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

In re:

Laser Spine Institute, LLC	Case No. 2019-CA-2762
CLM Aviation, LLC	Case No. 2019-CA-2764
LSI HoldCo, LLC	Case No. 2019-CA-2765
LSI Management Company, LLC	Case No. 2019-CA-2766
Laser Spine Surgery Center of Arizona, LLC	Case No. 2019-CA-2767
Laser Spine Surgery Center of Cincinnati, LLC	Case No. 2019-CA-2768
Laser Spine Surgery Center of Cleveland, LLC	Case No. 2019-CA-2769
Laser Spine Surgical Center, LLC	Case No. 2019-CA-2770
Laser Spine Surgery Center of Pennsylvania, LLC	Case No. 2019-CA-2771
Laser Spine Surgery Center of St. Louis, LLC	Case No. 2019-CA-2772
Laser Spine Surgery Center of Warwick, LLC	Case No. 2019-CA-2773
Medical Care Management Services, LLC	Case No. 2019-CA-2774
Spine DME Solutions, LLC	Case No. 2019-CA-2775
Total Spine Care, LLC	Case No. 2019-CA-2776
Laser Spine Institute Consulting, LLC	Case No. 2019-CA-2777
Laser Spine Surgery Center of Oklahoma, LLC	Case No. 2019-CA-2780
Assignors,	Consolidated Case No: 2019-CA-2762
To:	Division L
Soneet Kapila,	
Assignee	

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LASERSCOPIC CREDITORS' OPPOSITION TO
NON-PARTY HOLLAND & KNIGHT LLP'S MOTION TO INTERVENE

The Laserscopic Creditors submit their response in opposition to the *Non-Party Holland & Knight LLP's Motion to Intervene* (Filing # 194379025) filed on March 19, 2024 (the "Motion"). The Motion should be denied for the reasons outlined below.

I. *Holland and Knight LLP Cannot Intervene*

1. Holland & Knight LLP ("HK") seeks to "intervene in the ABC proceeding for the limited purpose of participating in the litigation in this Court, and in any subsequent appeal,

regarding the Motion to Approve" a settlement between the Assignee and HK. Motion at ¶3. At the outset it should be noted that there is no legal basis for a "limited" intervention. Rather, by intervening in the ABC a party is fully appearing before the court and subjecting itself to the processes. HK cannot choose to be a "limited" participant (and it cites no authority for doing so). Under the ABC statute, this Court looks out for the interests of the ABC estate, the creditors of the ABC, and the relative burdens on each of them, not what a non-party litigation target of the ABC estate desires.

2. In its Motion, HK relies on Rule 1.230 of the Florida Rules of Civil Procedure. But since this is an ABC Proceeding, which is more akin to a bankruptcy case, it is more appropriate to rely upon Section 1109(b) of the Bankruptcy Code. Section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." Notably, HK does not fall within any of the parties that are entitled to appear. The purpose of the statute is to prevent those who have no recovery from the estate appearing and acting to influence the estate and court. "[A]n entity that does not hold a financial stake in the case is generally excluded from the definition of "party in interest," including the court, the United States trustee and the Securities and Exchange Commission." [1]

3. The leading treatise notes that the "zone of interest" test is the proper test to analyze appearance in bankruptcy cases. *Id.* The test "denies a right [to participate] if the [party's] interests are so marginally related to **or inconsistent with the purposes implicit in the statute** that it

[1] *7 Collier on Bankruptcy P 1109.04* (16th 2024)

cannot reasonably be assumed that Congress intended to permit [participation]."[2] Here it is inconsistent with the point of the ABC statute for a litigation target with no claim in the ABC estate to appear and argue in support of the Assignee, as if the Assignee were unable to cogently advance his own arguments. If anything, permitting HK to intervene shows their undue influence over the Assignee – that he would defer to them in presenting arguments his own business judgment (arguments without any evidence or testimony).

4. Moreover, even if intervention were permitted on a discretionary basis (like the powers of labor unions and attorneys general to intervene under Fed. R. Bankr. P. 2018(a)), HK's intervention does not advance the Motion to Approve the Settlement and Compromise, it distracts from it. The issues to be heard will not be made any more or less likely by the intervention of HK because HK cannot change 1) the Assignee's lack of authority to bar the rights of all persons everywhere by the proposed bar order, 2) the Assignee's lack of a foundation for his business judgment given the withdrawal of all evidence, and/or 2) the Assignee acting against the paramount interests of the creditors (nearly all of whom have objected).

5. Similarly, under bankruptcy law (applicable to ABC proceedings in the absence of other law)[3] and Fla. Stat. Ann. §727.109(7) (which tracks the bankruptcy code 11 U.S.C. §363 and Fed. R. Bankr. P. 9019) the Court is to make its determination for the stakeholder's benefit (the estate) and not for the interest of the non-party who is a litigation target of the Estate. HK is obligated to defend *its own* interests, not those of the Assignee's Estate. In other words, HK's interests are necessarily opposed to the Assignee and receiving the best recovery for the estate.

