and a "necessary" ADA modification was *dicta*, it is well-established that "there is dicta and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). We, along with our sister circuits, "have previously recognized that 'dicta from the Supreme Court is not something to be lightly cast aside,'" and at a minimum is of considerable persuasive value. *Id.* at 1325-26 (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)); *see also Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 281 (4th Cir. 2019) (en banc) ("[W]e routinely afford substantial, if not controlling deference to dicta from the Supreme Court. Respect for the rule of law demands nothing less: lower courts grappling with complex legal questions . . . must give due weight to guidance from the Supreme Court, so as to ensure the consistent and uniform development and application of the law." (internal citation omitted)); *United States v. Montero—Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) ("We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference . . . . As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding." (quotation omitted)); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("This Court should respect considered Supreme Court dicta.").

[22] In its conclusion, the court expressed "no opinion about whether Domino's website or app comply with the ADA," leaving it "to the district court, after discovery, to decide in the first instance whether Domino's website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates." *Robles*, 913 F.3d at 911.

plaintiffs complained they were denied access to the goods and services of the physical stores through the website. In contrast, in this case, Winn-Dixie's website does not provide any direct sales of goods or services or impede access to the goods and services offered in the physical stores. Moreover, the application of the "nexus" standard was "critical" [*32] to the *Robles*'s court's holding, but as explained above, we decline to adopt the "nexus" standard. In sum, we do not find *Robles* persuasive, either factually or legally. Instead, we apply the statute, 42 U.S.C. §§ 12182(a) and (b)(2)(A)(iii), and our precedent, *see Rendon*, 294 F.3d at 1283, to the facts before us, and we hold that the absence of auxiliary aids on Winn-Dixie's website does not act as an intangible barrier that results in Gil being discriminatorily "excluded, denied services, segregated or otherwise treated differently than other individuals" in the physical stores—the operative place of public accommodation—because of the absence of auxiliary aids and services as contemplated by the ADA. 42 U.S.C. § 12182(b)(2)(A)(iii). Rather, we conclude that, on the facts of this case, Gil is able to enjoy fully and equally "the goods, services, facilities, privileges, advantages, or accommodations of" Winn-Dixie's physical stores as contemplated by Title III of the ADA. *Id.* § 12182(a).

III.

There is no doubt that Congress enumerated a broad spectrum of public accommodations when it enacted Title III of the ADA. There is similarly no doubt that a commendable purpose of the ADA was reflected in its title: to enhance the lives of Americans with disabilities by requiring certain accommodations [*33] for them. We also recognize that for many Americans like Gil, inaccessibility online can be a significant inconvenience. But constitutional separation of powers principles demand that the details concerning whether and how these difficulties should be resolved is a project best left to Congress. "[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949, 195 L. Ed. 2d 298 (2016) (quoting *Dodd v. United States*, 545 U.S. 353, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005)). Absent congressional action that broadens the definition of "places of public accommodation" to include websites, we cannot extend ADA liability to the facts presented to us here, where there is no barrier to the access demanded by the statute. We therefore vacate the district court's Final Judgment and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

Dissent by: JILL PRYOR

Dissent

JILL PRYOR, Circuit Judge, dissenting:

In this appeal we consider whether the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, is violated when a place of public accommodation, here, a store, offers valuable in-store benefits to customers through a website that is inaccessible to individuals with visual disabilities. Defendant Winn-Dixie Stores, Inc. operates grocery stores, some of which [*34] offer pharmacy services. To enhance its

customers' shopping experience, Winn-Dixie provided a website that enabled customers to, among other things, obtain express prescription refills with greater privacy and more conveniently benefit from discount offers by linking manufacturers' coupons electronically to their Winn-Dixie customer rewards cards. Winn-Dixie's customers could obtain the in-store prescription and coupon benefits only by accessing Winn-Dixie's website.

But visually-impaired customers could not access the website. The website was incompatible with screen-reading technology that would enable them to use it. Winn-Dixie's visually-impaired customers therefore were treated differently than its sighted customers and denied the full and equal enjoyment of services, privileges, and advantages offered by Winn-Dixie stores. I would hold that this inferior treatment amounted to disability discrimination by the operator of a place of public accommodation under Title III of the ADA.

Title III prohibits operators of places of public accommodation, like Winn-Dixie, from engaging in discrimination that deprives disabled individuals of "the full and equal enjoyment of the goods, services, [*35] facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Discrimination prohibited by the ADA includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated[,] or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id.* § 12182(b)(2)(A)(iii). Under this provision, an operator of a place of public accommodation "shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303(c)(1).

Winn-Dixie does not dispute that it failed to provide an auxiliary aid when it refused to make its website compatible with screen-reading technology. As a result, visually-impaired individuals could not access the website. And Winn-Dixie provided no alternative way for them to request express prescription refills or digitally link coupons to their rewards cards so that discounts could be applied seamlessly at checkout—privileges and advantages that sighted customers enjoyed. That conduct amounted to discrimination under § 12182(b)(2)(A)(iii) and was therefore prohibited by § 12182(a).

The majority opinion concludes [*36] that Winn-Dixie did not violate the ADA because visually-impaired customers remained able to shop in Winn-Dixie stores, where they could request prescription refills and manually redeem coupons. That conclusion is premised on the majority opinion's misunderstanding of the ADA's scope. The ADA's guarantee of freedom from discrimination for disabled individuals is broad: It prohibits places of public accommodation from denying them "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). It protects disabled individuals not only from "exclu[sion], deni[al] [of] services, and segregat[ion]," but also from being "treated differently." *Id.* § 12182(b)(2)(A)(iii). Winn-Dixie's discriminatory conduct "treated [visually-disabled individuals] differently," denying them the full and equal enjoyment of its stores' "services," "privileges," and "advantages"—namely, the more favorable treatment Winn-Dixie afforded to sighted customers, who could request express prescription refills or link manufacturers' digital coupons to their rewards cards

through the website before going to the store to shop. I would hold that in failing [*37] to make its website accessible, Winn-Dixie violated the ADA. I dissent.[1]

I.

Plaintiff Juan Carlos Gil is a long-time Winn-Dixie shopper who is legally blind. While in high school, Gil visited a Winn-Dixie grocery store as part of a class project, discovered that Winn-Dixie offered the lowest prices on groceries, and became a loyal Winn-Dixie customer. For more than 15 years, Gil bought his groceries at Winn-Dixie stores and filled his prescriptions there.

When Gil wanted to refill a prescription at Winn-Dixie, he went to the store, asked for employee assistance, walked with the employee to the pharmacy area, and told the pharmacist what he needed. The process would take 20 to 30 minutes. Its inherent lack of privacy made Gil "uncomfortable because he did not know who else was nearby listening" as he asked the pharmacist to refill his prescriptions. Doc. 63 at 3.[2]

When Gil, who had a low income, bought groceries at Winn-Dixie, he sometimes used coupons to take advantage of promotions. Taking advantage of those promotions required him to ask friends to read the coupons to him from a newspaper or request the help of Winn-Dixie employees. Employees were sometimes "annoyed [*38] by his request for help." *Id.*

Eventually, Gil learned that Winn-Dixie operated a website that enabled customers to, among other things, request prescription refills before coming to the store and link digital coupons to their customer rewards cards so that discounts were applied automatically at checkout. Through the website's prescription feature, customers could, in the privacy of their own homes, request refills in advance and then pick up their medication at the store when it was ready.[3] They could also transfer a prescription to be filled at a different Winn-Dixie store. Winn-Dixie described the online refill order feature as allowing

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[1] I am not arguing that the website in and of itself was a place of public accommodation under the ADA, but I disagree with the majority opinion's decision to fashion new circuit law on that issue, an issue on which the circuits are split. *See* Maj. Op. at 17 n.13 (explaining that it is taking a position in an existing circuit split). As the majority opinion acknowledges, the district court "twice declined to reach the issue," *id.* at 12 n.8, and Gil did not "plainly and prominently" present it in his brief on appeal. *Young v. Grand Canyon Univ., Inc.*, 980 F.3d 814, 821 n.4 (11th Cir. 2020) ("Although an appellee may urge us to affirm on any basis supported by the record," he abandons a position when he "does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims." (internal quotation marks omitted)); *see also Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012) (concluding that issue was waived when appellee mentioned it only in passing). Moreover, Gil flatly denied that he was raising the issue when asked about it at oral argument.

We generally do not consider—just to reject—arguments that appellees could have raised on appeal to defend a district court's judgment when those arguments are not presented to us. *See Hamilton*, 680 F.3d at 1319. This restraint "promotes careful and correct decision making[,]" "gives the appellate court the benefit of written arguments[,] and provides the court and the parties with an opportunity to prepare for oral argument with the opposing positions and arguments in mind." *Id.* Particularly given the circuit split, I disagree with the majority's decision to rule, without the benefit of adversarial argument, on whether websites can ever be places of public accommodation under the ADA because "[where] it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. Drug Enf't Agency*, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring).

[2] "Doc." numbers refer to the district court's docket entries.

[3] The prescription refill request tool, as well as the other tools on Winn-Dixie's website that are relevant to this appeal, was operated by a third-party. This fact does not affect the analysis. Winn-Dixie seamlessly incorporated these tools into its website to offer benefits to its customers. And, with respect to liability under the ADA, the parties do not place any significance on the fact that a third party, instead of Winn-Dixie, actually operated the tools.

customers to obtain "express re-fill[s]" of their prescriptions. Doc. 65 at 87. Gil sought to use this feature because it would afford him greater independence, convenience, and privacy, by allowing him to obtain prescription refills without having to disclose his medical information where others could overhear.

Through the website's coupon feature, customers could click on manufacturers' coupons displayed on the website to link the coupons to their customer rewards cards. Then, when the customer shopped and scanned his rewards card, the coupon discount [*39] was applied automatically to his order. Winn-Dixie accepted manufacturers' coupons in stores, the website tool was the only way a customer could link a coupon to his rewards card for automatic application at checkout. Gil, who had a rewards card, was interested in using this feature because it would give him greater independence by making it possible for him to find and use coupons without having to ask friends or store employees for help.

Gil also sought to use the website's store locator feature, which allowed its nondisabled customers to discover the location of Winn-Dixie's 495 stores that are spread throughout the southeastern United States. As a para-Olympian, Gil frequently travels across Florida. When he travels, he brings his laptop, which is equipped with screen-reading software, so he can locate and patronize nearby businesses. When a business's store locator feature is accessible to Gil, he can discover which of that business's physical stores he would like to patronize; when it is not so accessible, he can use a third party's store locator service that is accessible to him to accomplish that end. But it is faster for him to use the website of the store he wishes to patronize [*40] than to leave the website to use a search engine provided by a third party.

Eager to take advantage of the prescription and coupon benefits provided by the website and its store locator feature, Gil used his computer to try to access Winn-Dixie's website. Because he is blind, when using a computer Gil relies on screen-reading software, which vocalizes visual information found on the computer screen. With this software, Gil has successfully used more than 500 websites. The software could not read Winn-Dixie's website, however; as a result, approximately 90% of the website was inaccessible to him. Because the website was inaccessible to him, Gil was unable to request prescription refills online in advance, digitally link coupons to his rewards card, or use the website's store locator feature. Frustrated that Winn-Dixie had not made its website accessible to visually-impaired customers, Gil stopped shopping at Winn-Dixie and switched to another pharmacy to fill his prescriptions.

Gil sued Winn-Dixie, alleging that its failure to make its website accessible to visually-impaired customers violated the ADA. He sought an injunction requiring Winn-Dixie to modify its website so that it could [*41] be used by visually-impaired individuals.

The case proceeded to a bench trial. At trial, Gil contended that Winn-Dixie engaged in disability discrimination by failing to make its website compatible with screen-reading technology and thus denying visually-impaired individuals the ability to request advance in-store prescription refills, link coupons to their customer rewards cards, and access the website's store locator.

Post-trial, the district court ruled that Winn-Dixie had engaged in disability discrimination under the ADA. The court found that visually-impaired individuals could not access Winn-Dixie's website because it was incompatible with screen-reading technology. This incompatibility, the district court found, meant that Winn-Dixie, through its website, offered features and services to the general public that were

inaccessible to Gil, including an "online pharmacy management system," "the ability to access digital coupons that link automatically to a customer's rewards card," and a store locator. Doc. 63 at 10.[4]

In its conclusions of law, the district court addressed the types of conduct that constitute discrimination under the ADA. The court pointed to the ADA's broad statutory [*42] language prohibiting discrimination in "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." *Id.* at 8 (quoting 42 U.S.C. § 12182(a)). Given the breadth of this language, the district court concluded, the ADA did more than "merely require" that individuals with disabilities receive "physical access to a place of public accommodation." *Id.* at 10. In arriving at this conclusion, the district court also relied on our precedent holding that the ADA prohibited "intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures[,] that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges." *Id.* at 9 (quoting *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002)).

Applying the law to its findings of fact, the district court concluded that Winn-Dixie had discriminated against persons with visual disabilities by failing to make its website compatible with screen-reading software. Because Winn-Dixie's visually-impaired customers were unable to submit advance prescription refills for in-store pickup, easily locate and link digital coupons to their customer rewards cards so that discounts would be applied automatically [*43] at checkout, and access the store locator, the district court concluded that Winn-Dixie had denied them "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offer[ed] to its sighted customers." Doc. 63 at 10. To remedy this violation, the district court entered a permanent injunction requiring Winn-Dixie to make its website accessible to visually-impaired individuals and to ensure that the website complied with established guidelines governing website accessibility.

II.

A.

After "decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities," Congress "invok[ed] the 'sweep of congressional authority'" to pass the ADA. *Tennessee v. Lane*, 541 U.S. 509, 516, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) (quoting 42 U.S.C. § 12101(b)(4)). Following a thorough investigation, Congress engraved its findings into the ADA's text. *See* 42 U.S.C. § 12101(a)(1)-(8). As the Supreme Court has recognized, those findings have served a "critical[]" role in judicial construction of the Act's scope. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), *abrogated on other grounds by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

Specifically, Congress found that individuals with disabilities "continually encounter various forms of discrimination, including [*44] . . . communication barriers, . . . failure to make modifications to existing facilities and practices, . . . and relegation to lesser services, programs, activities, benefits, jobs, or other

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[4] The district court found that Gil was "credible and forthcoming" and that there were "virtually no disputes in the testimony and evidence." Doc. 63 at 1-2. The majority opinion does not challenge the district court's factual findings, which we may overturn only if clearly erroneous. Fed. R. Civ. P. 52(a)(6). The district court's credibility findings demand particularly great deference because only the district court had the opportunity to observe Gil's demeanor as he was testifying. *See Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

opportunities." 42 U.S.C. § 12101(a)(5). Given that finding, Congress announced that "the Nation's proper goals" regarding individuals with disabilities are to ensure "full participation, independent living, and economic self-sufficiency for such individuals." *Id.* § 12101(a)(7). To effectuate these broad remedial goals, the ADA prohibits discrimination in major areas of public life, including employment (Title I), public services (Title II), and public accommodations (Title III). *See Lane*, 541 U.S. at 516-17.

Our focus today is on Title III, which bars discrimination by operators of places of public accommodation. Title III sets forth a "[g]eneral rule," language by now familiar to the reader: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." 42 U.S.C. § 12182(a). To clarify that rule's scope, Title III also sets forth "[g]eneral prohibition[s]," [*45] *see id.* § 12182(b)(1), and "[s]pecific prohibitions," *see id.* § 12182(b)(2).

The specific prohibitions provide a non-exhaustive list of "examples of actions or omissions that constitute [prohibited] discrimination." *A.L. ex rel. D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1292 (11th Cir. 2018); *see* 42 U.S.C. § 12182(b)(2). One of the specific prohibitions deems it discriminatory for a place of public accommodation to "fail[] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated[,] or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," unless the entity demonstrates that taking such steps would "fundamentally alter the nature" of the service, privilege, or advantage offered or "result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii).

In my view, it is clear from that specific prohibition and § 12182(a)'s general rule that Winn-Dixie violated the ADA. So, there is no need to consider whether Winn-Dixie's conduct also ran afoul of § 12182(b)'s other specific prohibitions or its general prohibitions.

B.

I would hold that Winn-Dixie's failure to make its website accessible to visually-impaired individuals is discriminatory under § 12182(b)(2)(A)(iii) and thus prohibited by § 12182(a). I begin with what is undisputed. First, Gil's disability qualifies for protection [*46] under the ADA. Second, Winn-Dixie's physical stores are public accommodations under the ADA. *See* 42 U.S.C. § 12181(7) (including "grocery store[s]" and "pharmac[ies]" whose operations "affect commerce" within the definition of "public accommodation"). Third, the technology that integrates a website with the screen-reading software Gil uses qualifies as an "auxiliary aid[] and service[]" under the ADA. *See* 28 C.F.R. § 36.303 (providing that "screen[-]read[ing] software," "accessible electronic and information technology," and "other effective methods of making visually delivered materials available to [visually-impaired] individuals" are "[e]xamples" of auxiliary aids and services). Fourth, Winn-Dixie does not challenge the district court's finding that Gil and other visually-impaired individuals could not access Winn-Dixie's website or enjoy, by any other means, the three features of Winn-Dixie's website that are relevant to this appeal. Fifth, Winn-Dixie does not argue that making its website accessible to visually-impaired individuals would "fundamentally alter the nature of [its offerings]" or "result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii).

Given this common ground, whether Winn-Dixie violated the ADA turns on whether it was "necessary" [*47] for Winn-Dixie to make its website accessible to visually-impaired individuals to ensure they were not "denied services, segregated[,] or otherwise treated differently than [sighted]

individuals" in deprivation of their right to the "full and equal enjoyment of the goods, services, . . . privileges, [or] advantages . . . of [Winn-Dixie's stores]." *Id.* § 12182(a), (b)(2)(A)(iii). In my view, the answer is yes, and it follows from our precedent.

