

Laser Spine Institute, LLC
CLM Aviation, LLC
LSI HoldCo, LLC
LSI Management Company, LLC
Laser Spine Surgery Center of Arizona, LLC
Laser Spine Surgery Center of Cincinnati, LLC
Laser Spine Surgery Center of Cleveland, LLC
Laser Spine Surgical Center, LLC
Laser Spine Surgery Center of Pennsylvania, LLC
Laser Spine Surgery Center of St. Louis, LLC
Laser Spine Surgery Center of Warwick, LLC
Medical Care Management Services, LLC
Spine DME Solutions, LLC
Total Spine Care, LLC
Laser Spine Institute Consulting, LLC
Laser Spine Surgery Center of Oklahoma, LLC

Case No. 2019-CA-2762
Case No. 2019-CA-2764
Case No. 2019-CA-2765
Case No. 2019-CA-2766
Case No. 2019-CA-2767
Case No. 2019-CA-2768
Case No. 2019-CA-2769
Case No. 2019-CA-2770
Case No. 2019-CA-2771
Case No. 2019-CA-2772
Case No. 2019-CA-2773
Case No. 2019-CA-2774
Case No. 2019-CA-2775
Case No. 2019-CA-2776
Case No. 2019-CA-2777
Case No. 2019-CA-2780

Assignors,

Consolidated Case No.
2019-CA-2762

to

Soneet Kapila,

Division L

Assignee.

EXHIBIT B

**MOTION TO CORRECT SCRIVENER'S ERROR WITH RESPECT TO ASSIGNEE'S
MOTION FOR ORDER APPROVING COMPROMISE OF CONTROVERSY WITH
TEXAS CAPITAL BANK, N.A. AS ADMINISTRATIVE AGENT FOR LENDER GROUP**

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

In re:

Laser Spine Institute, LLC¹

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.

~~ORDER GRANTING ASSIGNEE'S MOTION FOR ORDER APPROVING SETTLEMENT AND (A) COMPROMISE OF CLAIMS AGAINST FORMER DIRECTORS AND~~
ORDER APPROVING COMPROMISE OF CONTROVERSY WITH TEXAS CAPITAL BANK, N.A., AS ADMINISTRATIVE AGENT FOR LENDER GROUP²
~~OFFICERS, (B) ORDER AUTHORIZING PAYMENT OF PROFESSIONAL~~

¹ On April 8, 2019, the Court entered an order administratively consolidating this case with the assignment cases of the following entities: LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC (collectively, the "Assignment Estates").¹

² Amended solely to correct title.

FEES, AND FINAL JUDGMENT AS TO SETTLED CLAIMS IN LAWSUITS

THESE ASSIGNMENT FOR THE BENEFIT OF CREDITORS (“ABC”) CASES (the “Assignment Cases”) came before the Court for a trial (the “Trial”) on April 14, 2021, at 1:30 p.m. (the “Hearing”) upon the Assignee’s Motion for Order Approving Compromise of Controversy with Texas Capital Bank, N.A. as Administrative Agent for Lender Group (the “Compromise Motion”) filed by Soneet R. Kapila as Assignee²³

and the Laserscopic Spinal Centers of America, Inc., Laserscopic Medical Clinic, LLC and Laserscopic Spine Centers of America, Inc.’s Response in Opposition to Assignee’s Motion for Order Approving Compromise of Controversy with Texas Capital Bank , N.A. as Administrative Agent for Lender Group (the “Laserscopic Claimants’ Objection”) filed by the Laserscopic Claimants.

The Court, having considered the Compromise Motion, the Laserscopic Claimants’ Objection; the record in the Assignment Cases; the testimony of Soneet Kapila, as the Assignee; the exhibits introduced in evidence; the argument of interested parties; and the parties’ post-trial submissions, finds and concludes as follows:³⁴

A. The Compromise Motion seeks approval of the Stipulation attached as Exhibit A to the Compromise Motion (the “Settlement Agreement”) which settles the controversy between the Assignee and Texas Capital Bank, as Administrative Agent for the lender group (“TCB”), regarding a surcharge of TCB’s collateral through allocation of so-called “Overlap Expenses” and professional fees incurred by the Assignment Estates, and resolves all issues related to the Assignee’s ability to surcharge such expenses against TCB⁴⁵. Under the compromise, TCB would receive an administrative claim, secured by a lien on unencumbered

²³ Capitalized terms not defined in the Order shall have the meaning set forth in the Compromise Motion.¹

³⁴ The findings of fact and conclusions of law stated in this Order shall constitute the Court’s findings of fact and conclusions of law. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed. To the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed. ¹

⁴⁵ Other provisions of the Settlement Agreement were resolved by the order Granting Assignee’s Motion for Order Authorizing Compromise of Controversy with Texas Capital Bank, N.A. dated October 22, 2020.

assets, in the amount of \$965,465, which consists of \$767,868 for TCB's share of the Overlap Expenses and \$196,957 for reimbursement for TCB's over-payment of its share of professional fees.