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[2] *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987) (emphasis added).

[3] Courts often look to title 11 of the United States Code (the "Bankruptcy Code") when an assignment for the benefit of creditors statute fails to provide guidance. *See, e.g.,* Moecker v. Antoine, 845 So. 2d 904, 911 n.10 (Fla. 1st DCA 2003) ("State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceeding involving assignments for the benefit of creditors").

Yet, in evaluating the compromise the Court looks *only* to the benefit to the ABC estate—the creditors, not the litigation target.

6. Here, numerous creditors have taken exception with certain language in the Settlement Agreement as it could be used by HK to argue that the terms are far broader than the Assignee has authority to agree to. As the Court is no doubt aware, there are separate lawsuits against HK, including by the Trustee of the Estate of EFO Holdings LP. As written, the language could lend itself to varying interpretations. By their objection, the Laserscopic *Creditors* have asked this Court to eliminate the risk that the Settlement Agreement can be used improperly to prejudice the rights of others. Failing to do so may create years of unnecessary litigation and expense that could be easily avoided by merely cleaning up the terms as was proposed by the Laserscopic *Creditors* and Texas Capital Bank (also an unsecured creditor) when it submitted a proposed order to the Assignee. The Assignee rejected the proposed edits without explanation. The objecting parties are creditors who have the right to object, but that is not true of HK based on the authority above.

7. Even under the Florida rule cited by HK, were it applicable, HK should not be permitted to intervene. Florida law provides that "[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." Fla. R. Civ. P. 1.230. The Florida Supreme Court established a two-part test for determining whether intervention is proper.[4]

[4] The cases that HK relies on are in apposite. Both *Barnhill v. Fla. Microsoft Anti-Trust Litig.*, 905 So. 2d 195, 199 (Fla. 3d DCA 2005), and *Litvak v. Scylla Properties, LLC*, 946 So. 2d 1165, 1173 (Fla. 1st DCA 2006), are cases regarding class actions and members/non-named members rights to intervene. A class member or potential class member are well sitauted to intervene in a case. That is not the same as HK who has no right to do so.

8. The trial court must first determine whether "the interest asserted is appropriate to support intervention." *Union Central Life Ins. Co. v. Carlisle,* 593 So. 2d 505, 507 (Fla. 1992). The trial court must then exercise its sound discretion as to whether to permit intervention. In this second part of the test, the trial court "should consider several factors, including the derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance. *Id.* at 507-508. Intervention is limited to the extent necessary to protect the interests of all parties.

9. To be clear, the interest must be direct and immediate, and the intervenor must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of indirect, inconsequential, or contingent interest is wholly inadequate. *See, Stefanos v. Rivera-Berrios*, 673 So. 2d 12 (Fla. 1996); *Farese v. Palm Beach Partners, Ltd*., 781 So. 2d 419, 421 (Fla. 4th DCA 2001).

10. Under the *Union Central* test, the interest must be in the specific litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation. *See Kissoon v. Araujo*, 849 So. 2d 426, 429 (Fla. 1st DCA 2003), citing *Morgareidge v. Howey*, 75 Fla. 234, 78 So. 14, 15 (1918); *see also Lexington Ins. Co. v. James*, 295 So. 3d 367, 371 (Fla. 1st DCA 2020)(Courts consider a number of factors "including the derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstances.") .

11. Additionally, the two important purposes for rules authorizing intervention are to foster the economy of judicial administration and to protect non-parties from having their interests

adversely affected by litigation conducted without their participation. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). HK's intervention would needlessly increase the expense to the parties, increase the burdens on judicial resources, and cover the courthouse with an avalanche of paperwork with no concomitant benefit to the creditors of the ABC estate, this Court, or the statutory process.

12. As noted above, here, there is nothing that HK could offer that benefits this Court's analysis when it is the Assignee who is obligated to meet his own burden of proof—but here there is no evidence before the Court to support the proposed settlement. The Laserscopic Creditors have objected to certain of the settlement terms and have asked this Court to either enter an order making clear what the Assignee has authority to do through the settlement or otherwise reject the settlement altogether.[5] By their Objection, the Laserscopic Creditors object to certain language in the Settlement Agreement because it illegal, unconstitutional, and beyond the powers granted to this Court under the ABC statute. That Objection does not make HK's involvement any more or less helpful in justifying the Trustee's decision (and frankly HK cannot meet the Assignee's burden for him). It only muddies the water.