To determine whether an accommodation is "necessary" under § 12182(b)(2)(A), we consider "how the[] [public accommodation's offerings] are used by nondisabled [customers]" and then ask whether the operator of the public accommodation has provided its disabled customers with a "like experience and equal enjoyment." *A.L.*, 900 F.3d at 1296 (vacating in part grant of summary judgment because a factual dispute existed as to whether a theme park's program creating a tailored experience for disabled patrons offered an experience comparable to the experience offered to nondisabled patrons). If the operator of a public accommodation has failed to provide disabled customers with "an experience comparable to that of [nondisabled customers]," then an accommodation is necessary. *Id.* at 1294 (quoting *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012));[5] *see also Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1133 (9th Cir. 2003) (concluding that [*48] an accommodation was necessary when a movie theater, which offered seating to wheelchair-bound patrons in the front row only, failed to afford these patrons a viewing experience comparable to that offered to nondisabled patrons by denying them access to "comfortable viewing locations").

C.

Under the standard established in *A.L.*, an accommodation was necessary because Winn-Dixie failed to provide its disabled customers with an experience comparable to the one it provided nondisabled customers. *A.L.* requires us to compare Winn-Dixie's treatment of sighted customers—who were able to obtain express prescription refills, link coupons electronically to their rewards cards, and use the store locator feature—with its treatment of visually-impaired customers, who could not use those features. *See* 900 F.3d. at 1296. So, let us compare.

First, consider the experience of refilling prescriptions for visually-impaired customers versus that of sighted customers. Visually-impaired customers had to request prescription refills inside Winn-Dixie stores. The customer had to go to the store and wait in line to speak to a pharmacist. After waiting in line, the customer may (like Gil) have had to verbally [*49] request his medication by name in a public setting where other customers might overhear. Once the refill was requested, the pharmacy had to take certain steps required by state law before dispensing the prescription. For example, under Florida law (which governed the Winn-Dixie pharmacies that Gil patronized) pharmacists were required to verify that the prescription authorized a refill, consider whether the prescription medication could cause a potential adverse reaction or an interaction with other medications the customer was taking, and ensure that the appropriate dose and quantity were provided.[6] In addition, pharmacy employees had to determine whether the customer had a prescription drug benefit plan that covered the refill and how much the customer should be charged. According to unrefuted evidence in the record, customers (like Gil) who requested refills in Winn-Dixie's store might wait 20 to 30 minutes until the refill was ready.

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[5] In *A.L.* we adopted the Ninth Circuit's approach in *Baughman. See A.L.*, 900 F.3d at 1296.

[6] *See, e.g.*, Fla. Admin. Code Ann. r. 64B16-27.211 (limiting the number of times a pharmacist can refill a particular prescription); Fla. Stat. § 465.003(6) (requiring that before a pharmacist dispenses a drug she must "interpret and assess the prescription order for potential adverse reactions [and] interactions"); Fla. Admin Code Ann. r. 64B16-27.1001(3), (4) (setting forth a pharmacist's responsibilities when filling a prescription).

By contrast, a sighted customer who submitted an online prescription refill request through Winn-Dixie's website was offered a streamlined, faster process that offered greater privacy. As to privacy, when a customer initiated a prescription [*50] refill in the store, she may have had to verbally request the refill. As Gil explained, this process made him "very uncomfortable" because others potentially could overhear him discussing his health conditions and medication needs with pharmacy employees. Doc. 65 at 44. Sighted customers could avoid verbally requesting their refill by using Winn-Dixie's website.[7]

As to time saved, a customer requesting her refill online benefitted from the pharmacist checking her insurance coverage, verifying that the prescription and refill were authorized, and preparing the prescription before her arrival. Upon arrival, the medication was ready for pickup. Indeed, Winn-Dixie touted the time savings that online customers enjoyed, advertising that its website gave customers access to "*express* re-fill[s]." Doc. 65 at 87 (emphasis added).

As the majority concedes, "nothing in the record" suggests that Winn-Dixie offered customers any means *other than its website* to request prescription refills "in advance of arriving at the physical store." Maj. Op. at 23 n.18. After comparing the experiences of Winn-Dixie's disabled and nondisabled customers regarding express prescription refills, I cannot understand how [*51] the majority concludes that disabled customers, like Gil, were offered the equal treatment and "like experience" that *A.L.* requires. 900 F.3d at 1296-98.[8]

Second, consider the coupon experience for visually-impaired customers versus that of sighted customers. When a store accepts manufacturers' coupons, it allows its customers to take advantage of discounts on the products they purchase. A visually-impaired customer who wanted to use manufacturers' coupons to purchase items at a Winn-Dixie store had to page through a newspaper, magazine, or other print source to find coupons for products he wanted to purchase, clip the coupons, bring them to the store, and present them to a cashier at checkout—needing to ask for the help of another when he could not perform these tasks himself.

By contrast, Winn-Dixie's website offered sighted customers an improved and more convenient way to use coupons that was available by no other means. A sighted customer could visit the website, which centralized manufacturers' coupons, and digitally link the desired coupons to his account. Then, when he scanned his customer rewards card at checkout, the coupon discounts were applied automatically to his order. [*52] There can be no doubt that, with its coupon-linking tool, available only to those who could use Winn-Dixie's website, Winn-Dixie failed to offer like treatment to its disabled and nondisabled

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[7] This privacy concern is particularly acute for visually-impaired customers, who may be less able than sighted customers to determine whether bystanders are close enough to overhear them.

[8] To support its conclusion that there was no ADA violation here because an accessible website was not "necessary" within the meaning of § 12182(b)(2)(A)(iii), the majority opinion does not discuss *A.L.*, our authoritative precedent on the matter, and instead relies on what the majority concedes is "dicta" from *PGA Tour*. Maj. Op. at 29. That dicta explains that an accommodation's necessity "might" depend on whether the plaintiff could "uncomfortabl[y]" enjoy the public accommodation's offerings or whether such enjoyment was "beyond [his] capacity." *PGA Tour*, 532 U.S. at 682. The majority opinion suggests that this dicta supports the proposition that an accommodation was not necessary in this case because Gil was "able to participate [in Winn-Dixie's services, privileges, and advantages], even if under 'uncomfortable or difficult' conditions." Maj. Op. at 29 (quoting *PGA Tour*, 532 U.S. at 682). But whether it was merely "uncomfortable" for Gil to enjoy Winn-Dixie's offerings or whether such enjoyment was "beyond [his] capacity" turns on how we conceptualize those offerings. As I explain later, the majority opinion's conception of Winn-Dixie's offerings under the ADA is incorrect. The *PGA Tour* dicta cited by the majority opinion therefore gives it no refuge.

customers. Rather, it privileged nondisabled customers, offering them a more convenient and effective way to obtain discounts inside Winn-Dixie stores.

Third, consider the store locator experience for visually-impaired customers. On Winn-Dixie's website, sighted customers could use the store locator feature to navigate virtually among the hundreds of Winn-Dixie stores to determine which location would be most convenient for them to patronize. Typically, a store locator feature not only helps customers get to stores but also informs them of the stores' hours, contact information, and specific services offered. Winn-Dixie's store locator was inaccessible to those with visual impairments. When a website's store locator feature is inaccessible to visually-impaired customers, they must gather the information provided by the feature elsewhere. Undisputed evidence in the record established that it would be more cumbersome for Gil to gather the information provided by the website's store locator from a [*53] third party's website. Toggling between multiple websites is more difficult for individuals relying on screen-reading software than it is for sighted individuals. This Court, albeit in an unpublished opinion, has already concluded that a place of public accommodation discriminates within the meaning of § 12182(b)(2)(A)(iii) when it offers a store locator feature on its website that is inaccessible to visually-impaired customers. *See Haynes v. Dunkin' Donuts LLC*, 741 Fed. Appx. 752, 753-54 (11th Cir. 2018) (unpublished). I agree with *Haynes*.

To be sure, the ADA does not require that places of public accommodation provide identical experiences for disabled and nondisabled patrons. *See A.L.*, 900 F.3d at 1294-95. But by offering inferior treatment to its visually-impaired customers with respect to prescription refills, digital coupons, and its store locator, Winn-Dixie failed to provide them with an "experience comparable to that of" its sighted customers. *Id.* at 1294 (internal quotation marks omitted); *see also* 42 U.S.C. § 12182(b)(2)(A)(iii) (requiring that disabled individuals are not "excluded, denied services, segregated[,] or *otherwise treated differently* than other individuals because of the absence of auxiliary aids") (emphasis added). Because of that failure, it was "necessary" for Winn-Dixie to provide an accommodation unless providing [*54] such an accommodation would "fundamentally alter the nature of [Winn-Dixie's offerings]" or result in an "undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). As I have explained, Winn-Dixie neither provided an accommodation nor argued that providing such an accommodation would "fundamentally alter" its offerings or result in an "undue burden." Its failure to make its website accessible to visually-impaired customers thus was discrimination under § 12182(b)(2)(A)(iii) that is barred by § 12182(a).

III.

The majority opinion resists this conclusion with three arguments. First, it argues that Gil was not discriminated against "in the full and equal enjoyment" of Winn-Dixie's services, privileges, and advantages because Gil was able to enter Winn-Dixie's stores, refill prescriptions, and use coupons. Second, it argues that caselaw suggests an intangible barrier to a public accommodation's offerings (like the website's incompatibility with Gil's screen-reading software) violates the ADA only when that barrier prevents disabled individuals from entering the public accommodation's sole access point or accessing one of its points of sale. Third, it argues that Winn-Dixie's failure to provide a website accessible to visually-impaired individuals did not constitute [*55] discrimination under § 12182(b)(2)(A)(iii) because Gil was prevented from effectively communicating only with Winn-Dixie's website, not its physical stores. Each of these arguments is unpersuasive. I address them in turn.

A.

First, the majority opinion contends that Winn-Dixie did not violate § 12182(a) because "Gil [was] able to enjoy fully and equally 'the goods, services, facilities, privileges, advantages, or accommodations of' Winn-Dixie's physical stores." Maj. Op. at 33 (quoting 42 U.S.C. § 12182(a)). To arrive at this conclusion, the majority asserts, as it must, that under the ADA the only relevant services, privileges, or advantages Winn-Dixie offered were "the ability to refill a prescription" and "[redeem] coupons." *Id.* at 20 n.16. After positing that the only relevant services, privileges, or advantages offered by Winn-Dixie are "filling prescriptions and using coupons," the majority opinion concludes that "Gil was able to enjoy fully and equally [those] services" and therefore Winn-Dixie did not violate the ADA. *Id.* at 26; *see also id.* at 23 (asserting that because "nothing prevent[ed] Gil from shopping at [Winn-Dixie's] physical store[s]," "refilling his prescriptions," or "us[ing] paper coupons," Gil was not denied full and equal access to Winn-Dixie's [*56] services, privileges, or advantages).

This argument is doubly flawed. Its premise—that, for ADA purposes, the relevant services, privileges, and advantages offered by Winn-Dixie were limited to "filling prescriptions and using coupons"—is wrong. And even if that premise were correct, the majority opinion's conclusion does not follow from it. For even if the majority is correct that the relevant services, privileges, or advantages were "filling prescriptions and using coupons," Gil was not "able to enjoy fully and equally [those] services," *id.* at 26, because he could enjoy only different—and markedly inferior—versions of them. I first explain why the majority opinion's conception of what constitutes a service, privilege, and advantage under the ADA contradicts the Act's plain text. Then, I show why, even under the majority opinion's understanding of those terms, its conclusion does not follow.[9]

The ADA prohibits discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). The meaning of this provision is a question of statutory interpretation. "As with any question of statutory interpretation, [*57] we begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002) (en banc). "In construing a statute we must begin, and often should end as well, with the language of the statute itself." *Id.* (internal quotation marks omitted). The ADA does not define the terms "services," "privileges," or "advantages," so we "look to the common usage of [these] words for their meaning." *In re Walter Energy, Inc.*, 911 F.3d 1121, 1143 (11th Cir. 2018) (internal quotation marks omitted).

To determine the common usage and ordinary meaning of terms, we look to dictionary definitions for guidance. *Id.* The dictionary definition of "service" is "useful labor that does not produce a tangible commodity." *Service*, Webster's New International Dictionary (3d ed. 1961).[10] A "privilege" is "a right . . . granted as a peculiar benefit, advantage, or favor." *Privilege*, Webster's New International Dictionary (3d ed. 1961). And an "advantage" is "a more favorable or improved position or condition." *Advantage*, Webster's New International Dictionary (3d ed. 1961).

Under these definitions, Winn-Dixie offered "services," "privileges," and "advantages" when it empowered customers to request express prescription refills and link coupons to their rewards cards

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[9] In responding to the majority opinion's arguments, I will not discuss the store locator feature because the majority opinion does not discuss it. But the same reasons that explain why the website's express prescription refill and coupon-linking features are "services," "privileges," or "advantages" within the meaning of the ADA apply also to the store locator feature.

[10] Although it appears that the current meaning of these terms is not much different, here I use dictionary definitions that were current in 1990 when the ADA was passed by Congress and signed by the President.

on [*58] its website. Winn-Dixie's prescription offering, by which its customers could pick up prescription refills they had requested in advance online, was a service. In common parlance, a service is provided when a customer requests a service provider to perform an activity, the service provider performs that activity, and the customer pays the service provider. For Winn-Dixie's customers who used the online prescription refill tool, a critical step in that process—the requesting of the service—occurred online. Thus, it makes no sense for the majority opinion to conceive of Winn-Dixie's prescription service as completely untethered from the website.

Even more clearly perhaps, the prescription refill and coupon-linking tools are "privileges" or "advantages." As the comparison above demonstrates, ordering express prescription refills from the privacy of one's home and using the coupon-linking tool to more conveniently take advantage of discounts "benefit[s]" and "improve[s] [the] position or condition" of Winn-Dixie's customers. That is, after all, precisely why Winn-Dixie provided its customers with those features.

The majority opinion does not contest my understanding of the plain meanings [*59] of the terms "service," "privilege," and "advantage." Rather, it argues that under my interpretation "virtually anything . . . might be deemed a 'service,' 'privilege' or 'advantage' for purposes of Title III" and thus ADA liability would extend beyond Congress's intent. Maj. Op. at 28. The majority opinion tells us that, when viewed "in context and with a view to the overall statutory scheme, it is clear that Title III will not bear [my] sweeping interpretation." *Id.* But it does not tell us what contextual or structural clues in the ADA the majority opinion has discovered that warrant casting aside the ordinary meaning of § 12182(a)'s terms.

Indeed, looking beyond the terms "services," "privileges," and "advantages" only further demands adherence to those terms' plain meanings. At the micro level, § 12182(a) clarifies that it not only bars discrimination occurring "in" places of public accommodation; it also bars discrimination in the "goods, services, facilities, privileges, advantages, or accommodations" offered *by* places of public accommodation, like Winn-Dixie stores. 42 U.S.C. § 12182(a) (barring discrimination in full and equal enjoyment of the "privileges[] or advantages . . . *of* any place of public accommodation") [*60] (emphasis added); *see also Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) ("[Section 12182(b)(2)(A)(iii)] applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation"); *id.* at 905-06 & n.6 (holding that § 12182(b)(2)(A)(iii)'s auxiliary aid requirement applies to websites when their inaccessibility impedes access to a physical location's services, "even though customers predominantly access [websites] away from [places of public accommodation]"). Winn-Dixie's express prescription refill service, by which customers could order refills to be picked up at a specific Winn-Dixie location, is unquestionably a privilege or advantage "of" that location.

At the macro level, the ADA's text demonstrates that Congress's intent in passing the statute was to comprehensively eradicate disability discrimination, *see* § 12101(b)(1), to ensure "full participation, independent living, and economic self-sufficiency" for Americans with disabilities. 42 U.S.C. § 12101(a)(7). Congress effectuated the ADA's "broad mandate," "comprehensive character," and "sweeping purpose," *see PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001) (internal quotation marks omitted), by prohibiting at least eight different forms of discrimination, *see* § 12182(b), "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place [*61] of public accommodation." 42 U.S.C. §12182(a). The ADA is a sweeping piece of legislation; it is hardly surprising that its terms prohibiting discrimination are broad and inclusive. To interpret them otherwise offends not only the principle that we should interpret terms according to their ordinary meaning, but also the "fundamental canon of statutory construction that the

words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. U.S.*, 139 S. Ct. 2116, 2126, 204 L. Ed. 2d 522 (2019) (internal quotation marks omitted).

Because the ability to request express prescription refills and electronically link coupons to one's rewards card via the website was a "service," "privilege," and "advantage" offered by Winn-Dixie's stores, the majority opinion errs in concluding that Gil could "enjoy fully and equally" Winn-Dixie's offerings because he could refill his prescriptions and use coupons at Winn-Dixie's stores. Maj. Op. at 33. In effect, the majority opinion's conception of Winn-Dixie's offerings distorts the meaning of "services" under the Act and strikes the words "privileges" and "advantages" from it altogether, nullifying Congress's decision to bar discrimination not only relating to "goods, services, [*62] [and] facilities" but also that relating to "privileges [and] advantages." 42 U.S.C. § 12182(a).[11]

For these reasons, the majority opinion's constricted conception of Winn-Dixie's offerings contradicts the ADA's text. But even if the majority opinion were correct that the only services, privileges, or advantages Winn-Dixie offered were its in-store prescription and coupon services, it would still be wrong to conclude that "Gil was able to enjoy fully and equally" those services. Maj. Op. at 33. Gil's enjoyment of Winn-Dixie's in-store prescription and coupon services was not full and equal but partial and lesser. While Winn-Dixie's sighted customers received greater privacy protections and were relieved of the need to wait in-store for pharmacists to refill their prescriptions, Gil had to verbally request prescription refills in-store and endure extended wait times. While Winn-Dixie's sighted customers could collect coupons online and redeem them instantly at checkout, Gil was left to find and assemble physical coupons and present them by hand. As a result of his disability and Winn-Dixie's inaccessible website, Gil received inferior prescription and coupon services from Winn-Dixie. The ADA bars precisely [*63] that result. *See* 42 U.S.C. § 12182(a); *see also id.* § 12101(a)(5) (expressing Congress's intent to end the "relegation [of Americans with disabilities] to lesser services").[12]

B.

