Docket #0003 Date Filed: 6/30/2024

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	Chapter 11
LAVIE CARE CENTERS, LLC, *et al.*,	Case No. 24-55507 (PMB)
Debtors.[1]	(Jointly Administered)
LAVIE CARE CENTERS, LLC; 1010 CARPENTERS WAY OPERATIONS LLC; 1120 WEST DONEGAN AVENUE OPERATIONS LLC; 11565 HARTS ROAD OPERATIONS LLC; 12170 CORTEZ BOULEVARD OPERATIONS LLC; 1465 OAKFIELD DRIVE OPERATIONS LLC; 15204 WEST COLONIAL DRIVE OPERATIONS LLC; 1550 JESS PARRISH COURT OPERATIONS LLC; 1615 MIAMI ROAD OPERATIONS LLC; 1851 ELKCAM BOULEVARD OPERATIONS LLC; 216 SANTA BARBARA BOULEVARD OPERATIONS LLC; 2333 NORTH BRENTWOOD CIRCLE OPERATIONS LLC; 2826 CLEVELAND AVENUE OPERATIONS LLC; 3001 PALM COAST PARKWAY OPERATIONS LLC; 3101 GINGER DRIVE OPERATIONS LLC; 3735 EVANS AVENUE OPERATIONS LLC; 4200 WASHINGTON STREET OPERATIONS LLC; 4641 OLD CANOE CREEK ROAD OPERATIONS LLC; 518 WEST FLETCHER AVENUE OPERATIONS LLC; 5405 BABCOCK STREET OPERATIONS LLC; 6305 CORTEZ ROAD WEST OPERATIONS LLC; 6414 13TH ROAD SOUTH OPERATIONS LLC; 6700 NW 10TH PLACE OPERATIONS LLC; 702 SOUTH KINGS AVENUE OPERATIONS LLC; 710 NORTH SUN DRIVE OPERATIONS LLC; 741 SOUTH BENEVA ROAD OPERATIONS LLC; 777 NINTH STREET NORTH OPERATIONS LLC; 7950	Adversary Proc. No. 24-05127 (PMB)

[1] The last four digits of LaVie Care Centers, LLC's federal tax identification number are 5592. There are 282 Debtors in these chapter 11 cases, which are being jointly administered for procedural purposes only. A complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://www.kccllc.net/LaVie. The location of LaVie Care Centers, LLC's corporate headquarters and the Debtors' service address is 1040 Crown Pointe Parkway, Suite 600, Atlanta, GA 30338.

2455507240630000000000002

LAKE UNDERHILL ROAD OPERATIONS LLC; 9311 SOUTH ORANGE BLOSSOM TRAIL OPERATIONS LLC; 9355 SAN JOSE BOULEVARD OPERATIONS LLC; BAYA NURSING AND REHABILITATION, LLC; BRANDON FACILITY OPERATIONS, LLC; CONSULATE FACILITY LEASING, LLC; EPSILON HEALTH CARE PROPERTIES, LLC; FLORIDIAN FACILITY OPERATIONS, LLC; JACKSONVILLE FACILITY OPERATIONS, LLC; JOSERA, LLC; KISSIMMEE FACILITY OPERATIONS, LLC; LIDENSKAB, LLC; LV CHC HOLDINGS I, LLC; MELBOURNE FACILITY OPERATIONS, LLC; MIAMI FACILITY OPERATIONS, LLC; NEW PORT RICHEY FACILITY OPERATIONS, LLC; NORTH FORT MYERS FACILITY OPERATIONS, LLC; ORANGE PARK FACILITY OPERATIONS, LLC; PORT CHARLOTTE FACILITY OPERATIONS, LLC; TALLAHASSEE FACILITY OPERATIONS, LLC; TOSTURI, LLC; AND WEST ALTAMONTE FACILITY OPERATIONS, LLC;

Plaintiffs,

v.

HEALTHCARE NEGLIGENCE SETTLEMENT RECOVERY CORP.

Defendant.