B. At the outset, it is helpful to discuss the nature of the matter being ruled on by the Court. The issue before the Court is not whether the allocations set forth in the Compromise Motion are exactly correct. Instead, the Court must determine whether the settlement satisfies the standards set forth in *In re Justice Oaks II, Ltd.*, 898 F.2d 1544 (11th Cir. 1990) cert. denied 498 U.S. 959 (1990)⁵⁶

C. , and exceeds the lowest amount that the litigation could produce.⁶⁷

D.

E. The resolution of this dispute requires an analysis of Fla. Stat. § 727.114, the section of the assignment statute which establishes the priorities of distributions in ABC cases. The priority scheme in ABC cases mirrors the distribution scheme in bankruptcy cases found in 11 U.S.C. § 507⁷⁸. In an ABC case, a secured creditor such as TCB has the highest priority and is entitled to receive its collateral or proceeds from the liquidation of its collateral, subject only to the Assignee's right to surcharge. Distributions to secured creditors can be surcharged for the "reasonable, necessary expenses of preserving or disposing of such collateral *to the extent of any benefit to such creditors* [i.e., the secured creditor]," the exact language also found in the Bankruptcy Code 11 U.S.C. § 506(c).

⁵⁶ State courts often look to federal bankruptcy law for guidance as to legal issues arising in a proceeding involving assignment for the benefit of creditors. *Moecker v. Antoine*, 845 So.2d 904, 911, fn 2 (1st DCA 2003).¹

⁶⁷ The factors enunciated in *Justice Oaks* are (i) the probability of success in litigation; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (iv) the paramount interest of the creditors and the proper deference to their reasonable views in the promises. *Id.* at 1549.¹

⁷⁸ Section 507 of the United States Bankruptcy Code (the "**Bankruptcy Code**") sets forth the priorities of unsecured claims in a bankruptcy case.

F. To the extent that administrative expenses cannot be surcharged under § 727.114(1)(a), such administrative expenses are entitled to the second level of priority under § 727.114(1)(b). A close analysis of the Compromise Motion reveals that settlement follows the priorities set forth in the ABC statute. The Laserscopic Claimants have incorrectly assumed that the Compromise Motion seeks to surcharge expenses to unsecured creditors. The allocation of expenses between those which can be surcharged to the secured creditor and those which cannot is the result of applying the ABC statutory priorities and not the result of any modification to the statutory priority scheme. Similarly, the Laserscopic Claimants' attempt to argue that TCB should be responsible for all expenses, even those that did not confer a direct tangible benefit on TCB, would contravene the express language of the Florida statute.⁸⁹

G. While there are no reported decisions that interpret Fla. Stat. section 727.114(1)(a), there is a substantial body of case law interpreting the same language in section 506(c) of the Bankruptcy Code. These cases establish several principles. First, the purpose of surcharge is to prevent a windfall to the secured creditor. *Ford Motor Credit Co. v. Reynolds & Reynolds Co.*, 26 F.3d 481, 483 (4th Cir. 1994); *United States v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993). Second, surcharge is the exception rather than the rule. *In re Smith International Enterprises, Inc.*, 325 B.R. 450, 463 (Bankr. M.D. Fla. 2005). Third, the burden is on the party seeking surcharge, here the Assignee. *In re Chariots of Palm Beach, Inc.*, 2019 WL474790, *3 (Bankr. S. D. 2019). Fourth, among other things, the benefit must be a direct tangible benefit and mere participation in the liquidation proceeding is insufficient to establish a benefit. *In re Flagstaff Foodservice Corporation*, 762 F.2d 10, 12 (2nd Cir. 1985) (allegations that the secured creditor benefited from the preservation of most of the

⁸⁹ See Paragraph 10 of Laserscopic Spine Centers of America, Inc.'s Response to ~~Deearlation~~[Declaration](#) of Soneet Kapila Supporting Assignee's Motion for Order Approving ~~Comprmoise of Convtrovyersy~~[Compromise of Controversy](#) with Texas Capital Bank, N.A. as ~~Administrative~~[Administrative](#) Agent for Lender Group dated October 13, 2020.

going concern value of its collateral was insufficient to establish an entitlement to a § 506(c) surcharge); *In re Flagstaff Foodservice Corporation*, 739 F.2d 73, 76 (2nd Cir. 1984).

H. A bankruptcy trustee has a fiduciary duty to pursue a surcharge against a secured creditor. *JKJ Chevrolet*, 26 F.3d at 485. The Assignee has a similar fiduciary responsibility under the Florida statute. Mr. Kapila testified that he waited until he had enough information to initiate discussions with TCB regarding his duty to surcharge TCB's collateral. As there are no further expenses to be allocated, the Assignee testified that he has all information necessary to resolve issues related to the Assignment Estates' surcharge claim.