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[11] The majority opinion's concern that my interpretation of the words "service," "privilege," and "advantage" is too "sweeping"—and will therefore expand § 12182 liability too far—is misplaced for another reason as well. *See* Maj. Op. at 28-29. Congress expressly included safeguards in § 12182(b)(2)(A)(iii) to protect operators of public accommodations from liability when accommodating disabled individuals is too onerous: when accommodations would "fundamentally alter the nature of the [offering]" or "result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). As I noted, these exceptions to liability are not implicated here because Winn-Dixie has not argued that either of them applies. Thus, the majority opinion errs by distorting the plain meaning of the terms "service," "privilege," and "advantage" based on a fear of overextending Title III liability even though Congress addressed that concern by including these exceptions.

[12] The majority opinion points out that Winn-Dixie is "not required to have a website, and that it could simply remove the [web]site." Maj. Op. 23 n.17. True, but irrelevant. Federal antidiscrimination laws typically do not require public accommodations to provide goods, services, or privileges. Instead, those laws decree that, if such offerings are provided, they may not be provided in a discriminatory manner. For example, the Civil Rights Act of 1964 did not require stores to install lunch counters. But once they did, the Act entitled all persons to "full and equal enjoyment of th[os]e goods, services, facilities, privileges, advantages, and accommodations" that the stores chose to provide. 42 U.S.C. § 2000a(a).

That majority's observation that "Gil is at no less of a disadvantage than a sighted customer who does not have internet access" is also irrelevant Maj. Op. at 28 n.20. The ADA requires us to compare Winn-Dixie's treatment of nondisabled guests ready to enjoy its services to its treatment of disabled guests ready to enjoy its services. *A.L.*, 900 F.3d 1270 ("[P]ublic accommodations must start by considering how their facilities are used by nondisabled guests and then must take reasonable steps to provide disabled guests with a like experience.") (internal quotation marks omitted). It makes no difference whether Winn-Dixie treated nondisabled guests ready to enjoy its services like other individuals who, because of their personal circumstances, were not ready, or did not want, to enjoy its services.

Second, the majority opinion appears to resist the conclusion that Winn-Dixie violated the ADA by grafting a rule upon the Act that is supposedly derived from caselaw. The majority opinion does not dispute that it is settled law in this circuit that violations of § 12182 can result from "intangible barriers" that do not "occur on site [of a place of public accommodation]." *Rendon*, 294 F.3d at 1283-84; *see also* Maj. Op. at 25-26 n.19. Nevertheless, the majority opinion maintains that offsite intangible barriers cannot result in a § 12182 violation unless they bar customers with disabilities from the public accommodation's "sole access point" or obstruct those customers from accessing one of its "point[s] of sale." Maj. Op. at 22-23. The majority opinion apparently derives this rule from two cases in which federal courts of appeals held that plaintiffs *could* state a claim under Title III when a technological barrier prevented them from accessing the offerings of a place of public accommodation. *See Rendon*, 294 F.3d at 1283-86 (aspiring game show contestants stated a claim under Title III when an automated telephone [*64] system prevented them from enjoying the privilege of trying out for the show); *Robles*, 913 F.3d at 905-06 (holding that the ADA applied to a pizza restaurant's website and app because those technologies "connect[ed] customers to the [restaurant's] goods and services" and the technologies' alleged inaccessibility "impede[d] access to [the restaurant's offerings]").

The majority opinion's discussion of *Rendon* and *Robles* therefore cannot advance its position. Those cases held only that plaintiffs can state a Title III claim when inaccessible technologies prevent them from accessing a public accommodation's offerings; they had no occasion to consider whether a public accommodation might also violate the ADA when it offers a website inaccessible to visually-impaired customers that serves as the only way for a customer to access in-store privileges or advantages. At best they established only a sufficient, not a necessary, condition for stating a claim.[13]

C.

Third, the majority opinion argues that Winn-Dixie did not violate § 12182(b)(2)(A)(iii) because that provision prohibits the absence of auxiliary aids and services only when their absence prevents disabled individuals from "effective[ly] communicat[ing]" [*65] *with physical stores. See* Maj. Op. at 24-25 (quoting 28 C.F.R. § 36.303(c)(1)). According to the majority opinion, because only Winn-Dixie's stores (and not its website) are "place[s] of public accommodation," Gil's "inability to communicate with and access the services available on the website" does not constitute a violation of § 12182(b)(2)(A)(iii) because Gil could "communicate effectively with, or access the services offered in, the physical stores." *Id.* at 25-26. The majority opinion reasons that, because Gil was "able to enjoy fully and equally the services in question—filling prescriptions and using coupons—in Winn-Dixie's physical stores," there is "no basis for concluding that Winn-Dixie violated § 12182(b)(2)(A)(iii)." *Id.* at 26.

This chain of reasoning suffers from at least two defects. First, the argument is premised upon the majority opinion's position that "the services available on [Winn-Dixie's] website" are untethered from the services offered by Winn-Dixie's store. *Id.* at 25. As I have explained, that premise is flawed. Winn-Dixie

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[13] In any event, the majority opinion is wrong in asserting that *Rendon* and *Robles* are distinct from this case in a legally significant way. *See* Maj. Op. at 21-22, 27. It is true that, in *Rendon*, unlike in this case, the inaccessible technology was the "sole access point for individuals to [seek] the privilege." *Id.* at 21. And it is true that, in *Robles*, unlike in this case, the public accommodation "[made] sales through its website and app." *Id.* at 28. But those distinctions are of no moment to the ADA, which prohibits discrimination that not only "exclude[s]" individuals with disabilities but also discrimination that "treat[s] [them] differently" and denies them the "full and equal enjoyment of [the offerings of public accommodations]." 42 U.S.C. § 12182; *see also A.L.*, 900 F.3d at 1294-98 (explaining that places of public accommodation must provide disabled patrons with an experience comparable to the one they provide nondisabled patrons).

offered in-store services, privileges, and advantages—namely, the ability to request express prescription refills and link coupons to one's account—through (and only through) its inaccessible website.

Second, the argument rests upon [*66] the majority opinion's misconception that Winn-Dixie's website is not a tool of communication that Winn-Dixie provided to convey information to, and receive information from, customers. By refusing to recognize that the website is, at least in part, a tool of communication between Winn-Dixie and its customers, the majority opinion arrives at the striking conclusion that, although Gil proved at trial that he could not comprehend or communicate with the website, § 12182(b)(2)(A)(iii) was not violated because Gil "never asserted that he was [un]able to communicate effectively with . . . the physical stores." *Id.*

But contrary to the majority opinion's understanding, Gil's inability to access the website prevented him from effectively communicating with Winn-Dixie's stores in at least two ways. The website's inaccessibility prevented Gil from (1) accessing the information that Winn-Dixie was conveying to its sighted customers and (2) conveying information to Winn-Dixie. For example, there was no way for Gil, unlike Winn-Dixie's sighted customers, to communicate with a Winn-Dixie store that he would like to have a specific prescription refilled at a specific time. And there was no way for Gil, unlike Winn-Dixie's [*67] sighted customers, to communicate with a Winn-Dixie store that he would like to link specific coupons to his rewards card so they could be applied automatically when he purchased discounted goods. Thus, the website's inaccessibility prevented Gil from effectively communicating with Winn-Dixie's stores, violating the plain terms of the regulation requiring effective communication. 28 C.F.R. § 36.303(c)(1) ("A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.").

Put differently, individuals and businesses communicate with each other by using communication technologies, like websites, phones, and apps. Therefore, the majority opinion's contention that Gil's inability to access the website prevented him from communicating with only the website—and not Winn-Dixie's physical stores—defies reality. A customer's ability to access a communication technology and his ability to communicate effectively with a store are not unrelated propositions, as the majority opinion suggests. Rather, those propositions are causally related. *Because* Gil was unable to use Winn-Dixie's website, he was unable to effectively communicate [*68] with Winn-Dixie's stores.

The regulation requiring effective communication provides that "[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303(c)(1). An auxiliary aid, like a website compatible with screen-reading software, was necessary to ensure effective communication between Gil and Winn-Dixie's physical stores. By failing to furnish that aid (or any alternative), Winn-Dixie ran afoul of § 36.303.[14]

IV.

The majority opinion holds that Title III does not require public accommodations to provide disabled individuals with the same in-store privileges and advantages that they provide nondisabled individuals when those in-store privileges and advantages are offered through a website. I disagree. Our constitutional

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[14] I agree with the majority opinion that there is no reason to superimpose a "nexus" standard onto the inquiry into whether a place of public accommodation violates the ADA when it offers a service, privilege, or advantage that can be attained solely by accessing its website. *See* Maj. Op. at 26-27. We need only apply the statutory text and ask whether such a website's incompatibility with screen-reading software prevents disabled customers from fully and equally enjoying the offerings of a place of public accommodation. *See* 42 U.S.C. § 12182(a).

role is "to apply statutory language, not to rewrite it." *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc). The statutory language at issue mandates that disabled individuals are not, without legal justification that is absent from this case, "excluded, denied services, . . . or otherwise treated differently . . . because of the absence of auxiliary aids and services." 42 U.S.C. § 12182(b)(2)(A)(iii). And it entitles disabled individuals to [*69] the "full and equal enjoyment" of a public accommodation's offerings. *Id.* § 12182(a). The majority opinion's declaration that Gil could fully and equally enjoy Winn-Dixie's offerings does not make it so. Winn-Dixie treated Gil as a second-class customer, offering him different and inferior prescription and coupon services than it provided to its nondisabled customers.

I fear the majority opinion's errors will have widespread consequences. Places of public accommodation, such as stores and restaurants, increasingly use websites and apps to offer their customers safer, more efficient, and more flexible access to goods and services in physical stores. As I read it, the majority opinion gives stores and restaurants license to provide websites and apps that are inaccessible to visually-impaired customers so long as those customers can access an inferior version of these public accommodations' offerings. That result cannot be squared with the ADA. Respectfully, I dissent.

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Baillie Lumber Co. v. Thompson

United States Court of Appeals for the Eleventh Circuit

December 2, 2004, Decided ; December 2, 2004, Filed

No. 03-15932

Reporter
391 F.3d 1315 *; 2004 U.S. App. LEXIS 24841 **; 43 Bankr. Ct. Dec. 273; 18 Fla. L. Weekly Fed. C 65

BAILLIE LUMBER COMPANY, LP, Plaintiff-Appellant, versus BERT F. THOMPSON, ICARUS HOLDING, LLC, f.k.a. Piedmont Hardwood Flooring, LLC., Defendants-Appellees.

Subsequent History: Certified question answered by Baillie Lumber Co. v. Thompson, 2005 Ga. LEXIS 300 (Ga., Apr. 26, 2005)

Prior History: [**1] Appeal from the United States District Court for the Middle District of Georgia. D. C. Docket No. 02-00433-CV-4-DF-5.

Disposition: Court certified question to the Supreme Court of Georgia.

Counsel: For Baillie Lumber Company, LP, Appellant: Tilman Eugene Self, III, Edward Scott Sell, III, Sell & Melton, Macon, GA.

For Bert F. Thompson, Appellee: Hubert C. Lovein, Jr., Jones, Cork and Miller, Macon, GA.

For Icarus Holding, LLC, Appellee: Hubert C. Lovein, Jr., Jones, Cork and Miller, Macon, GA.

Grant Thomas Stein, Troy J. Aramburu, Alston & Bird, Atlanta, GA.

For The Official Committee of Unsecured Creditors of I, Amicus: George Hamilton McCallum, Jr., Ward Stone, Jr., Stone & Baxter, LLP, MACON, GA.

Judges: Before BIRCH, BARKETT and COX, Circuit Judges.

Opinion by: BIRCH

Opinion

[*1317] BIRCH, Circuit Judge:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA, PURSUANT TO O.C.G.A. § 15-2-9. TO THE SUPREME COURT OF GEORGIA AND ITS HONORABLE JUSTICES:

In this case we must determine if a corporate entity in bankruptcy has exclusive standing to bring a state alter ego action against its principal. Baillie Lumber Company ("Baillie Lumber") appeals the order [**2] of the district court granting summary judgment in favor of Bert F. Thompson ("Thompson") and Icarus Holdings, LLC ("Icarus") [1] as to Georgia alter ego claims against Thompson. The district court approved the bankruptcy court's decision that held an alter ego claim is property of the debtor's bankruptcy estate under Georgia law, and therefore, the debtor has exclusive standing to bring such a claim. Because it is unclear under Georgia law whether a corporate entity can bring an alter ego action against its former principal, we certify the question to the Supreme Court of Georgia for review. Question CERTIFIED.

I. BACKGROUND

The facts of this case are undisputed. Icarus is a national manufacturer and distributer of hardwood flooring. Before 17 December 2001, Baillie Lumber sold lumber [*1318] to Icarus and was never paid. On 17 December 2001, Icarus filed for Chapter 11 bankruptcy. Prior to that date, Thompson, Icarus's primary member and president, engaged [**3] in certain financial irregularities that harmed Icarus's liquidity. These irregularities included the use of Icarus's assest and resources to make improvements on Thompson's hunting lodge, and the use of Icarus's assets to fund Thompson's separate company, Southern Wood Services, LLC. At the time of this suit Thompson was no longer involved in the management of Icarus.

On 28 December 2001, Icarus filed a complaint against Thompson in bankruptcy court claiming that the irregularities were fraudulent transfers and were held in constructive trust for Icarus. On 8 January 2002, Baillie Lumber filed suit against Thompson in a Georgia state court alleging Thomson is the alter ego of Icarus and thus personally liable for the debts owed to Baillie Lumber. Baillie argues that the state alter ego claim is not the property of Icarus's estate, and that it is not trying to recover money owed to the

[1] Formerly known as Piedmont Hardwood Flooring, LLC.

estate. Thus, Baillie contends that Icarus and the Official Committee of Unsecured Creditors of Icarus ("Committee") [2] have no authority to settle the alter ego claim against Thompson.

[**4] Meanwhile, Icarus and the Committee began negotiations with Thompson to settle, among other things, any alter ego suit they may have against Thompson. On 17 April 2002, Thompson brought this suit requesting injunctive relief because the alter ego claim is property of Icarus's estate. A week later, Icarus also joined in this suit as a third party plaintiff.

On 10 October 2002, the bankruptcy court issued an order holding that Georgia law makes the alter ego claim the property of Icarus's estate, and, therefore, Icarus has the exclusive right to bring an alter ego claim against Thompson. Further, it held that the separate alter ego suit brought by Baillie Lumber would be subject to an automatic stay. On appeal to the district court, the decision of the bankruptcy court was upheld.

Baillie Lumber now appeals to this court arguing that its alter ego claim against a third party, in this case Thompson, was separate property. Specifically, Baillie Lumber argues that under 11 U.S.C. § 541 a bankruptcy estate includes only property that the debtor possessed at the time of the bankruptcy filing, and here, Baillie Lumber claims the Georgia alter ego claim against Thompson [**5] is its own separate property.

II. DISCUSSION

The bankruptcy court and district court granted summary judgment by interpreting Georgia law to allow a corporation's alter ego suit against its former principal, thus making any such claims property of the bankruptcy estate, 11 U.S.C. § 541, and any similar claims by creditors subject to an automatic stay, 11 U.S.C. § 362. We review the district court's interpretation of law and determination of estate property *de novo*. *See In re Witko*, 374 F.3d 1040, 1042 (11th Cir. 2004). Because standing to assert the alter ego claim is a question of state law in this case, we must review the district court's decision in accordance with Georgia law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Where there is doubt in the interpretation of state law however, "a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state [*1319] court the opportunity to interpret or change existing law." *CSX Transp., Inc. v. City of Garden City*, 325 F.3d 1236, 1239 (11th Cir. 2003) [**6] (citations omitted).

In order to stay Baillie Lumber's separate alter ego action against Thompson, Icarus [3] must have standing to bring its own alter ego action under 11 U.S.C. § 541 or 11 U.S.C. § 544. Generally, courts that allow the trustee or debtor-in-possession to bring an exclusive alter ego action do so under section 541. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688, 700-05 (2d Cir. 1989); *Koch Refining v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1343-47 (7th Cir. 1987) ("*Koch*"); *In re S.I.*

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[2] Baillie Lumber is a member of this committee.

[3] A trustee was not appointed in this case, but Icarus, the debtor-in-possession, plays essentially the same role for purposes of bankruptcy law. 11 U.S.C. § 1107(a).