BRIEF IN SUPPORT OF DEBTORS' MOTION FOR ENTRY OF ORDER (I) EXTENDING THE AUTOMATIC STAY AND/OR ENJOINING CLAIMS AND CAUSES OF ACTION AGAINST NON-DEBTOR DEFENDANTS AND (II) EXPEDITION

CONTENTS

LaVie Care Centers, LLC ("LaVie") and certain of its affiliates and subsidiaries, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors") and as plaintiffs in the above-captioned adversary proceeding (the "Adversary Proceeding"), hereby submit this brief (this "Brief") in support of (a) the *Debtors' Motion for Entry of Order (I) Extending the Automatic Stay and/or Preliminarily Enjoining Claims and Causes of Action Against Non-Debtor Defendants and (II) Expedition* (the "Motion"); (b) the *Complaint* (the "Complaint") initiating this adversary proceeding; and (c) the *Declaration of M. Benjamin Jones in Support of Debtors' Motion for Entry of Order (I) Extending the Automatic Stay and Preliminary Enjoining Claims and Causes of Action Against Non-Debtor Defendants and (II) Expedition* (the "Jones Declaration"), each of which is filed contemporaneously herewith and fully incorporated herein by reference. In support of thereof, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT[1]

1. Through these Chapter 11 Cases, the Debtors seek to maximize the value of their estates through various restructuring efforts that, to the best of the Debtors' ability, provide meaningful recoveries for creditors and stakeholders alike, including, among others, the marketing, auction, and sale of substantially all of their assets under section 363 of the Bankruptcy Code, and subsequent chapter 11 plan of reorganization. The relief sought herein—enforcing the automatic stay to stop Recovery Corp.'s continued prosecution of the claims and causes of action against the Non-Debtor Defendants in the Recovery Corp. Action—is critical to the Debtors' ability to achieve that purpose.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them elsewhere in this Brief. Unless otherwise indicated, citations and quotations are omitted, emphasis is added, and citations to "Ex. __" refer to the exhibits being submitted with the Jones Declaration.

2. Putting aside the lack of merits of the Recovery Corp. Action,[2] the claims and causes of action asserted against the Non-Debtor Defendants should be stayed because (a) certain claims and causes of action—including those alleging fraudulent conveyances, successor liability, and corporate veil piercing—unequivocally belong solely to the Debtors as property of their estates in these Chapter 11 Cases, and (b) Recovery Corp.'s claims and causes of action against the Non-Debtor Defendants seek "in effect a judgment or findings against the debtor," both because (i) such claims depend on adverse findings against the Debtor Defendants, and "are inextricably interwoven with, and present common questions of fact and law," *see In re Fiddler's Creek, LLC*, No. 9:10-bk-03846-ALP, 2010 WL 6618876, at *6 (Bankr. M.D. Fla. Sept. 15, 2010), and because (ii) certain claims implicate broad indemnification obligations owed to the Non-Debtor Defendants by the Debtor Defendants.

3. Simply put, the Recovery Corp. Action cannot proceed without impeding the Debtors' efforts to reorganize before this Court. In addition to the financial impacts on the Debtors' estates, the continued pursuit of the Recovery Corp. Action against the Non-Debtor Defendants risks producing inequitable results, rewarding the winners in the proverbial "race to the courthouse" and disadvantaging all other creditors by draining valuable estate resources at this critical juncture in these Chapter 11 Cases. Moreover, because of the indemnification obligations owed by the Debtor Defendants to the Non-Debtor Defendants, any claim or final resolution against any of the Non-Debtor Defendants in the Recovery Corp. Action would result in potential liability for the Debtor Defendants and indemnification claims asserted by the same Non-Debtor Defendants against the Debtor Defendants in these Chapter 11 Cases.

[2] The Debtors dispute the allegations set forth in the Recovery Corp. Action and reserve all rights, counterclaims, and defenses with respect thereto.

4. Accordingly, the Debtors seek entry of an order (a) declaring that the automatic stay applies to the claims asserted against the Non-Debtor Defendants in the Recovery Corp. Action; (b)(i) extending the automatic stay to apply to all claims and causes of action asserted against the Non-Debtor Defendants in the Recovery Corp. Action or (ii) preliminarily enjoining the same; and (c) expediting the proceedings.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The legal predicates for the relief requested herein are sections 105(a) and 362(a) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 7001(7), 7007 and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Rule 7007-1 of the Local Rules of Practice for the United States Bankruptcy Court for the Northern District of Georgia (the "Local Rules"), and the *Second Amended and Restated General Order 26-2019, Procedures for Complex Chapter 11 Cases*, dated February 6, 2023 (the "Complex Case Procedures").