13. Settlements in bankruptcy cases are not binding on the estate until approved. *In re Degenaars*, 261 B.R. 316 (Bankr. M.D. Fla. 2001). The same is true of any settlement in this ABC. This Court has the statutory obligation to supervise the Assignee's estate, including ensuring that the paramount interests of the creditors are considered, even to the exclusion of what the Assignee may want. Thus, the Court will not shirk its obligations to take a skeptical eye to an Assignee who, with no evidence in the record, wants the Court to authorize the Assignee to enter

[5] As noted in the Laserscopic Creditors' Objection, while they believe the amount of the settlement is much lower than the value, they recognize that the Assignee has authority to make that determination. The Objection is limited to other conditions that the Assignee has agreed to but those terms are beyond his authority and jurisdiction.

into a settlement that purports to bar other persons nationwide, even a federal chapter 7 trustee, and that is opposed strongly by nearly all creditors with claims.

14. Because the bar order is illegal and unconstitutional, HK's participation is not needed or helpful. The Assignee does not have the right to impact the rights of third parties who did not agree to be bound by the terms of the Settlement Agreement. Indeed, as noted in the Objection, as written the settlement at issue is not fair and equitable to the largest unsecured creditor, the Trustee of the Estate of EFO Holdings LP or other third parties.

15. The creditors are not seeking to "re-write" the motion. In the intervention motion, HK republished confidential settlement negotiations and then argues that, by making settlement proposals, the creditors seek to "re-write" the settlement, but that is not true. By opposing the Compromise Motion, the creditors seek its denial (or at least make clear what authority the Assignee has and to prevent him from going beyond that). The creditors plead with this Court to listen to their concerns and, given the total lack of any evidence from the Assignee, deny the motion in full. However, those same creditors are reasonable had proposed compromises and changes that they submitted to the Court, which would be acceptable.

16. The Court should deny the motion to approve the settlement as written because it is not fair, reasonable, and in the best interest of the estate, and HK's intervention does not help in the Court's analysis. The law requires the court to give real, measured, consideration to the interests of the creditors, but the Court will also consider the unfairness of a compromise that purports to override the powers of a chapter 7 trustee (or others) who have not appeared. "Under the 'fair and equitable' standard, [courts look] to the fairness of the settlement to the other persons, i.e., the parties who did not settle." *Will v. Northwestern Univ.* (*In re Nutraquest, Inc.*), 434 F.3d 639, 645 (3d Cir. 2006). It is the debtor—the Assignee—who has the burden of persuasion, not

the Laserscopic Creditors. *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986).[6] This includes "assess[ing] and balance[ing] the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995). In this regard, the creditors' interests are a material consideration that this Court must consider in analyzing whether to approve a settlement as written. *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

17. Here, there are numerous bases to deny the Motion to intervene. First, HK is not a party in interest and holds no claim as a creditor of the ABC. Thus, Rule 1.230, Fla. R. Civ. P. is inapplicable. Second, the decision of the Assignee to seek approval of the Compromise under Fla. Stat. Ann. §727.109(7) is between the Assignee and the ABC's creditors, to whom the Assignee owes a duty—HK's benefit is irrelevant. *Id.* Similarly, the Court will consider how the terms of the settlement impact the rights of third parties. HK has no right to intervene to affect the rights of non-parties any more than it could intervene to affect the rights of the ABC's creditors. HK cannot "backstop" the Assignee. It is the Assignee's duty to present evidence sufficient to meet his burden of proof and prove all of the terms of the settlement are in the best interests of the estate and reflect the paramount interests of creditors. He has presented no evidence. He cannot meet that burden. HK cannot meet it for him.

18. ***Holland and Knight LLP Does Not Have Standing*** Even bankruptcy authority were not applicable, the result is the same under Florida law. Standing asks "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498 (1975); *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (Standing is a threshold jurisdictional question); *see also Nedeau*

[6] Here, recall that the Assignee's affidavit was stricken. As a result, there is no credible evidence on which this Court can even make that analysis or determination in favor of the Assignee.

v. Gallagher, 851 So. 2d 214, 215 (Fla. 1st DCA 2003) ("Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation" and the "interest cannot be conjectural or merely hypothetical" and "the claim should be brought by, or on behalf of, the real party in interest.") (internal citations omitted).

19. "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Matthews v. Fed. Nat. Mortg. Ass'n*, 160 So. 3d 131 (Fla. 4th DCA 2015) (In *Matthews,* the appellate court held that Fannie Mae failed to establish standing at the beginning of the lawsuit because there was no assignment or other document that pre-dated the lawsuit and the promissory note attached to the complaint was not made payable to Fannie Mae).

20. Here, the issue before the Court is whether the Court, administering the ABC, should grant authority to the Assignee (who without evidence) seeks to bind himself to a settlement that is opposed by nearly all the ABC's creditors. This is about the facts of the ABC and the factual basis for the Assignee's position, not HK. HK's "facts" on whether the Assignee is acting appropriately do not matter.

WHEREFORE, based on the foregoing, the Motion should be denied.

Dated: March 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 20, 2024, a true and correct copy of the foregoing has been electronically filed with the Clerk of Court through the Florida Court's e-Filing Portal, which will send a Notice of Electronic Filing to all counsel of record or electronic mail to the parties listed on the Master Limited Notice Service List attached.

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