Acquisition, 817 F.2d 1142, 1153 (5th Cir. 1987); *In re City Communications, Ltd.*, 105 B.R. 1018, 1020 (Bankr. N.D. Ga. 1989). [4]

[**7] A. *Section 541*

Section 541 establishes a debtor's bankruptcy estate and includes "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). This includes legal causes of action the debtor had against others at the commencement of the bankruptcy case. *See Koch*, 831 F.2d at 1343-44; *In re Adam Furniture Indus., Inc.*, 191 B.R. 249, 255 (Bankr. S.D. Ga. 1996) ("*Adam Furniture*"). If such causes of action, including alter ego actions, are property of the estate under section 541(a), any similar extraneous lawsuits brought by individual creditors will be subject to the automatic stay provision of 11 U.S.C. § 362(a)(3). [5] *See S.I. Acquisition*, 817 F.2d at 1153. We must, therefore, look to Georgia law to determine whether Icarus is allowed to bring an alter ego action against its former principal, therefore making it property of the bankruptcy estate and Baillie Lumber's separate state action subject to the automatic stay.

[**8] Although several circuits have examined this same issue, not all circuits have arrived at the same result. Before allowing a debtor-in-possesion or trustee to bring an alter ego action on behalf of the corporation, most courts require that (1) the alter ego claim be a general claim that applies equally to all creditors, and (2) [*1320] state law allows the corporate entity to bring an alter ego action against its principal. *See St. Paul Fire & Marine Ins.*, 884 F.2d at 703-04 (interpreting state law to allow corporations to bring alter ego actions against a parent because it prevents injustice and allowing third party creditors to only bring personal and not general alter ego type claims); *Koch*, 831 F.2d at 1345-46.

In *Koch* for example, oil company creditors asserted their right to bring a separate alter ego action against a debtor corporation. The Seventh Circuit concluded that Illinois and Indiana law allowed a trustee in bankruptcy to bring an alter ego action on behalf of the debtor corporation, and therefore, the trustee had the exclusive right to bring an alter ego claim. *See id.* at 1346. The court reasoned that both Indiana and [**9] Illinois alter ego law was based on a doctrine that imposed liability to reach an equitable result, and, therefore, could allow a trustee to bring an alter ego suit against the principal if equity so required. [6]

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[4] While other circuits have recognized that section 544 may be an alternative grounds for trustees and debtor corporations to assert exclusive alter ego claims as representatives of all creditors, see, e.g., Koch, 831 F.2d 1339, 1342-43 (7th Cir. 1987), we believe this approach, though not dispositive here, is tenuous at best. Our decision in *E.F. Hutton & Co. v. Hadley*, casts serious doubt on the use of section 544 to bring alter ego actions. 901 F.2d 979, 985-86 (11th Cir. 1990). The purpose of section 544 is to give a trustee the power of a hypothetical lien creditor to avoid transfers of and liens on the debtor's property when the trustee cannot prevent them under other sections of the bankruptcy code. *See* 11 U.S.C. § 544; *In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1229-30 (8th Cir. 1987) ("Ozark"). Many courts have completely rejected 544's use as a means for debtor corporations to bring alter ego actions. *See, e.g.*, *id.* at 1230; *see also Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (interpreting *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972) to say 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."); *City Communications*, 105 B.R. at 1021 (interpreting *Caplin* and subsequent congressional history to mean section 544 is not an alternative for alter ego claims).

[5] A bankruptcy petition "operates as a[n] [automatic] stay applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate." 11 U.S.C. § 362(a)(3).

[6] The Illinois Supreme Court later rejected this interpretation of Illinois law, stating that Illinois alter ego law does not allow a subsidiary to bring an alter ego claim against its parent because to do so would torture the notion that alter ego claims are tools for creditors only and not corporations. See *In re Rehab. of Centaur Ins. Co.*, 158 Ill. 2d 166, 632 N.E.2d 1015, 1019, 198 Ill. Dec. 404 (Ill. 1994). The court noted that allowing a corporation to pierce its own veil would effectively deny the corporation of its own existence. *See id.* at 1018 (quoting *In re Dakota Drilling, Inc.*, 135 B.R. 878, 884 (Bankr. D.N.D. 1991)).

See id. The *Koch* court noted, however, that the trustee would only be able to bring general claims that are common to all creditors of the debtor corporation, and could not avoid the personal claims of creditors that are unique to that creditor. *See id.* at 1348-49. In *Koch*, the court concluded that the oil company's claims were general to all creditors and only affected the debtor corporation directly and the oil companies indirectly. *Id.* at 1349. Thus, the trustee in *Koch* could bring an exclusive alter ego action when the claims were common to all creditors and state law allowed a corporation to sue its principal.

[**10] In a subsequent opinion, the Seventh Circuit prevented a trustee from bringing an alter ego action because the claim was personal to the individual creditor and not general. *See Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994). In *Steinberg*, the bankruptcy trustee brought an alter ego suit against the debtor corporation's primary shareholders in an attempt to obtain money not paid to an employee pension fund. *See id.* at 891. The court found no evidence that the shareholders directly harmed the corporation itself by taking unreasonably high salaries or "looting" the corporate assets. *Id.* at 892. Only the pension fund was harmed directly. *See id.* Thus, the court held that an alter ego claim by the corporation itself would be improper because the injury was to the pension fund and not the corporation and creditors in general. [7]

[**11] On the other hand, the Eighth Circuit has interpreted Arkansas law to not allow alter ego actions by the corporation itself. *Ozark*, 816 F.2d at 1225. In *Ozark*, Arkansas law allowed veil piercing when "the corporate structure is illegally or fraudulently abused *to the detriment of a third person.*" *Id.* (citations omitted). The court concluded that this language means [*1321] that a veil-piercing action brought against a corporation is personal to the creditors themselves and cannot be brought by the corporation. *See id.* Thus, the veil piercing or alter ego claim is not property of the bankruptcy estate for the trustee to administer. *See id.*

Like many courts that have addressed this issue, we hold that in order to bring an exclusive alter ego action under section 541, a bankruptcy trustee's claim should (1) be a general claim that is common to all creditors and (2) be allowed by state law. *See In re iPCS, Inc.*, 297 B.R. 283, 297 (Bankr. N.D. Ga. 2003). In this action, we find that Baillie Lumber asserts only a general cause of action and no personal damages that are unique to them. Baillie Lumber's claim would be personal if Baillie Lumber [**12] itself was "harmed and no other . . . creditor has an interest in the cause." *Koch*, 831 F.2d at 1348. The claim is a general one when liability extends "to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Id.* at 1349. Here, the assertion is that Thompson blurred the line between himself and the corporation by taking assets of the corporation and using them to his own personal ends. Unlike the *Steinberg* shareholders, Thompson did "loot" the corporate assets. An alter ego action under these circumstances could be brought by all creditors of Icarus. Baillie Lumber has shown no unique or personal harm aside from the fact that each creditor would demand a different amount in compensation. By misappropriating corporate assets, Thomson caused direct harm to the corporation and only indirect harm to Baillie Lumber. Thus, this action meets our first factor. However, it is unclear whether Georgia law allows a corporation to bring an alter ego action against itself.

B. *Georgia Alter Ego Law*

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[7] *Steinberg* compares this claim to a hypothetical tort claim, where the neighbor of the debtor corporation's principal is injured on the principal's property. The action brought by the neighbor in that case would be personal to the neighbor and not the sort of general claim a bankruptcy trustee could take. *Steinberg*, 40 F.3d at 892.

There is no Georgia law that directly addresses whether a trustee for a debtor corporation in [**13] bankruptcy can bring an alter ego action against the corporation's former principal. In Georgia, alter ego and veil-piercing actions are based on equitable principals. *Acree v. McMahan*, 276 Ga. 880, 882, 585 S.E.2d 873 (Ga. 2003). Georgia courts allow alter ego actions "to remedy injustices which arise where a party has overextended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or evade contractual or tort responsibility." *Paul v. Destito*, 250 Ga. App. 631, 550 S.E.2d 739, 747 (Ga. App. 2001) (citations omitted). The Georgia Supreme Court in past decisions, however, has noted that it "has been reluctant to disregard the corporate entity except where third parties were involved in dealing with the corporation and director or shareholder liability was in question, or where public policy might require looking beyond the corporate structure in the public interest." *Pickett v. Paine*, 230 Ga. 786, 199 S.E.2d 223, 227 (Ga. 1973). [8] *In Pickett*, the court refused to pierce the corporate veil for the benefit of a minority shareholder's suit against the majority shareholder. *Id.* at 228. [**14] The Georgia Court of Appeals, however, has rejected the proposition that Georgia law *per se* "prohibits a director, officer, or shareholder from piercing the corporate veil." *Paul*, 550 S.E.2d at 747; *see also Cheney v. Moore*, 193 Ga. App. 312, 387 S.E.2d 575, 576-77 (Ga. App. 1989) (holding that a 50 percent shareholder can pierce the corporate veil). Thus, as far as we can determine there is no clear demarcation in Georgia law that [*1322] allows us to say an alter ego action is property of the bankruptcy estate.

The only courts in Georgia to address this issue directly are the federal bankruptcy courts, but they are divided on whether Georgia law allows a corporation to bring this type of alter ego action. *Compare Adam Furniture*, 191 B.R. at 255 (considering the corporation's alter ego claim as property of the [**15] estate under Georgia law), *and City Communications*, 105 B.R. at 1022 (interpreting Georgia law to allow corporations to bring alter ego claims), *with Ellenberg v. Waliagha (In re Mattress N More, Inc.)*, 231 B.R. 104, 109 (Bankr. N.D. Ga. 1998) (holding that Georgia law does not allow a corporation to bring alter ego actions). In the first case to consider the question, the *City Communications* court compared the *Koch* and *Ozark* cases and determined that, like the *Koch* court, Georgia alter ego law would allow a debtor corporation to bring general alter ego claims in bankruptcy because Georgia law was founded on equity concerns. *See City Communications*, 105 B.R. at 1022. [9] The *Adam Furniture* court subsequently followed the same reasoning and determined Georgia law allowed a corporation's alter ego suit for equity reasons. 191 B.R. at 255.

[**16] The *Mattress N More* court, on the other hand, rejected the reasoning of both *City Communications* and *Adam Furniture* to hold that Georgia law will not allow a corporation's alter ego suit. The court reasoned that although it might make sense for a trustee to have exclusive possession of an alter ego action, there was no basis in Georgia or bankruptcy law for such a result. *See Mattress N More*, 231 B.R. at 109-10. The court was troubled that a corporate entity created to shield shareholders from liability would itself assert a claim to destroy that protection. *Id.* at 109. Further, the court determined that it was "relatively difficult to pierce the corporate veil in Georgia." *Id.* Thus as the court explained, the

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[8] It is unclear whether public policy in the second part of this statement would allow a corporation to bring an alter ego suit against a principal.

[9] The bankruptcy court did note that, traditionally, alter ego actions are asserted by only creditors and not the corporation. *See City Communications*, 105 B.R. at 1022. The court, however, explained that state law makes it unlikely for a corporation to bring an alter ego action outside of bankruptcy because that would normally require the officers and directors to sue themselves. *See id.* Bankruptcy policy on the other hand has "different motives and policies underlying the development of their equitable remedies. . . ." and therefore makes "the logical and proper party to pursue [an alter ego] claim . . . the trustee." *Id.*

issue is ripe for certification to the Georgia Supreme Court. *Id.* at 109 n.3. Considering the split between Georgia bankruptcy courts and the uncertain state of Georgia alter ego law, we choose to certify the following question to the Georgia Supreme Court:

1. WILL GEORGIA LAW ALLOW THE REPRESENTATIVE OF A DEBTOR CORPORATION TO BRING AN ALTER EGO CLAIM AGAINST THE CORPORATION'S FORMER PRINCIPAL?

2. IF [**17] SO, WHAT IS THE MEASURE OF RECOVERY?

III. CONCLUSION

This appeal comes after the bankruptcy and district courts interpreted Georgia law to allow a corporation to bring an alter ego suit, therefore making such a suit property of the bankruptcy estate under 11 U.S.C. § 541. Because we find Georgia law is not clear in regard to this issue we have certified the question above. Our particular phrasing of this question is not intended to limit the inquiry of the Supreme Court. Neither is our recital of the parties' arguments intended to substitute for the full statement of contentions by the parties. [*1323] The Supreme Court is at liberty to consider the problems and issues involved in this case as it perceives them to be. To assist in its consideration of this question, the entire record, along with the briefs of the parties, will be transmitted to the Supreme Court of Georgia. Until the Supreme Court responds to our certified question, all relevant proceedings in this appeal are STAYED.

QUESTION CERTIFIED.

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In re Xenerga, Inc.

United States Bankruptcy Court for the Middle District of Florida, Orlando Division

May 24, 2011, Decided

Case No. 6:09-bk-13954-KSJ, Chapter 7

Reporter
449 B.R. 594 *; 2011 Bankr. LEXIS 1915 **; 54 Bankr. Ct. Dec. 220; 23 Fla. L. Weekly Fed. B 28

In re XENERGA, INC., Debtor.

Counsel: [**1] For Xenerga, Inc., Debtor: Maureen A Vitucci, Gray Robinson PA, Orlando, FL.

For Marie E. Henkel, Trustee: Richard B Webber, II, Zimmerman Kiser & Sutcliffe PA, Orlando, FL.

Judges: KAREN S. JENNEMANN, United States Bankruptcy Judge.

Opinion by: KAREN S. JENNEMANN

Opinion

[*596] MEMORANDUM OPINION DENYING APPROVAL OF COMPROMISE OF CONTROVERSY

Before this bankruptcy case was filed, two of the debtor's unsatisfied customers, [*597] North Texas Alternative Energy, LLC, and NTAE Biofuel Mfg., LLC (together, "NTAE"), sued the debtor and three insiders in state court alleging numerous causes of action arising from a breach of contract between the parties. The Chapter 7 trustee, Marie Henkel, now seeks approval to settle NTAE's claims against the debtor's insiders for $80,000, arguing that the claims actually are "alter ego" claims which are subject to her administration and that she has not authorized NTAE to continue prosecuting the claims. NTAE objects to the proposed compromise, arguing the trustee cannot settle NTAE's "direct" claims against the insiders for their individual liability to NTAE because such claims do *not* belong to the estate. The Court denies approval of the settlement because NTAE has alleged at least two direct claims [**2] against the insiders that the trustee indeed cannot settle.

On April 21, 2009, NTAE filed a complaint against Xenerga, Raptor Fabrication & Equipment, Inc., [1] Filta Group, [2] Victor Clewes, and Jason Sayers (Clewes and Sayers together, the "Principals") in the Circuit Court of the Ninth Judicial Circuit for Orange County, Florida. [3] NTAE brought claims for breach of contract, fraud in the inducement, breach of fiduciary duty, negligent misrepresentation, violations of Florida's Uniform Fraudulent Transfer Act ("FUFTA"), declaratory judgment, violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), conspiracy, and unjust enrichment. This state court action was stayed as to the debtor when, on September 18, 2009, Xenerga filed this Chapter 7 bankruptcy case. [4] Ms. Henkel later was appointed the Chapter 7 trustee.

On October 22, 2010, the trustee filed her Motion for Approval and Notice of Compromise of Controversy attaching a proposed stipulation [5] that seeks to settle all "insider preference claims, fraudulent transfer claims and alter ego claims, sounding in breach of fiduciary duty, conspiracy, unjust enrichment, fraud in the inducement and violation of Florida Deceptive and Unfair Trade [**4] Practices Act" (the "Claims") brought by NTAE against the Principals and Filta. For $80,000, the trustee agrees to release the Principals and Filta from the Claims asserted by NTAE in the state court complaint inasmuch as the Claims arguably constitute "general claims" that only the trustee can assert.

NTAE objects to the trustee's settlement for two reasons: (1) the trustee is attempting to settle claims she has no authority to settle because they are not [*598] property of the estate, and (2) even if the trustee does have authority to settle such claims, the compromise is not in the best interest of creditors under the *Justice Oaks* [6] standard. The trustee responds that *all* of NTAE's state court claims against the Principals are derivative "alter ego" claims that belong to all creditors generally, and thus belong to the estate and are subject to administration by her alone. The trustee also evaluated her claims against the Principals and, in her sound business judgment, argues that the $80,000 settlement is in the best interest of the estate.

The threshold issue is whether the trustee has authority to settle the [**5] claims. Section 541(a) of the Bankruptcy Code [7] defines a debtor's bankruptcy estate to include "all legal and equitable interests of the debtor in property as of the commencement of the case." This includes legal causes of action the debtor had against others as of the commencement of the bankruptcy case. [8] Only a bankruptcy trustee has standing to assert causes of action that belong to the estate, and any similar lawsuits brought by individual

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[1] NTAE's claims against Raptor raised in Count 11 of the state court complaint are resolved. Raptor is no longer a party to the state court suit. However, the Court is unclear as to whether NTAE is still pursuing Clewes and Sayers individually on an alter ego theory of liability in connection with its breach of contract, negligent misrepresentation, and unjust [**3] enrichment causes of action against Raptor. To be thorough, the Court assumes NTAE has not yet abandoned such causes of action for purposes of this order.

[2] Filta Group, formerly the debtor's landlord, is a related entity that also is owned and operated by Clewes and Sayers.

[3] Case No. 09-CA-12495 (Ex. 1, Doc. No. 70).

[4] On August 2, 2010, the Florida Circuit Court entered an Order Granting in Part and Denying in Part Motion to Stay Proceedings as to the Principals, which stayed NTAE's claims against Clewes and Sayers for breach of contract and unjust enrichment but allowed all other claims to proceed "unless and until the automatic stay provision in Xenerga, Inc.'s bankruptcy case, Case No. 6:09-bk-13954, in the Middle District of Florida, Orlando Division is deemed to apply to these claims." Ex. 6 (Doc. No. 70).

[5] Doc. No. 53.

[6] *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990).

[7] All references to the Bankruptcy Code are to Title 11 of the United States Code.