BACKGROUND

I. The Chapter 11 Cases

7. On June 2, 2024 (the "Petition Date"), each Debtor commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases") in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (the "Court"), which are being jointly administered for procedural purposes only. The Debtors continue to operate their business and manage their property as debtors and debtors-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

8. On June 13, 2024, the Office of the United States Trustee for Region 21, Atlanta Division (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Committee"), consisting of the following nine members: (a) Healthcare Services Group, Inc., (b) Omnicare, Inc., (c) Twin Med, LLC, (d) ShiftMed, LLC, (e) CBD Services USA, LLC, (f) Amidon Nurse Staffing, (g) Recovery Corp.,[3] (h) the Estate of Nancy Walsh, and (i) Theodore Horrobin. *See* Docket No. 112. To date, no chapter 11 trustee or examiner has been appointed in the Chapter 11 Cases.

9. Certain of the Debtors in the Chapter 11 Cases manage and/or operate approximately 43 skilled nursing facilities and independent living facilities. These Debtors provide short-term rehabilitation, comprehensive post-acute skilled care, long-term care, assisted living, and therapy services in each of their facilities, comprising nearly 4,300 licensed beds across Pennsylvania, Mississippi, North Carolina, Virginia, and Florida. Additional information regarding the Debtors and these Chapter 11 Cases, including the Debtors' business operations, capital structure, financial condition, and the reasons for and objectives of these Chapter 11 Cases, is set forth in the *Declaration of M. Benjamin Jones in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 17].

II. The Recovery Corp. Action

10. On April 22, 2024, approximately nine weeks ago, a newly-formed entity called "Healthcare Negligence Settlement Recovery Corp." ("Recovery Corp.")[4] filed a lawsuit

[3] Recovery Corp. is a member of the Committee.

[4] According to allegations asserted in the Recovery Corp. Action, approximately 97 tort plaintiffs putatively assigned their claims to Recovery Corp., who then brought suit on behalf of those entities against certain of the Debtors and the Non-Debtor Defendants. The Debtors do not waive any arguments or defenses with respect to the Recovery Corp. Action, including, without limitation, whether Recovery Corp. has standing and whether the claims are valid.

(the "Recovery Corp. Action")[5] in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida Civil Division by Recovery Corp., captioned *Healthcare Negligence Settlement Recovery Corp. v. 5405 Babcock Street Operations, LLC,* et al., No. 2024-007342-CA-01. The Recovery Corp. Action was filed against several of the Debtors (collectively, the "Debtor Defendants")[6] and approximately nine non-debtor entities (collectively, the "Non-Debtor Defendants"), including (a) 9400 SW 137th Avenue Operations LLC, (b) Aspire Healthcare, LLC, (c) CMC II, LLC, (d) Concourse Partners, LLC, (e) Concurrent Partners, LLP, (f) Daniel E. Dias, Esq., (g) NSPIRE Healthcare Inc., (h) NSPRMC, LLC, and (i) Synergy Healthcare Services, Inc.

11. Recovery Corp. appears to have mistakenly named certain of the foregoing Non-Debtor Defendants. For example, CMC II, LLC is an entity that no longer exists, as it was dissolved following the post-effective date administration of its estate, and all claims and causes of action against it were released as a result of its prior chapter 11 case.[7] Concourse Partners, LLC

---

[5] A true and correct copy of the complaint filed in the Recovery Corp. Action is attached to the Jones Declaration as Exhibit 1 (the "Recovery Corp. Complaint").