I. A liquidation, either in an assignment case or a bankruptcy, imposes fiduciary obligations on the individual appointed to administer the liquidation. The Assignee testified at length regarding the challenges confronted by these cases, including his numerous fiduciary obligations in liquidating a healthcare business. These expenses were necessary to the administration of the Assignment Estates even though they did not confer a direct tangible benefit on TCB or even provide a direct tangible benefit to unsecured creditors. However, as Mr. Kapila testified, these obligations must be performed and were carried out in these cases.

J. At the Trial, the Laserscopic Claimants for the first time argued that the Assignee should have abandoned assets. While a fiduciary may have been able to abandon certain assets, the Assignee testified such actions were not appropriate at the early stages of these cases. Additionally, no party in interest sought to compel the Assignee to abandon assets. The Assignee further testified that it was not clear that abandonment would avoid all burdens and costs imposed by these fiduciary obligations or reduce the overall costs of the administration of the Assignment Estates. In fact, abandonment may have increased expenses of the assignment cases, as the Assignment Estates would have had to bear all expenses, including expenses surcharged

against TCB under the Compromise Motion. Furthermore, there was no proof that abandoning assets would have resulted in a higher recovery for creditors.

K. The Laserscopic Claimants alleged that they did not have sufficient information to prosecute the Laserscopic Claimants' Objection. The Court notes that the Compromise Motion has been pending for more than six months, ample time for the Laserscopic Claimants to propound discovery for any missing information or to depose TCB regarding its involvement in these cases, which the Laserscopic Claimants apparently chose not to do.

L. The proposed settlement does not seek or result in burdening the Assignment Estates with all costs of the Assignment Cases for the period from March 15, 2019 through July 31, 2020. The Assignment Estates' expenses (not including legal fees) exceed \$4,350,000 and legal fees exceed \$4,100,000, all of which have been paid from TCB's cash collateral or proceeds from TCB's collateral. Pursuant to the Compromise Motion, TCB agreed to be surcharged for approximately 83% of the expenses and 52% of the professional fees incurred in the Assignment Cases.

M. Under the settlement, TCB is paying approximately 65% of all expenses and professional fees incurred by the Assignment Estates. Importantly, if the settlement is not approved and the Court was required to hold a trial on the surcharge issues, the burden would be on the Assignee to show that TCB received more than \$5.5 million in direct tangible benefit as a result of the preservation or disposition of its collateral.

N. The Laserscopic Claimants' argument that they are prejudiced by TCB being granted a lien on unencumbered assets also disregards the language of the distribution scheme under the ABC statute. TCB's administrative claims arise as a result of its payment of expenses entitled to administrative expense status under § 727.114(1)(b). Under § 727.114(1)(b), those

administrative expenses have and will continue to have priority over the claims of unsecured creditors.

O. The only witness at the Trial was Soneet Kapila, the Assignee, who has more than thirty years of experience of operating as a fiduciary in insolvency cases. Mr. Kapila's testimony was forthright and credible. He testified that he regularly deals with allocation issues as a fiduciary in liquidation cases, issues which are generally resolved without the need for court intervention. Mr. Kapila also testified that, given the high burden with respect to surcharge of a secured creditor's collateral and the fact that expenses that cannot be surcharged are administrative claims under Fla. Stat. § 727.114(1)(b), there is a significant risk that TCB's administrative claim would be higher in the absence of settlement, resulting in a smaller recovery for unsecured creditors, including the Laserscopic Claimants.

P. The settlement and compromise embodied in the Settlement Agreement falls within the reasonable range of possible litigation outcomes and reflects the Assignee's appropriate exercise of his business judgment.

Q. The settlement and compromise embodied in the Settlement Agreement is in the best interests of creditors and the estates will avoid the substantial risk, delay, and expense associated with continued litigation with TCB.

R. The terms of the Settlement Agreement are above the lowest level in the range of reasonableness and in all respects satisfy the standards set forth in *Justice Oaks*, for approval of a compromise of a controversy on behalf of the Assignment Estates.

Based on the findings above and for the reasons stated in the Compromise Motion and in the terms of the Settlement Agreement, which shall constitute the decision of the Court, it is

ORDERED as follows:

1. The Compromise Motion is granted.
2. The Settlement Agreement is approved in all respects.
3. TCB shall have an administrative claim in the amount of \$965,465, which shall be secured by a lien on unencumbered assets.
4. The Assignee and TCB are authorized and directed to implement and comply with the terms and conditions of the Settlement Agreement.
5. This Order shall not be binding on the parties as to any allocation of fees awarded by the Court for periods following July 31, 2020.
6. Counsel for the Assignee shall serve this Order upon all interested parties and their counsel, and upon the Limited Notice Parties List.

DARREN FARFANTE
Circuit Court Judge

Copies to: Counsel of record

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Description	Compromise Order with TCB [EXH A - Amd with correct title]
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Deleted cell	
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