[8] *Icarus Holding*, 391 F.3d at 1319.

creditors are subject to the automatic stay provision of § 362(a)(3). [9] Likewise, the trustee has no right to bring claims that belong solely to the estate's creditors. [10]

Under Florida law, an alter ego claim is an action to impose liability on a corporation's principals or related entities where a corporation was "organized or used to mislead creditors or to perpetrate a fraud upon them." [11] In such circumstances Florida courts will "pierce the corporate veil" upon finding by a preponderance of the evidence that:

> (1) [a] shareholder dominated and controlled [**6] the corporation to such an extent that the corporation's existence, was in fact nonexistent and the shareholders were in fact alter egos of the corporation;
> (2) the corporate form must have been used fraudulently or for an improper purpose; and
>
> (3) the fraudulent or improper use of the corporate form caused injury to the claimant. [12]

The Eleventh Circuit Court of Appeals has held an alter ego action belongs to the bankruptcy estate under § 541 if (1) it is "a general claim that is common to all creditors," and (2) state law allows the corporate entity to bring an alter ego action against its principal. [13] An alter ego claim is a general one when liability extends "to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." [14] In other words, if the injury alleged in the alter ego action is an injury to the corporation and thus suffered generally by all creditors, and is not an injury [*599] inflicted directly on any one creditor, the trustee has exclusive standing to bring such an alter ego action. Conversely, a trustee may not bring an alter ego claim [**7] if the alleged injury is specific to one creditor and not to the debtor corporation and creditors generally. [15]

The alter ego allegations raised in NTAE's complaint raise a general claim that is common to all creditors: [16]

> 65. Clewes and Sayers dominated and controlled both Xenerga and FiltaFry in such a way that the companies were in essence merely an alter ego used for their personal benefit.
> * * *
> 69. Xenerga and FiltaFry were merely a device or sham by which Clewes and Sayers secured huge up front deposits from 'customers' and then absconded with their money and/or hiding asserts by transferring sums between the two companies without consideration, and with the ultimate goal of defrauding the Xenerga clientele, such as Plaintiffs.

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[9] *Id*.

[10] *See, e.g., Caplin v. Marine Midland Grace Trust Co*., 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972).

[11] *Seminole Boatyard, Inc. v. Christoph*, 715 So.2d 987, 990 (Fla. 4th DCA 1998).

[12] *Id*.

[13] *Icarus*, 391 F.3d at 1321.

[14] *Id*. (quoting *Koch Refining v. Farmers Union Cent. Exch., Inc*., 831 F.2d 1339, 1349 (7th Cir. 1987).

[15] *Id.; Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994).

[16] Ex. 1, ¶¶ 56-70.

> 70. Upon information and belief, the corporate property of Xenerga was converted and/or depleted for the benefit of FiltaFry, and ultimately Clewes and Sayers, including but not limited to the purpose of funneling funds into their new FiltaFry project in anticipation [**8] of walking away from Xenerga.

NTAE thus alleges the Principals should be liable for *all* of Xenerga's corporate debts because their actions wrongfully depleted its assets. NTAE's alter ego allegations describe a harm suffered by *all* of Xenerga's creditors, not just NTAE, and therefore are general to all of Xenerga's creditors. The trustee is the proper party to assert such an alter ego action. NTAE's alter ego claims belong to the estate under § 541.

As to whether Florida law allows the trustee to bring an alter ego action, the Court finds Florida law would allow a corporation to pierce its own corporate veil in an alter ego action against the corporation's principals. Under Florida case law, the purpose of an alter ego action or an action to "pierce the corporate veil" is to disregard the corporate entity in circumstances where it would be inequitable to allow a corporation's principals to hide behind the corporate form. [17] In elaborating on this standard, the Florida Supreme Court has stated a plaintiff must show that a corporation

> was organized...for fraudulent or misleading purposes, or in some fashion that the corporate property was converted *or the corporate assets [**9] depleted for the personal benefit of the individual stockholders*, or...in general, that property belonging to the corporation can be traced into the hands of the stockholders. [18]

As such, under Florida law, an injured party may pierce the corporate veil if insiders abuse the corporate form and injured a party. Trustees who represent the interest of all unsecured creditors of a debtor corporation are in the best position to assert claims against abusive insiders who have harmed the general creditor body as a whole. Therefore, the Court finds that Florida law allows a Chapter 7 trustee to bring an alter ego action against [*600] a debtor's principals if they manipulated the corporation specifically to injure the corporation's creditors. Accordingly, because NTAE's alter ego claim is one general to all creditors in this case, and because the Court finds Florida law would allow the trustee to bring an alter ego claim against the Principals, NTAE's alter ego claim belongs to the estate and is most properly brought by the Chapter 7 trustee.

Having held that *only* the Chapter 7 trustee may bring an alter ego claim on behalf of the general creditor body of a debtor corporation, the next issue is whether *all* of NTAE's claims are derivative of its alter ego allegations, which NTAE can no longer pursue and which the trustee can settle, or, instead, whether NTAE has alleged any direct claims against the Principals and Filta. The Claims are derivative if they rely upon a finding of alter ego liability against the Principals but are direct if the Principals' liability is entirely independent of any alter ego finding.

The vast majority of NTAE's Claims are indirect claims derivative of an alter ego action. Specifically, the Principals are liable under NTAE's causes of action for breach of contract (Count I), [19] fraud in the

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[17] *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1118 (Fla. 1984).

[18] *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1120 (Fla. 1984) (quoting [**10] *Advertects, Inc. v. Sawyer Industries, Inc.*, 84 So.2d 21 (Fla. 1955)) (emphasis added).

[19] NTAE's breach of contract claim against Raptor (Count II) has been resolved to the extent Raptor is no longer a defendant to the state court action.

inducement (Count III), breach of fiduciary duty (Count V), [20] negligent misrepresentation (Count VI), fraudulent transfer (Count VII), declaratory judgment (Count VIII), and unjust enrichment (Counts XI and XII) (the "Indirect Claims") *only* if a court first pierces the debtor's corporate veil to hold the Principals individually [**11] liable for *all* of the corporation's debts. A cursory review of the complaint indicates that for each of these counts primarily asserted against Xenerga, NTAE simply tacked on allegations that the Principals are each individually liable for Xenerga's liabilities "by reason of the specific allegations contained herein," clearly referring to the alter ego allegations set forth in ¶¶ 56-70 of the complaint. Thus, NTAE's Indirect Claims are not separate causes of action from the identical claims asserted against Xenerga and Raptor within each count; they are merely derivative of such claims. The trustee, and only the trustee, can prosecute the alter ego claims raised in Counts I, III, V, VI, VII, VIII, XI, and XII. Because these claims only raise derivative claims relying on Xenerga's allegedly improper conduct, only the trustee can prosecute and settle (or not) these claims. The automatic stay applies to the indirect claims.

NTAE, however, has raised two direct claims against the Principals that do not rely upon either an alter ego finding or the debtor's independent liability: (1) its claim that the Principals are each individually liable under the Florida Deceptive and Unfair Trade Practices Act (Count IX), and (2) its claim that the Principles and Filta conspired with Xenerga to violate FDUTPA and commit other wrongful actions (Count X). Well established Florida case law holds that claims against a corporation's principal under the FDUTPA need only "allege that the individual was a direct participant in the improper dealings." [21] Piercing the corporate veil is [*601] unnecessary to find a corporation's principal individually liable. [22] NTAE thus need not bring an alter ego action to establish the Principals' liability under the FDUTPA. Accordingly, NTAE's claim under FDUTPA *is* a direct claim against the Principals that belongs solely to NTAE and not the estate.

Likewise, NTAE's conspiracy claim is directly against the Principals and Filta. The claim alleges Clewes and Sayers each conspired with Xenerga and Filta to commit unlawful acts, including fraudulent inducement into two contracts, fraudulent transfer of funds, violation of the FUDTPA, and breaches of fiduciary duties. The claim does not rely upon an alter ego finding because it alleges the Clewes and Sayers are liable in their capacity as individuals for conspiring with Xenerga and Filta. Thus, to the extent NTAE's conspiracy claim is a viable claim it is a direct claim against the Principals and Filta.

Because two of the Claims the trustee seeks to settle are direct claims held by NTAE against non-debtors, the trustee cannot settle these two claims. The proposed compromise improperly attempts to settle claims that are not property of the debtor's estate under § 541 of the Bankruptcy Code. Accordingly, the Court will deny approval of the compromise. [23] Moreover, for the reasons stated above, the Court holds that the automatic stay imposed by § 362(a)(3) of the Bankruptcy Code [**14] applies to all counts and causes of action in NTAE's state court amended complaint *except* for its direct claims against Clewes and Sayers

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[20] The amended complaint is numbered incorrectly and does not have a Count IV. Regardless, the Court refers to the count [**12] numbers as stated in the amended complaint.

[21] *KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1074 (Fla. 4th DCA 2008); *Aboujaoude v. Poinciana Development Co. II*, 509 F.Supp.2d 1266 (S.D. Fla. 2007); *Anden v. Litinsky*, 472 So.2d 825 (Fla. 4th D.C.A. 1985).

[22] *Rollins, Inc. v. Heller*, 454 So.2d 580 (Fla. 3d DCA 1984) [**13] (noting it is unnecessary to pierce the corporate veil because the individual defendant was a direct participant in the dealings).

[23] Doc. No. 53.

under the FDUTPA in Count IX, and its direct claims against Clewes, Sayers, and Filta for civil conspiracy in Count X. All other claims against Clewes, Sayers, and Filta are stayed because they are derivative of the debtor's liability to NTAE and only the trustee may prosecute such claims on behalf of the estate.

A separate order consistent with this memorandum opinion will be entered simultaneously.

DONE AND ORDERED in Orlando, Florida, on May 24, 2011.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN

United States Bankruptcy Judge

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Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards

United States Court of Appeals for the Eleventh Circuit

January 30, 2006, Decided ; January 30, 2006, Filed

No. 05-12320

Reporter
437 F.3d 1145 *; 2006 U.S. App. LEXIS 2227 **; Bankr. L. Rep. (CCH) P80,449; 19 Fla. L. Weekly Fed. C 227

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PSA, INC., et al., on behalf of PSA, Inc., et al., Plaintiff, TRUSTEE DARRYL S. LADDIN, of the ETS Creditors' Litigation Trust, Plaintiff-Appellant, versus CHARLES EDWARDS, et al., Defendants, LEGENDS COMMUNICATIONS, INC., SHELDON E. FRIEDMAN, FRIEDMAN, DEVER & MERLIN, LLC, PWH, INC., d.b.a. Friedman, Denver & Merlin, LLC d.b.a. Sheldon E. Friedman, KARLOVEC FINANCIAL, INC., RELIANCE TRUST COMPANY, PENSCO, et al., Defendants-Appellees.

Subsequent History: Summary judgment granted by, Partial summary judgment denied by Laddin v. Edwards, 2006 U.S. Dist. LEXIS 30356 (N.D. Ga., Apr. 20, 2006)

US Supreme Court certiorari denied by Laddin v. Reliance Trust Co., 549 U.S. 811, 127 S. Ct. 45, 166 L. Ed. 2d 19, 2006 U.S. LEXIS 5711 (2006)

Prior History: [**1] Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 02-03327-CV-TWT-1.

Disposition: AFFIRMED.

Counsel: For DARRYL S. LADDIN, Appellant; Ross H. Parker, Phil C. Appenzeller, Jr., LaDawn Horn Conway,Munsch Hardt Kopf & Harr, P.C., Dallas, TX, Allen I. Hirsh, Neil C, Gordon, Arnall, Golden & Hirsch, Atlanta, GA.

For LEGENDS COMMUNICATIONS, INC., SHELDON E. FRIEDMAN, FRIEDMAN, DEVER & MERLIN, LLC, PWH, INC., KARLOVEC FINANCIAL, INC., RELIANCE TRUST COMPANY, PENSCO, Appellee; George William Long, III, Adam Scott Katz, Womble, Carlyle, Sandridge & Rice, PLLC, Atlanta, GA, Dennis P. Zapka, Cleveland, OH, David W. White, Brandee B. Bower, Foland

Wickens Eisfelder Roper & Hofer, Kansas City, MO, Henry D. Fellows, Jr., Fellows, Johnson & La Briola, Atlanta, GA, Craig A. Gillen, Gillen, Parker & Withers, LLC, Atlanta, GA.

Judges: Before CARNES, HULL and PRYOR, Circuit Judges.

Opinion by: Pryor

Opinion

[*1148] PRYOR, Circuit Judge:

This appeal presents two issues, the first of which is an issue of first impression in this Circuit: (1) whether the doctrine of in pari delicto bars a trustee's claims on behalf of a bankrupt debtor for violations of the Racketeer Influenced and Corrupt Organizations Act; and (2) whether the trustee can maintain a claim for aiding and abetting a breach of fiduciary duties under Georgia law. See 11 U.S.C. § 541(a); 18 U.S.C. § 1964(c). Darryl S. Laddin is the trustee-in-bankruptcy for ETS, which operated a massive Ponzi scheme that defrauded thousands of investors of hundreds of millions of dollars. Laddin appeals an order that dismissed his complaint, under RICO and Georgia law, against entities that, Laddin alleges, assisted ETS in the operation of its fraudulent scheme. Because the defense of in pari delicto bars recovery by a central and active violator of RICO and Georgia courts do not recognize a [**2] claim for aiding and abetting a breach of fiduciary duties, we affirm the dismissal of Laddin's complaint.

I. BACKGROUND

In his complaint, Laddin alleged that in October 1994, Charles Edwards formed ETS Payphones, Inc., a company that sold and leased-back payphones as investment opportunities. "With Edwards at its helm, ETS devised [a] scheme" where an investor paid a fixed sum to purchase a payphone, and ETS leased the payphone back from the investor for a fee. "ETS represented itself as . . . a no loss proposition" and induced individuals to purchase the phones. Although "ETS . . . created marketing and promotional materials that promised returns . . . of 14% or 15%," it consistently lost money on its payphone operations and continually had to attract new investors to meet its obligations to existing investors. "With the sale of each phone, ETS assumed a liability it could not satisfy." The operation of the sale-leaseback program was a Ponzi scheme that defrauded thousands of investors of over $ 300 million. As the sole shareholder of ETS, Edwards transferred the proceeds from ETS to himself or other companies he owned.

On September 11, 2000, ETS filed for bankruptcy. [**3] The bankruptcy court allowed the creation of an Official Committee of Unsecured Creditors, and the Debtors and Creditors' Committee created the ETS Creditors' Litigation Trust. The committee appointed Laddin as trustee of the debtor estate.

Laddin sued several defendants, including Reliance Trust Co., PENSCO, Inc., and Community National Bank, for (1) aiding and abetting a breach of fiduciary duties under Georgia law, (2) violations of section 1962(c) and (d) of RICO, 18 U.S.C. §§ 1962(c), (d), and (3) avoidance claims. Reliance Trust Co., PENSCO, Inc., and Community National Bank (collectively, IRA Custodians) are large holders of individual retirement accounts, and Laddin alleged that these IRA Custodians aided ETS in defrauding investors by funneling investor IRA funds into ETS payphone investments. Laddin alleged that "by failing to conduct appropriate due diligence and/or ignoring the facts altogether," "the IRA Custodians enabled thousands of investors to partake of the ETS scheme and caused ETS to incur millions of dollars in additional debt."

The IRA Custodians moved to dismiss Laddin's complaint. They argued that Laddin, as trustee, could not maintain a claim [**4] of aiding and abetting a breach of fiduciary duties and the doctrine of in pari delicto, which provides that a wrongdoer [*1149] may not profit from his wrongful acts, barred Laddin's claims. The district court granted the motions to dismiss.

Before it addressed the merits of Laddin's complaint, the district court addressed Laddin's standing to sue. The district court concluded that Laddin had standing to bring claims on behalf of the debtor, ETS, but Laddin did not have standing to assert claims on behalf of the creditors. The court reasoned that the Creditors' Committee did not have the authority to assign the claims belonging to ETS creditors and the Trust Agreement did not authorize Laddin to bring claims on behalf of creditors.

The district court also concluded that the doctrine of in pari delicto barred Laddin's complaint. The district court found that, under Georgia law, the wrongdoing of Edwards as a sole shareholder was imputed to ETS, the debtor corporation, under the "sole actor" rule. The court reasoned that, because the "legal and equitable interests of the debtor" in bankruptcy are only as strong as the debtor's claim against defendants at the commencement of the bankruptcy, [**5] see 11 U.S.C. § 541(a), the doctrine of in pari delicto barred Laddin's state law claims. The district court also held that the doctrine of in pari delicto barred Laddin's claims under RICO. Laddin appeals the dismissal by the district court.

II. STANDARD OF REVIEW

This Court reviews de novo the ruling of the district court on a motion to dismiss and construes the allegations in the complaint "in the light most favorable to the plaintiff." Jackson v. BellSouth Telcomms., 372 F.3d 1250, 1263 (11th Cir. 2004). A motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101, 2 L. Ed. 2d 80 (1957).

III. DISCUSSION

Our discussion is divided into three parts. We first address the trustee's argument that his complaint is not subject to a defense of in pari delicto that might have been asserted against the debtor. We then discuss whether the defense of in pari delicto can be asserted against a plaintiff who asserts violations [**6] of the federal RICO statute. We finally consider whether the trustee can maintain a claim under Georgia law for aiding and abetting a breach of fiduciary duties.

A. The Trustee Is Subject to the Defenses that Were Available Against the Debtor.

The Bankruptcy Code provides that property of the debtor estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "Legal interests or equitable interests" include any causes of action the debtor may bring. Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 356 (3d Cir. 2001). A trustee, as the representative of the estate, succeeds into the rights of the debtor-in-bankruptcy and has standing to bring any suit that the debtor corporation could have brought outside of bankruptcy. 11 U.S.C. § 323; O'Halloran v. First Union Nat'l Bank, 350 F.3d 1197, 1202 (11th Cir. 2003). The argument of the IRA Custodians that the wrongdoing of ETS deprives Laddin of standing to assert claims against them fails because "an analysis of standing does not include an analysis of [**7] equitable defenses, such as in pari delicto." R.F. Lafferty & Co., 267 F.3d at 347. We agree with the district court that Laddin had standing based on [*1150] an alleged injury to the debtor estate, see id. at 346-48, but Laddin's standing to bring claims on behalf of the debtor estate does not mean that the debtor's wrongdoing is immaterial.

Laddin contends that his enforcement, as a trustee of the "legal interests or equitable interests" of the debtor estate, is not subject to the doctrine of in pari delicto. Laddin argues that, because the doctrine of in pari delicto depends on the "personal malfeasance of the individual seeking to recover," the wrongs of ETS should not be imputed to him as the bankruptcy trustee. Laddin asserts that his argument is supported by the legislative history to the Bankruptcy Code, which explains that "to the extent . . . an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate." 124 Cong. Rec. 32,399 (1978).

We need not resort to legislative history because the [**8] text of section 541(a) is unambiguous, and "the language of our laws is the law." CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1227 (11th Cir. 2001). Under the plain meaning of section 541(a), the debtor estate includes all "legal or equitable interests of the debtor as of the commencement of the case." 11 U.S.C. § 541(a) (emphasis added). "A bankruptcy trustee stands in the shoes of the debtor and has standing to bring any suit that the debtor could have instituted" when the debtor filed for bankruptcy, and there is no suggestion in the text of the Bankruptcy Code that the trustee acquires rights and interests greater than those of the debtor. O'Halloran, 350 F.3d at 1202; see also 11 U.S.C. § 362(a). If a claim of ETS would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense.

Even if we considered legislative history, Laddin's argument would fail. The portion of the legislative history on which Laddin relies pertains to section 541(d), not section [**9] 541(a). Section 541(d) governs "property in which the debtor holds . . . only legal title and not an equitable interest, such as a mortgage secured by real property . . . ." 11 U.S.C. § 541(d). The portion of the legislative history quoted by Laddin is inapplicable to the interpretation of "property of the debtor estate" under section 541(a). See 124 Cong. Rec. 32,399. In the law of commercial paper, personal defenses are affirmative defenses that may not be asserted against a holder-in-due-course. See U.C.C. § 3-305(a)(1), (2), (3) (stating that a holder-in-due-course is subject to real defenses of duress, fraud in the factum, infancy, insolvency, and legal incapacity); see also FDIC v. Wood, 758 F.2d 156, 160 (6th Cir. 1985); 6 Ronald A. Anderson, Anderson on the Uniform Commercial Code § 3-305:103 (3d ed., rev. vol. 1998) ("Under the Negotiable Instruments Law that preceded the Code, the defenses were divided into real and personal defenses."). In

his complaint, Laddin does not assert any rights either as a holder-in-due-course or under section 541(d). Laddin provides no support for his assertion that in pari [**10] delicto is a personal defense that is excluded from the debtor estate under section 541(a).

Our reading of the text of section 541(a) also comports with the purposes of the Bankruptcy Code. See Demarest v. Manspeaker, 498 U.S. 184, 190-91, 111 S. Ct. 599, 604, 112 L. Ed. 2d 608 (1991) (stating that the text of the statute governs unless the result would be "so bizarre that Congress could not have intended it" (internal quotations and citations omitted)). Upon the commencement of a bankruptcy case, [*1151] an automatic stay freezes the rights of parties to the bankruptcy, both debtor and creditors. 11 U.S.C. § 362(a). The automatic stay and the definition of the debtor estate "place[] both temporal and qualitative limitations on the reach of the bankruptcy estate." Sender v. Buchanan (In re Hedged-Inv. Assocs.), 84 F.3d 1281, 1285 (10th Cir. 1996); see 11 U.S.C. § 541. Under Laddin's erroneous interpretation of section 541, a postpetition event, the appointment of a trustee, could undermine the automatic stay and change the nature of the legal and equitable interests of the debtor estate.

Laddin argues [**11] that his recovery would ultimately inure to the benefit of innocent creditors instead of the wrongful debtor, but he fails to account for the likelihood that individual creditors damaged by the debtor's Ponzi scheme could separately pursue claims against the IRA Custodians free from the bar of in pari delicto. If Laddin were allowed to pursue the debtor's claims, his recovery, on the one hand, would become part of the bankruptcy estate to be apportioned among creditors without regard to whether they were harmed by the IRA Custodians. See 11 U.S.C. §§ 507, 1129(b)(2) (stating that the plan of confirmation must be "fair and equitable[] with respect to each class of claims or interests"). If creditors who were harmed by the IRA Custodians, on the other hand, sued separately outside of bankruptcy, then those creditors would not risk dilution through apportionment to senior creditors or unharmed creditors of equal priority. See id. § 507 (prioritizing classes of claims). Creditors whose legal interests were harmed by the IRA Custodians could rightfully recover more outside of bankruptcy because they would not compete with the trustee's claims on behalf [**12] of the debtor estate.

We are not alone in concluding that the defense of in pari delicto may be asserted against a bankruptcy trustee. Although this is an issue of first impression in this Circuit, our sister circuits that have considered the issue have unanimously concluded that in pari delicto applies with equal force to a trustee-in-bankruptcy as a debtor outside of bankruptcy. See Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833, 837 (8th Cir. 2005); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 356-57 (3d Cir. 2001); Terlecky v. Hurd (In re Dublin Sec.), 133 F.3d 377, 381 (6th Cir. 1997); Sender v. Buchanan (In re Hedged-Inv. Assocs.), 84 F.3d 1281, 1285 (10th Cir. 1996); see also Official Comm. of Unsecured Creditors of Color Tile v. Coopers & Lybrand, LLP, 322 F.3d 147, 158-66 (2d Cir. 2003) (applying the defense of in pari delicto to bar Texas law claims brought by trustee-in-bankruptcy). Against this weight of authority, Laddin urges us to chart a new course.

Laddin erroneously relies on a decision of the Seventh Circuit and the perspective of a commentator [**13] to support his argument that in pari delicto does not bar recovery by a bankruptcy trustee. See Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995); cf. Jeffrey Davis, Ending the Nonsense: The *In Pari Delicto* Doctrine Has Nothing to Do with What Is § 541 Property of the Bankruptcy Estate, 21 Emory Bankr. Dev. J. 519, 542 (2005). Laddin argues that the Seventh Circuit refused to apply in pari delicto to bar recovery for a receiver who brought a fraudulent conveyance action under Illinois law, Scholes, 56 F.3d at 754, but Laddin's appeal is governed by the Bankruptcy Code, not the law of receiverships and fraudulent conveyances under state law. See Knauer v. Jonathon Roberts Fin.

Group, Inc., 348 F.3d 230, 234-37 (7th Cir. 2003); In re Hedged-Inv. Assocs., 84 F.3d at 1285 & n.5. Fraudulent conveyances [*1152] also are an exception to the general rule that the trustee takes the debtor estate as it is at the commencement of the bankruptcy. Compare 11 U.S.C. § 544(b) (providing that trustees may void prepetition fraudulent conveyances after the commencement of the bankruptcy) [**14] with id. § 541(a) (providing that the debtor estate includes "all legal or equitable interests of the debtor in the property as of the commencement of the case" (emphasis added)). As for Laddin's other persuasive authority, the legal commentator makes the same flawed arguments about legislative history and the Scholes decision that we have already rejected. See Davis, supra at 521-22, 538-39; see also Tanvir Alam, Fraudulent Advisors Exploit Confusion in the Bankruptcy Code: How *In Pari Delicto* Has Been Perverted to Prevent Recovery for Creditors, 77 Am. Bankr. L.J. 305 (2003).

Both the text and purposes of the Bankruptcy Code support the conclusion of the district court that Laddin's complaint is subject to the same defenses that were available against a complaint filed by the debtor at the commencement of the bankruptcy. "The equitable defense of in pari delicto is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor." Grassmueck, 402 F.3d at 837 (citing R.F. Lafferty & Co., Inc., 267 F.3d at 355-56, 358). The next questions [**15] involve whether the defense of in pari delicto would have barred recovery by the debtor, ETS, under either the federal RICO statute or Georgia law. We consider these questions in turn.

B. The Doctrine of In Pari Delicto Bars a RICO Claim by a Conspirator.

Laddin argues that the district court erroneously dismissed his RICO claims because the defense of in pari delicto is not an available defense against the debtor. Under RICO, "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains . . . ." 18 U.S.C. § 1964(c). Section 1962(c) of RICO states, "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Id. § 1962(c). Conspiracies in violation of section 1962(c) are also prohibited. Id. § 1962(d).

The doctrine of in pari delicto is an equitable doctrine that states "a plaintiff who has participated in wrongdoing may not recover damages [**16] resulting from the wrongdoing." Black's Law Dictionary 794 (7th ed. 1999). This common law defense "derives from the Latin, in pari delicto potior est conditio defendentis: 'In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.'" Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306, 105 S. Ct. 2622, 2626, 86 L. Ed. 2d 215 (1985). The doctrine of in pari delicto is based on the policy that "courts should not lend their good offices to mediating disputes among wrongdoers" and "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." Id. The issue whether this defense bars a complaint under RICO is one of first impression for our Circuit.

The federal law of affirmative defenses governs the enforcement of causes of action created by federal statutes. See O'Melveny & Myers v. FDIC, 512 U.S. 79, 84-85, 114 S. Ct. 2048, 2053, 129 L. Ed. 2d 67 (1994). There is a paucity of federal caselaw regarding whether the doctrine of in pari delicto bars a complaint under RICO, [*1153] and none of our sister circuits have squarely decided the issue. See [**17] Roma Constr. Co. v. Russo, 96 F.3d 566, 570 (1st Cir. 1996) ("Whether or not there exists such an 'innocent party' requirement is a question of first impression in this circuit and, indeed, we are not aware of any cases anywhere that adopt such a requirement."); cf. Bontkowski v. First Nat'l Bank of

Cicero, 998 F.2d 459, 462 (7th Cir. 1993) (considering whether the doctrine of in pari delicto barred a RICO defendant for purposes of equitable tolling).

In two cases, the Supreme Court has considered the application of the in pari delicto doctrine in the enforcement of antitrust and securities laws. Bateman Eichler, 472 U.S. 299, 105 S. Ct. 2622, 86 L. Ed. 2d 215; Perma Life Mufflers, Inc. v. Internat'l Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968). Although in both cases it declined to apply the doctrine of in pari delicto, the Court explained that this or a related doctrine might apply in other contexts. We consider each decision of the Supreme Court for guidance in resolving this issue.

At first glance, the earlier decision of the Supreme Court, Perma Life Mufflers, would appear [**18] to preclude the use of in pari delicto against a federal RICO claim because the Court held "that the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." 392 U.S. at 140, 88 S. Ct. at 1985. The plaintiffs were franchisees who alleged that the franchisor, its parent corporation, other subsidiaries, and several individuals conspired to restrain trade and engage in illegal price discrimination. Id. The Court cautioned against "invoking broad common-law barriers to relief where a private suit serves important public purposes," and in the antitrust context, the Court explained that there is an "overriding public policy in favor of competition." Id. at 138-39, 88 S. Ct. at 1984. "A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement." Id. That first glance does not tell the whole story, however.

The rest of the story in Perma Life Mufflers is that the franchisees were, in the eyes of the Court, at worst, passive violators of [**19] the antitrust laws. Because "in pari delicto literally means 'of equal fault,'" the Court reasoned that the doctrine should not "deny[] recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others." Id. at 138-39, 88 S. Ct. at 1985 (emphasis added). The Court explained that the participation of the franchisees in the alleged antitrust conspiracy "was not voluntary in any meaningful sense." Id. at 139, 88 S. Ct. at 1985. Although the franchisees "sought the franchises enthusiastically[,] . . . they did not actively seek each and every clause of the agreement." Id. The franchisees "alleged that they had continually objected to [the violative terms]." Id. Although the Court held that in pari delicto did not bar the franchisees from recovery, it explicitly left open the question whether complete involvement in an antitrust violation, "wholly apart from the idea of in pari delicto," would bar a plaintiff from bringing an antitrust claim. Id. at 140, 88 S. Ct. at 1985.

The later decision of the Supreme Court in Bateman Eichler [**20] is much like the earlier one in Perma Life Mufflers, because the Court refused to apply the doctrine of in pari delicto to bar tippees from recovery for insider trading under federal securities [*1154] laws. Bateman Eichler, 472 U.S. 299, 105 S. Ct. 2622, 86 L. Ed. 2d 215. The tippees alleged that a securities broker and a company official had induced them to purchase company stock by providing them with materially false insider information. Id. at 301-02, 105 S. Ct. at 2624-25. The tippees alleged that they suffered damages when the stock price fell as a result of the false information. Id.

As in Perma Life Mufflers, the holding in Bateman Eichler was limited, because the Court concluded that the tippees were not active participants in the alleged violation of federal law. The Court stated that, "in its classic formulation, the in pari delicto defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury," id. at 306-07, 105 S. Ct. at 2627, and the

Court explained that "where a plaintiff truly bore at least substantially equal responsibility [**21] for the violation, a defense based on such fault . . . should be recognized." Id. at 308-09, 105 S. Ct. at 2628 (emphasis added). The Court then concluded that the face of the complaint did not reveal that the tippees had engaged in wrongdoing. Id. at 311 n.21, 105 S. Ct. at 2629 n.21 (stating that "the complaint does not set forth sufficient facts to conclude" that the tippees were in delictum because "it is uncertain whether [the tippee-plaintiffs] had any basis to believe that [the tipper-defendant] . . . had violated his fiduciary duties").

The Court explained that "there are important distinctions between the relative culpabilities of tippers, securities professionals, and tippees in these circumstances." Id. at 312-13, 105 S. Ct. at 2630. The Court did "not believe that the tippee properly can be characterized as being of substantially equal culpability as his tippers." Id. at 314, 105 S. Ct. at 2631. The Court concluded that, because the tippers in Bateman Eichler "masterminded this scheme to manipulate the market . . . for their own personal benefit[] and . . . used the . . . respondents [**22] as unwitting dupes," the tippees were not equally culpable. Id.

The Court in Bateman Eichler expressed its desire to advance the policy goal of the securities laws to protect "the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'" Id. at 315, 105 S. Ct. at 2631 (citing SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87, 84 S. Ct. 275, 280, 11 L. Ed. 2d 237 (1963)). Because "'the true insider or the broker-dealer is at the fountainhead of the confidential information[,] . . . the most effective means . . . is to nip in the bud the source of the information'" and allow tippees to recover from the fraudulent tippers. Id. at 316, 105 S. Ct. at 2632 (quoting Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 57-58 (S.D.N.Y. 1971)). For that reason, the Court explained that a tippee's complaint should be barred "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not [**23] significantly interfere with the effective enforcement of the securities laws and protection of the investing public." Id. at 310-11, 105 S. Ct. at 2629.

Under Perma Life Mufflers and Bateman Eichler, the application of the defense of in pari delicto to causes of action created by federal statutes depends on two factors: (1) the plaintiffs' active participation in the violation vel non and (2) the policy goals of the federal statute. See Pinter v. Dahl, 486 U.S. 622, 632-33, 108 S. Ct. 2063, 2071, 100 L. Ed. 2d 658 (1988). Both of these factors support the application of the in pari delicto doctrine [*1155] in this appeal. We consider each factor in turn.

First, it is beyond doubt that the allegations of the trustee's complaint render ETS in active participation with the IRA Custodians. If anything, the conduct of ETS was in majore delicto. Laddin alleged that "ETS devised the scheme and promoted and marketed the sale and leaseback of payphones as investment opportunities to individuals." ETS also "controlled all aspects of the operation," "created marketing and promotional materials," and "promised returns . . . of 14% or 15%" although it "assumed [**24] a liability it could not satisfy." Although the IRA Custodians allegedly "enabled thousands of investors to partake of the ETS scheme and caused ETS to incur millions of dollars in additional debt," ETS "devised the scheme," transferred funds from IRA accounts, and "with the sale of each phone, [] assumed a liability it could not satisfy."

On appeal, Laddin fails to explain how the IRA Custodians violated RICO while ETS was a passive bystander in their scheme to defraud. Laddin's complaint alleged that ETS was the hub of the Ponzi scheme to defraud investors. The allegations in the complaint logically compel the conclusion that ETS

had "substantially equal responsibility for [its] injury." Bateman Eichler, 472 U.S. at 308-09, 105 S. Ct. at 2628.

Second, the application of in pari delicto to bar Laddin's complaint advances the policy of civil liability under the federal RICO statute. Laddin argues that plaintiffs should be allowed to recover to serve the deterrent purposes underlying the civil liability provision of RICO regardless of whether the plaintiffs participated in the wrongdoing. We disagree. Under RICO, "it shall be unlawful for any person employed [**25] by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (emphasis added). It would be anomalous, to say the least, for the RICO statute to make racketeering unlawful in one provision, yet award the violator with treble damages in another provision of the same statute. "Congress intended RICO's civil remedies to help eradicate 'organized crime from the social fabric' by divesting 'the association of the fruits of ill-gotten gains.'" Genty v. Resolution Trust Corp., 937 F.2d 899, 910 (3d Cir. 1991) (quoting United States v. Turkette, 452 U.S. 576, 585, 101 S. Ct. 2524, 2529, 69 L. Ed. 2d 246 (1981)). Laddin's recovery under RICO would not divest RICO violators of their ill-gotten gains; it would result in a wealth transfer among similarly situated conspirators.

Laddin argues that some district courts and bankruptcy courts have held that the doctrine of in pari delicto is not an available defense in federal RICO actions because the public policy objectives of RICO [**26] are similar to those of the antitrust laws, but Laddin's reliance on these decisions is misplaced. See, e.g., Harper v. AT&T, 54 F. Supp. 2d 1371 (S.D. Ga. 1999); Bieter Co. v. Blomquist, 848 F. Supp. 1446 (D. Minn. 1994); In re Nat'l Mortgage Equity Corp., 636 F. Supp. 1138 (C.D. Cal. 1986). These courts have relied on Perma Life Mufflers to conclude that the punitive and deterrent aspects of antitrust treble damages are equally applicable in the racketeering context, In re Nat'l Mortgage Equity Corp., 636 F. Supp. at 1156 (stating that the reasoning in Perma Life Mufflers is "equally applicable to RICO treble damage actions"), but they misinterpret the holding of Perma Life Mufflers. Because federal RICO violations, as a matter of law, require affirmative wrongdoing rather than passive acquiescence, Perma Life Mufflers [*1156] does not preclude the defense of in pari delicto in the RICO context.

The Court in Perma Life Mufflers premised its holding on the passive characteristics of antitrust participants. In that context, "participation is not voluntary in any meaningful sense" when antitrust violators [**27] do not "seek each and every clause of the agreement," but must accept questionably violative terms to obtain an otherwise attractive business opportunity. Perma Life Mufflers, 392 U.S. at 139, 88 S. Ct. 1985. Perma Life Mufflers explicitly left open the possibility that a defense of active involvement could bar a complaint about an antitrust conspiracy, and our sister circuits have accordingly barred antitrust claims where the plaintiff was completely involved in the antitrust conspiracy. See THI-Hawaii, Inc. v. First Commerce Fin. Corp., 627 F.2d 991, 995 (9th Cir. 1980) (holding that there is "complete involvement" where "the illegal conspiracy would not have been formed but for [the plaintiff's] participation" and barring recovery by a plaintiff who negotiated, prepared, and earned revenues from an exclusive sales agreement with the defendant); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 15-16 (4th Cir. 1971) ("When parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from [**28] seeking treble damages from the other."); cf. Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138 (7th Cir. 1970) ("We believe that Perma Life holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are

required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants.").

In contrast with antitrust violations, a federal RICO violation requires affirmative and deliberate participation. A violation of RICO requires that the defendants "participated, either directly or indirectly, in the conduct of the affairs of the enterprise . . . through a pattern of racketeering activity." United States v. Starrett, 55 F.3d 1525, 1541 (11th Cir. 1995); 18 U.S.C. § 1962(c). A "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added); see id. § 1961(1) (defining "racketeering" as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery," etc.). The defendant also must [**29] "knowingly implement[]" and "make" decisions. Starrett, 55 F.3d at 1548; see Reves v. Ernst & Young, 507 U.S. 170, 185, 113 S. Ct. 1163, 1173, 122 L. Ed. 2d 525 (1983) (holding that the defendant "participates" if he "directs" the pattern of racketeering activity).

Because a complaint brought by ETS, outside of bankruptcy, against other members of its RICO conspiracy would have been barred by the doctrine of in pari delicto, Laddin is likewise barred from recovery within bankruptcy. Laddin's complaint is barred because ETS was an active participant in the Ponzi scheme and the application of the defense of in pari delicto furthers the policy of the federal RICO statute. The district court did not err when it dismissed Laddin's claim for treble damages under the federal RICO statute, because his recovery was barred based on the face of his complaint.

C. Georgia Does Not Recognize a Claim for Aiding and Abetting a Breach of Fiduciary Duties.

Laddin contends that the doctrine of in pari delicto does not bar his claims for aiding and abetting a breach of [*1157] fiduciary duties. We need not reach this issue because we previously have held [**30] that Georgia courts have not recognized a cause of action for aiding and abetting a breach of fiduciary duties. Munford v. Valuation Research Corp., 98 F.3d 604, 613 (11th Cir. 1996); see also Monroe v. Bd. of Regents of Univ. Sys. of Ga., 268 Ga. App. 659, 602 S.E.2d 219, 224 (Ga. Ct. App. 2004) ("Georgia has never recognized a claim for aiding and abetting a breach of fiduciary duty."). "We may affirm for any reason supported by the record, even if not relied on by the district court." Cochran v. U.S. Health Care Fin. Admin., 291 F.3d 775, 778 n.3 (11th Cir. 2002). "Even assuming that Georgia courts will someday recognize a cause of action for aider and abettor liability in the context of a breach of fiduciary claim, the facts in this case do not warrant its creation now." Munford, 98 F.3d at 613. Because the bankruptcy trustee may only "bring any suit that the debtor could have instituted had it not been thrown into bankruptcy," O'Halloran, 350 F.3d at 1202, the district court correctly dismissed Laddin's claim for aiding and abetting a fiduciary duty.

IV. CONCLUSION

The dismissal of Laddin's [**31] complaint for federal RICO violations and aiding and abetting a breach of fiduciary duties under Georgia law is

AFFIRMED.

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O'Halloran v. PricewaterhouseCoopers LLP

Court of Appeal of Florida, Second District

May 4, 2007, Opinion Filed

Case No. 2D04-147

Reporter
969 So. 2d 1039 *; 2007 Fla. App. LEXIS 6784 **; 32 Fla. L. Weekly D 1196

KEVIN O'HALLORAN, as trustee and individually as alleged assignee, Appellant, v. PRICEWATERHOUSECOOPERS LLP, Appellee.

Subsequent History: As Corrected May 14, 2007.

Prior History: [**1] Appeal from the Circuit Court for Pinellas County; Susan F. Schaeffer, Judge, and Stephen L. Dakan, Associate Senior Judge.

Disposition: Reversed and remanded.

Counsel: Zala L. Forizs and Haley Dempsey of Forizs & Dogali, P.L., Tampa, and Nicholas J. DiCarlo of Beus Gilbert, PLLC, Scottsdale, Arizona, for Appellant.

John R. Blue, Thomas J. Roehn, and Ellen K. Lyons of Carlton Fields, P.A., Tampa, and Jami Wintz McKeon and John C. Goodchild, III, of Morgan, Lewis & Bockius LLP, Philadelphia, Pennsylvania, for Appellee.

Judges: CANADY, Judge. NORTHCUTT and WALLACE, JJ., Concur.

Opinion by: CANADY

Opinion

[*1041] CANADY, Judge.

In this case, the trial court dismissed with prejudice a complaint against PricewaterhouseCoopers (PWC) filed by Kevin O'Halloran, a chapter 11 bankruptcy trustee for Keller Financial Services of Florida, Inc., and subsidiary corporations (collectively, Keller Financial). The claims asserted by O'Halloran arose from the performance of financial advisory services by PWC for Keller Financial in 1997 and 1998. O'Halloran's claims include "debtors' causes of action," as well as a claim--the noteholder claim--brought pursuant to assignments made to O'Halloran by certain purchasers of secured notes sold by Keller Financial.

The gravamen [**2] of the complaint was that PWC, which was retained to give advice concerning the restructuring of Keller Financial, pursued a merger strategy that PWC knew or should have known was futile. By doing so, according to O'Halloran's allegations, PWC delayed Keller Financial's filing for bankruptcy and thereby "allowed Keller [Financial] to become increasingly insolvent and Keller [Financial's] assets to be looted, squandered or otherwise dissipated while PWC pursued [the] futile transaction." O'Halloran also alleged that PWC pursued the merger strategy because it would have involved "a lucrative 'transaction fee'" for PWC.

The debtors' causes of action against PWC--that is, claims against PWC allegedly possessed by Keller Financial when it went into bankruptcy--included claims for breach of fiduciary duty (count 1), negligence/professional malpractice (count 2), aiding and abetting breach of fiduciary duty (count 3), breach of contract (count 4), and constructive fraud (count 5). The noteholder claim was for aiding and abetting breach of fiduciary duty (count 6).

The trial court ruled that several of the claims--counts 1, 3, 4, and 5--were subject to dismissal because they were barred by [**3] res judicata--or claim preclusion--arising from the bankruptcy court's order confirming the joint plan of liquidation presented in the Keller Financial bankruptcy proceedings. In brief, the trial court concluded that these claims could have been litigated in the bankruptcy proceedings and that the bankruptcy plan did not adequately preserve O'Halloran's right to litigate them after confirmation of the plan by the bankruptcy court.

The trial court also ruled that several of the claims--counts 1, 2, 3, and 4--were barred by the doctrines of imputation and *in pari delicto*. The trial court reasoned that O'Halloran, as bankruptcy trustee, "stands in the shoes" of Keller Financial and that--according to O'Halloran's own [*1042] allegations--Keller Financial was itself involved in wrongdoing "to further its existence." In reaching this conclusion, the trial court relied not only on the allegations of the complaint in the instant case but also on the allegations in a complaint filed by O'Halloran against insiders of Keller Financial and in a complaint filed by O'Halloran against KPMG Peat Marwick, Keller Financial's auditor.

In addition, the trial court ruled that the noteholder claim (count 6) was [**4] barred because O'Halloran "is not empowered to bring creditors' claims" and because allowing the claim would create the possibility of "double recovery" by noteholders who did not assign their claims to O'Halloran.

The trial court thus dismissed with prejudice all of the claims against PWC and entered a final judgment in favor of PWC.

1. *Principles Governing Review of Dismissed Claims*

Since a trial court's ruling on a motion to dismiss presents a question of law, it is subject to de novo review. *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 734 (Fla. 2002). In conducting such de novo review, the appellate court is "required to accept the factual allegations of the complaint as true and to consider those allegations and any inferences to be drawn therefrom in the light most favorable to" the plaintiff. *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 87 (Fla. 2005).

Florida Rule of Civil Procedure 1.110(d) provides that "[a]ffirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion [to dismiss] under rule 1.140(b)." Accordingly, a complaint may be dismissed if its allegations show the existence of an affirmative defense to the claims asserted [**5] in the complaint. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 568-69 (Fla. 2005).

2. *The Res Judicata Issue*

'Halloran argues on appeal--as he did before the trial court--that the debtors' claims against PWC were specifically preserved in the bankruptcy proceeding and that the order confirming the bankruptcy plan therefore does not operate to preclude those claims. We conclude that O'Halloran's argument is supported by the record before the trial court concerning the bankruptcy proceedings and the law concerning the preservation of a debtor's claims in bankruptcy. [1]

Section 1123 of the Bankruptcy Code provides that a bankruptcy plan may provide for "the retention and enforcement by the debtor, [or] by the trustee" of "any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3) (1994). Accordingly, although a bankruptcy confirmation order may give rise to res judicata with respect to claims of [**6] the debtor that could have been litigated in the bankruptcy proceeding, *see Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873-74 (2d Cir. 1991), "res judicata does not apply when a cause of action has been expressly reserved for later adjudication," *D & K Props. Crystal Lake v. Mut. Life Ins. Co. of N.Y.*, 112 F.3d 257, 259-60 (7th Cir. 1997). There is considerable divergence of opinion concerning the degree of specificity required for an effective retention of a debtor's claim pursuant to § 1123. *See Kmart Corp. v. Intercraft Co. (In re Kmart Corp.)*, 310 B.R. 107, 120 (Bankr. N.D. Ill. 2004) (discussing various views regarding [*1043] "how a section 1123(b)(3) retention provision must be written in order to accomplish the desired result").

Here, the trial court's ruling on the res judicata issue can be sustained only if we adopt a strict rule of specificity under which the naming of each cause of action is required for the effective retention of the debtors' claims. We decline to impose such an exacting rule of specificity.

To begin with, the text of § 1123 provides no support for the imposition of such a rule. Furthermore, the context strongly militates against such a rule. [**7] "To require a debtor to conjure up and list every

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[1] Because we conclude that the claims against PWC were preserved, we need not address the argument of O'Halloran that PWC was not a party to the bankruptcy proceeding and thus was not entitled to assert any res judicata effect of the bankruptcy confirmation order.

imaginable cause of action would unduly complicate the reorganization process and would be unrealistic." *EXDS, Inc. v. Ernst & Young LLP (In re EXDS, Inc.)*, 316 B.R. 817, 824 (Bankr. D. Del. 2004). "[M]andating a specific description of every claim the debtor intends to pursue could entail months or years of investigation and a corresponding delay in the confirmation of the plan of reorganization." *Katz v. I.A. Alliance Corp. (In re I. Appel Corp.)*, 300 B.R. 564, 569 (S.D.N.Y. 2003); *see also Alary Corp. v. Sims (In re Associated Vintage Group, Inc.)*, 283 B.R. 549, 564 (B.A.P. 9th Cir. 2002) (recognizing "the danger of engrafting an unduly burdensome specificity requirement onto the § 1123(b)(3) authorization for the retention and enforcement of claims" and stating that it is "impractical and unnecessary to expect that a disclosure statement and plan must list . . . each and every possible theory" of recovery).

We turn now to the language used in the bankruptcy disclosure statement concerning claims retained against PWC and to our evaluation of the application of the law.

The disclosure statement filed by O'Halloran makes two references [**8] to claims against PWC. First, the statement states that "[t]he Debtors may be able to assert claims . . . against . . . accounting firms for professional malpractice." The statement then goes on to specifically list PWC after stating that "all [p]ersons identified herein by . . . name should understand that *all claims* against them held by the Trustee or the Debtors are preserved and may be asserted following confirmation of the Plan." (Emphasis added.) Second, under the heading of "Professional Liability," the statement again names PWC and states: "*All claims* held by the Trustee or the Debtors against any professional persons employed, retained, or consulted by the Debtors are reserved for the benefit of the Debtors' creditors under the Plan."

The trial court concluded that the language of the disclosure statement was sufficient to preserve only the claim against PWC for negligence/malpractice (count 2). If the only reference in the disclosure statement to claims against PWC were the reference to "professional malpractice" claims, we would be inclined to agree with the trial court. But the second reference to claims against PWC--under the heading of "Professional Liability"-- suggests [**9] a broader interpretation of the scope of the claims preserved against PWC. Those provisions of the disclosure statement are most reasonably read as preserving all the asserted claims of the debtors against PWC arising from PWC's professional relationship with Keller Financial. We also conclude, for the reasons that we have discussed above, that such language preserving "all claims" against PWC arising from PWC's professional relationship with Keller Financial was sufficient to be an effective retention pursuant to section 1123.

The trial court read the claim preservation provisions of the disclosure statement in an unreasonably restrictive manner and [*1044] applied an unduly exacting requirement of specificity. The trial court therefore erred in dismissing the claim based on res judicata.

3. *The In Pari Delicto Issue*

O'Halloran contends that the doctrine of *in pari delicto* is inapplicable (1) because the alleged wrongdoing of the agents of Keller Financial should not be imputed to the corporation or to O'Halloran and (2) because the alleged wrongdoing of Keller Financial's agents is distinct from the alleged wrongdoing of PWC. Considering the allegations of fact before the trial court and the [**10] inferences to be drawn from those allegations in the light most favorable to O'Halloran, we conclude that there is merit in both of these arguments advanced by O'Halloran.

In pari delicto means "in equal fault." *Black's Law Dictionary* 806 (8th ed. 2004). The phrase appears in the legal maxim: "Where both parties are equally in the wrong, the position of the defendant is the

stronger." [2] *Id.* at 1725, appendix B. "In pari delicto refers to the plaintiff's participation in the same wrongdoing as the defendant." *Memorex Corp. v. Int'l Bus. Machs. Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977). The defense of *in pari delicto* "is both an affirmative defense and an equitable defense. Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing." *Nisselson v. Lernout*, 469 F.3d 143, 151 (1st Cir. 2006); *see also Hall v. Hall*, 93 Fla. 709, 112 So. 622, 628 (Fla. 1927) (referring to "'the universal rule of our law that one in a court of justice cannot complain . . . of another's wrong whereof he was a partaker'") (quoting Bishop, *Marriage and Divorce*, § 1548). [3]

> The defense [of *in pari delicto*] is grounded on two premises: first, that courts should not lend their [**11] good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality. In its classic formulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because "in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt." 1 J. Story, Equity Jurisprudence 304-305 (13th ed. 1886) (Story).

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306-07, 105 S. Ct. 2622, 86 L. Ed. 2d 215 (1985) (footnotes omitted). [4]

Where the defense of *in pari delicto* is asserted against a corporate entity based on the misconduct of the corporation's agents, it must be determined whether the misconduct of those agents is properly imputed to the corporation. "As [*1045] a general rule, a principal may be held liable for the acts of its agent that are within the course and scope of the agency." *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).

But if a corporate agent was "acting adversely to the corporation's interests, the knowledge and misconduct of the agent are not imputed to the corporation." *State, Dep't of Ins. v. Blackburn*, 633 So. 2d 521, 524 (Fla. 2d DCA 1994); *see also Seidman & Seidman v. Gee*, 625 So. 2d 1, 2-3 (Fla. 3d DCA 1992) (referring to "an exception to the imputation rule [that] exists where [**13] an individual is acting adversely to the corporation"); *Joel Strickland Enters., Inc. v. Atlantic Disc. Co.*, 137 So. 2d 627, 629 (Fla. 1st DCA 1962) (stating that knowledge is not imputed to the corporation "where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, as where an agent is in reality acting in his own business or for his own personal interest and adversely to the principal"). When a corporate agent engages in misconduct that is calculated to benefit the agent and to harm the corporation, the agent has effectively ceased to function within the course and

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[2] The Latin maxim is "In pari delicto potior est conditio defendentis." *Black's Law Dictionary* 1725, appendix B.

[3] The *in pari delicto* doctrine is a corollary of the doctrine of unclean hands which requires "that no one shall be permitted to profit from his own fraud or wrongdoing, and that one who seeks the aid of equity must do so with clean hands." *Yost v. Rieve Enters., Inc.*, 461 So. 2d 178, 184 (Fla. 1st DCA 1984).

[4] Application of the doctrine may yield to public policy [**12] considerations: "The defense of *in pari delicto* is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy." *Kulla v. E.F. Hutton & Co.*, 426 So. 2d 1055, 1057 n.1 (Fla. 3d DCA 1983); *see also Turner v. Anderson*, 704 So. 2d 748, 751 n.2 (Fla. 4th DCA 1998) (relying on *Kulla*).

scope of the agency relationship with the corporation. Although formally he acts as the agent of the corporation, in reality he has forsaken the corporation and acts as an agent for himself.

This limitation on the general rule that the acts of a corporate agent are imputed to the corporation is commonly known as the "adverse interest exception." *See Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1560 (S.D. Fla. 1990); *Nerbonne, N.V. v. Lake Bryan Int'l Props.*, 685 So. 2d 1029, 1031 (Fla. 5th DCA 1997); *State Dep't of Ins. v. Blackburn (In re Blackburn)*, 209 B.R. 4, 11 (Bankr. M.D. Fla. 1997).

A [**14] claim of adverse interest cannot be successfully invoked where the corporate actors whose conduct is at issue were the "alter egos" of the corporation. Where a corporation is wholly dominated by persons engaged in wrongdoing, the corporation has itself become the instrument of wrongdoing. *See Terlecky v. Hurd (In re Dublin Sec.)*, 133 F.3d 377, 380 (6th Cir. 1997). This principle comes into play when there is no innocent member of management who could act to thwart the wrongdoing. *See Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003). [5] Conversely, the presence of any innocent decision-maker in the management of a corporation can provide the basis for invoking the adverse interest exception, preventing the imputation of wrongdoing and defeating the use of the *in pari delicto* defense against the corporation. *See Sharp Int'l Corp. v. KPMG LLP (In re Sharp Int'l Corp.)*, 278 B.R. 28, 39 (Bankr. E.D.N.Y. 2002).

[*1046] In summary, determining whether misconduct should be imputed to a corporation requires that the focus of analysis be on whether the misconduct was calculated to benefit the corporation. The misconduct will be imputed where the corporation has been operated as an "engine of theft." *See Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 454 (7th Cir. 1982). [**16] For example, a "corporation, 'whose primary existence was as a perpetrator of [a] Ponzi scheme, cannot be said to have suffered injury from the scheme it perpetrated.'" *Freeman*, 865 So. 2d at 552 (quoting *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1203 (11th Cir. 2003)). Such a corporation is in no position to invoke the adverse interest exception. Where the misconduct at issue consists, however, in looting the corporation, the corporation--which is itself purely the victim of the misconduct--may properly invoke the adverse interest exception and defeat an *in pari delicto* defense. *See Baena v. KPMG LLP*, 453 F.3d 1, 7 (1st Cir. 2006) (referring to "looting" as the "classic example" of conduct by corporate agents that falls within the "[a]dverse interest" exception).

The law is well established that under § 541(a) of the Bankruptcy Code, "[a] bankruptcy trustee stands in the shoes of the debtor.'" *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006) (quoting *O'Halloran*, 350 F.3d at 1202). "If a claim of [the debtor] would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the [**17] same claim, when asserted by the trustee, is subject to the same affirmative defense." *Id.*; *see also Nisselson*,

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[5] Similarly, the adverse interest exception to the imputation rule has been held inapplicable "where the transaction on behalf of the principal is entrusted solely to the officer or agent having the knowledge." *Nerbonne, N.V.*, 685 So. 2d at 1031. The "sole [**15] actor doctrine" may be invoked by an innocent third party against the corporation because in such circumstances it makes "sense to impute the agent's knowledge to the corporation, so that the corporation, rather than the third party, should suffer at the hands of the corporate agent." *Id.* at 1032. By wholly entrusting a matter to its agent, the corporation bears the risk that such an unaccountable agent will act adversely to the corporation's interest. This "sole actor doctrine"--which requires imputation to the corporation of the sole actor's conduct even when that conduct is adverse to the corporation--may not be invoked by an agent against the agent's corporation. Whether the "sole actor doctrine" can be raised in connection with a defense of *in pari delicto* by a third party where the third party itself has been accused of wrongdoing is an unsettled question in Florida law.

469 F.3d at 153 (stating that "the in pari delicto defense must be available to a defendant in an action by a bankruptcy trustee whenever that defense would have been available in an action by the debtor"). Accordingly, in making his claims pursuant to § 541(a)--that is, the debtors' causes of action--O'Halloran will be barred by PWC's *in pari delicto* defense to the same extent that Keller Financial would be barred by that defense.

We thus turn to the factual question of whether Keller Financial was *in pari delicto* with PWC with respect to the alleged wrongdoing which is the basis for the assertion of the debtors' claims by O'Halloran against PWC.

In considering this question and conducting our de novo review of the dismissal of O'Halloran's claims, we are required to consider the allegations of fact and inferences from those allegations "in the light most favorable to" O'Halloran. *Aguilera*, 905 So. 2d at 87. "[A]ll reasonable inferences are allowed in favor of the plaintiff['s] case." *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 883 (Fla. 1972). We [**18] also must consider this question against the backdrop of the provision of rule 1.110(g) that "[a] party may . . . state as many separate claims . . . as that party has, regardless of consistency."

The complaint against PWC contains two allegations that are particularly pertinent to the *in pari delicto* issue. The first of these is the allegation that "[a]t no time during the period of PWC's engagement was Keller [Financial] merely a 'Ponzi scheme' organized for the purpose of engaging in criminal activity or committing fraud." The second is the allegation that the former president of Keller Financial, Michael Nixon, testified under oath that "had PWC recommended an immediate bankruptcy for Keller [Financial] in the spring of 1997, Nixon would have followed PWC's advice and placed Keller [Financial] into bankruptcy at that time and would not have pursued a restructuring plan involving another company."

[*1047] Both of these allegations--which we are required to accept as true in considering the motion to dismiss--seriously undermine the *in pari delicto* defense. Both allegations support the conclusion that even if agents of the corporation were somehow complicit in the alleged wrongdoing of PWC, [**19] the adverse interest exception applies and the wrongdoing of the corporate agents therefore should not be imputed to Keller Financial.

Furthermore, it is not clear from the allegations of the complaint that the alleged wrongdoing of PWC is the same as the alleged wrongdoing of the agents of Keller Financial. Viewing the allegations in the light most favorable to O'Halloran, the alleged misconduct of PWC can be considered distinct from the alleged misconduct of the corporate agents. There is no allegation that the corporate insiders participated in the specific wrongdoing alleged against PWC of pursuing the merger with actual or constructive knowledge that doing so was futile.

Accordingly, we hold that the trial court erred in dismissing claims based on the *in pari delicto* defense. Of course, our holding with respect to the trial court's ruling on the *in pari delicto* defense as a basis for dismissal of claims does not foreclose PWC from further litigating the *in pari delicto* defense issue and establishing the facts necessary to support that defense.

4. *The Issue of the Noteholder Assignments*

The trial court ruled that O'Halloran was precluded from bringing the claim based on the noteholder [**20] assignments because a trustee in bankruptcy "is not empowered to bring creditors' claims." In dismissing the claim based on the noteholder assignments, the trial court also relied on the potential for

"double recovery" by nonassigning noteholders. We conclude that the trial court erred in dismissing O'Halloran's noteholder claim.

In support of the trial court's ruling, PWC relies primarily on *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 434, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972), which held that a bankruptcy trustee did "not have standing to sue an indenture trustee on behalf of debenture holders." Because the trustee in *Caplin* had not brought suit based on assignments of the claims of the debenture holders, we conclude that the instant case is easily distinguishable and that *Caplin*does not provide a basis for affirming the trial court's ruling with respect to the noteholder claims brought by O'Halloran.

The *Caplin* Court relied on three related grounds to support the conclusion that the trustee lacked standing. First, the Court noted that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf [**21] of debenture holders." 406 U.S. at 428. Second, the Court stated that the debenture holders "are capable of deciding for themselves whether or not it is worthwhile to seek to recoup whatever losses they may have suffered by an action against the indenture trustee." *Id.* at 431. The court concluded that as "the persons truly affected," the debenture holders "should make their own assessment of the respective advantages and disadvantages, not only of litigation, but of various theories of litigation." *Id.* Third, the Court observed that "a suit by [the bankruptcy trustee] on behalf of debenture holders may be inconsistent with any independent actions that they might bring themselves." *Id.* at 431-32.

The three problems identified by the Court in *Caplin* are all remedied by the giving of unconditional assignments of [*1048] claims to a bankruptcy trustee. In so understanding *Caplin*, we follow *Logan v. JKV Real Estate Services (In re Bogdan)*, 414 F.3d 507, 512 (4th Cir. 2005), which concluded that a "per se ban on trustee suits based on assignments from creditors finds no support in *Caplin*."

The assignments made to the bankruptcy trustee which were at issue in *Logan* were of claims by certain mortgage [**22] lender creditors against alleged coconspirators of the debtor corporation in a scheme to defraud the mortgage lender creditors. The *Logan* court pointed to the provision of § 541(a)(7), which provides that the "property of the estate" includes "'[a]ny interest in property that the estate acquires after the commencement' of [the] bankruptcy case." 414 F.3d at 512 (quoting § 541(a)(7)). "Thus, the unconditional assignments" constitute "'property of the estate' that the trustee is authorized to 'collect and reduce to money' on behalf of the estate." *Id.* (citing *Steinberg v. Kendig (In re Ben Franklin Retail Stores)*, 225 B.R. 646, 650 (Bankr. N.D. Ill. 1998)). The court concluded that by virtue of the absolute assignments to the trustee, the bankruptcy estate was "the real party in interest" because the trustee was "seeking to collect money it claims the alleged coconspirators owe the trustee as assignee and representative of the estate, not money owed to specific creditors." *Id.* at 513.

Other courts have similarly concluded that a trustee may bring suit based on assigned claims. *See Schnelling v. Thomas (In re AgriBioTech)*, 319 B.R. 207, 215 (Bankr D. Nev. 2004) ("Because the assignor-[creditors] [**23] assigned their claims in full to the Trustee under the [bankruptcy] Plan, those claims became property of the estate under section 541(a)(7) which the Trustee has standing to pursue."); *Sender v. Mann*, 423 F. Supp. 2d 1155, 1173-74 (D. Col. 2006) (holding that bankruptcy trustee had standing to bring action based on unconditional assignment of claims by creditors); *Semi-Tech Litigation, LLC v. Bankers Trust Co.*, 272 F. Supp. 2d 319, 323 (S.D.N.Y. 2003) ("*Caplin* is distinguishable from this case in that the debenture holders there, in contrast to the situation here, had not assigned their claims to the trustee."), *rev'd in part on other grounds*, *In re Bankers Trust Co.*, 450 F.3d 121 (2d Cir. 2006);

Collins v. Kohlberg & Co. (In re Sw. Supermarkets, L.L.C.), 315 B.R. 565, 570-71 (Bankr. D. Ariz. 2004) (holding that trustee had standing to pursue on behalf of bankruptcy estate claims assigned by creditors for the benefit of the estate).

The *Logan* court also held that although the doctrine of *in pari delicto* would be applicable to the debtor, it would not bar the trustee's suit based on the assignments. The court stated that "[a]s assignee, the trustee stands in the shoes of the [assigning [**24] creditors], thereby assuming all rights and interests that the [assigning creditors] have in the causes of action and becoming subject to all defenses that could have been asserted against the [assigning creditors], not [the debtors]." 414 F.3d at 514; *see also Sender*, 423 F. Supp. 2d at 1174 ("[*In pari delicto*] applies to claims a bankruptcy trustee brings as a debtor, but not as a representative of creditors, since creditors are not culpable for the misconduct of the corporate entity. This doctrine therefore does not bar [the trustee's] claims brought on behalf of creditors . . . by assignment." (citing *Caplin*, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195)).

Here, O'Halloran's complaint alleged that "[u]pon execution of the respective assignments, those claims became property of the Bankruptcy Estate pursuant to Bankruptcy Code section 541(a)(7)" and that "[t]he assigned claims can no longer be pursued by the individual assignors." Documents that were subject to judicial [*1049] notice by the trial court indicate that "any proceeds derived from [the assigned] claims will be treated as property under the Liquidation Plan and distributed in accordance therewith." Although the form of assignment--which was also subject to [**25] judicial notice--does not expressly state that the assignment of claims was made unconditionally and for the benefit of the bankruptcy estate, for purposes of the motion to dismiss, the factual allegations of the complaint must be accepted as true. Those allegations bring the noteholder claims squarely under the rule articulated in *Logan*--which we adopt--with respect to unconditionally assigned claims of creditors.

Finally, we reject the trial court's speculation concerning the potential for "double recovery" by nonassigning noteholders. We are unconvinced that such a double recovery will necessarily result even if the noteholders' claim is successfully litigated. Furthermore, we see no reason that such a potential should prevent the assigning noteholders from choosing how they wish to pursue their claims against PWC.

We therefore conclude that the trial court erred in dismissing the noteholder claim.

5. *Conclusion*

The final judgment in favor of PWC is reversed, and the case is remanded for further proceedings.

Reversed and remanded.

NORTHCUTT and WALLACE, JJ., Concur.

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Bevan v. Wanicka

Court of Appeal of Florida, Second District

April 22, 1987, Filed

No. 86-1999

Reporter
505 So. 2d 1116 *; 1987 Fla. App. LEXIS 7900 **; 12 Fla. L. Weekly 1101

Brian Bevan, Appellant, v. Frank Wanicka, individually and as Sheriff of Lee County, and Thomas Wallace, individually and as designated custodian of the records, Appellees

Prior History: [**1] Appeal from the Circuit Court for Lee County; James R. Thompson, Judge.

Counsel: Brian Bevan, Pro Se.

Thomas C. Chase of Allen, Knudsen, Swartz, DeBoest, Rhoads & Edwards, P.A., for Appellees.

Judges: Scheb, Acting Chief Judge. Ryder and Lehan, JJ., concur.

Opinion by: SCHEB

Opinion

[*1117] Brian Bevan appeals a trial court's order dismissing his case with prejudice. We reverse.

Bevan filed suit against the appellees claiming a violation of the Public Records Act. *See* § 119.07, Fla. Stat. (1985). Bevan was seeking police records of an investigation pertaining to the death of a young man named William B. Jackman. Subsequently, he amended his complaint to include an allegation of destruction or concealment of records. In response to the amended complaint, appellees sought discovery, among other things, of the following: (1) information regarding Bevan's criminal history, if any; (2) the names, phone numbers, and addresses of witnesses who supplied Bevan with information regarding the allegedly missing records; and (3) the names, addresses, and phone numbers of any private investigators

retained by Bevan to locate allegedly missing records. Although the trial court granted Bevan's [**2] motion for a protective order as to other items appellees sought, it required that he provide the information in (1), (2), and (3).

Bevan petitioned this court for writ of certiorari, contending that the trial court departed from the essential requirements of the law by compelling him to answer the subject questions. We denied his petition without opinion. *Bevan v. Wanicka*, 487 So.2d 298 (Fla. 2d DCA 1986). Thereafter, the trial court in a modified order compelled Bevan to answer questions regarding (1) his criminal history and (2) the names, phone numbers, and addresses of witnesses who had personal knowledge relating to the existence or nonexistence of public records.

Upon Bevan's refusal to answer such questions, appellees sought to have the court hold him in contempt and impose sanctions. At the hearing on their motion, the trial judge gave Bevan another opportunity to comply with the discovery request. When he again refused to answer the subject discovery, the trial court declined to hold him in contempt but dismissed his suit with prejudice. Bevan then filed this appeal.

At the outset, we note that a simple denial of certiorari without opinion is not an affirmance and [**3] does not establish the law of the case. *Don Mott Agency, Inc. v. Harrison*, 362 So.2d 56 (Fla. 2d DCA 1978). Therefore, we reject appellees' contention that our denial of Bevan's petition for certiorari constitutes the law of the case now before us.

The basic premise of the Public Records Act is to have all state, county, and municipal records in Florida open to public inspection, unless specifically exempted by statute. *Tribune Co. v. Public* [*1118] *Records*, 493 So.2d 480 (Fla. 2d DCA 1986). Furthermore, the Public Records Act does not condition the inspection of public records on any requirement that the person seeking to inspect records reveal that person's background information. *See* § 119.07, Fla. Stat. (1985). Therefore, unless the records Bevan sought were specifically exempted, he was entitled to inspect them in accordance with the statute. Here, however, Bevan's suit became more than a request for public records because he also alleged destruction and concealment of records. As such, the appellees were entitled to discover the source(s) of Bevan's allegations as to these items. There does not, however, appear to be any relevant reason for the discovery of [**4] Bevan's past criminal record, if any. *See News-Press Publishing Co., Inc. v. Gadd*, 388 So.2d 276 (Fla. 2d DCA 1980) (holding that the Public Records Act does not direct itself to the motivation of the person who seeks the records.)

Accordingly, we reverse the dismissal of Bevan's action. We remand for an evidentiary hearing as to whether the appellees have furnished Bevan all available public records to which he is entitled. If at that time Bevan still pursues his allegation of destruction and concealment, the trial court can re-address the appellees' requests for discovery concerning Bevan's knowledge of any alleged concealment or destruction of records.

RYDER and LEHAN, JJ., Concur.