[6] The Debtor Defendants include LaVie Care Centers, LLC; 1010 Carpenters Way Operations LLC; 1120 West Donegan Avenue Operations LLC; 11565 Harts Road Operations LLC; 12170 Cortez Boulevard Operations LLC; 1465 Oakfield Drive Operations LLC; 15204 West Colonial Drive Operations LLC; 1550 Jess Parrish Court Operations LLC; 1615 Miami Road Operations LLC; 1851 Elkcam Boulevard Operations LLC; 216 Santa Barbara Boulevard Operations, LLC; 2333 North Brentwood Circle Operations, LLC; 2826 Cleveland Avenue Operations LLC; 3001 Palm Coast Parkway Operations LLC; 3101 Ginger Drive Operations LLC; 3735 Evans Avenue Operations LLC; 4200 Washington Street Operations LLC; 4641 Old Canoe Creek Road Operations LLC; 518 West Fletcher Avenue Operations LLC; 5405 Babcock Street Operations LLC; 6305 Cortez Road West Operations LLC; 6414 13th Road South Operations LLC; 6700 NW 10th Place Operations LLC; 702 South Kings Avenue Operations LLC; 710 North Sun Drive Operations LLC; 741 South Beneva Road Operations LLC; 777 Ninth Street North Operations LLC; 7950 Lake Underhill Road Operations, LLC; 9311 South Orange Blossom Trail Operations, LLC; 9355 San Jose Boulevard Operations LLC; Baya Nursing And Rehabilitation, LLC; Brandon Facility Operations, LLC; Consulate Facility Leasing, LLC; Epsilon Health Care Properties, LLC; Floridian Facility Operations, LLC; Jacksonville Facility Operations, LLC; Josera, LLC; Kissimmee Facility Operations, LLC; Lidenskab, LLC; LV CHC Holdings I, LLC; Melbourne Facility Operations, LLC; Miami Facility Operations, LLC; New Port Richey Facility Operations, LLC; North Fort Myers Facility Operations, LLC; Orange Park Facility Operations, LLC; Port Charlotte Facility Operations, LLC; Tallahassee Facility Operations, LLC; Tosturi, LLC; and West Altamonte Facility Operations, LLC.

[7] *See Findings of Fact, Conclusions of Law, and Order Confirming the First Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation*, *In re CMC II, LLC*, Case No. 21-10461 (JTD) (Bankr. D. Del. Mar. 1, 2021) [Docket No. 718] ("[A]ll entities who have held, hold, or may hold Claims against or Equity Interests in the Debtors shall be **permanently enjoined** from taking any of the following actions against any property that is to be distributed under the terms of the Combined Plan and Disclosure Statement on account of

and Concurrent Partners, LLP are not entities in the Debtors' corporate structure and the Debtors do not know who they are or what services they provide.[8] Finally, the Debtors are unaware of any entities that exist with the legal names of "Synergy Healthcare Services, Inc." or "NSPIRE Healthcare Inc." and can only surmise that Recovery Corp. attempted to name Pourlessoins, LLC, d/b/a Synergy Healthcare Services ("Synergy"), and NSPRMC, LLC, d/b/a NSPIRE Healthcare ("NSPIRE"). Accordingly, this action seeks to extend the automatic stay to the following Non-Debtor Defendants: Mr. Dias, 9400 SW 137th Avenue Operations LLC, Synergy, NSPIRE, and Aspire Healthcare, LLC.

12. The Recovery Corp. Action is in its nascent stages. No responsive pleadings have been filed, discovery has yet to commence, and substantial work remains before a resolution on the merits—which is, at best, many months away.

III. The Indemnification Obligations

13. Pursuant to various operating, support services, administrative services, and operating transfer agreements, the Debtor Defendants are contractually obligated to indemnify the Non-Debtor Defendants for any damages and reasonable attorneys' fees incurred in connection with many of the claims asserted in the Recovery Corp. Action, creating an identity of interest and meriting extension of the automatic stay.

---

any such Claims or Equity Interests: (a) commencing or continuing, in any manner or in any place, any action or other proceeding . . .") (emphasis added); *see also* Docket No. 718-1 at 4 ("After the Effective Date, after completing all remaining ordinary course business operations, fiduciary obligations, and the administration of this Combined Plan and Disclosure Statement, **the Debtors will be dissolved**.") (emphasis added).

[8] Given the Debtors' unfamiliarity with these entities, Concourse Partners, LLC and Concurrent Partners, LLP are not discussed herein.

A. The LVCC Operating Agreement

14. Pursuant to its limited liability company operating agreement (the "LVCC Operating Agreement"),[9] Debtor Defendant LaVie Care Centers, LLC is required to indemnify certain of the Non-Debtor Defendants for any liability incurred in the Recovery Corp. Action. Section 17(b) of the LVCC Operating Agreement provides:

> **The Company shall indemnify an Indemnified Representative against any Liability incurred in connection with any Proceeding in which the Indemnified Representative may be involved as a party or otherwise by reason of the fact that such person is or was serving in an Indemnified Capacity**, including, without limitation, any Liability resulting from any actual or alleged breach or neglect of duty, error, misstatement or misleading statement, negligence, gross negligence or act giving rise to strict or products liability. . . .

Jones Decl., Ex. 2, § 17(b) (emphasis added).

15. The LVCC Operating Agreement defines "Indemnified Representative" as:

> [A]ny and all **members, managers, officers, employees and agents of the Company and any other person designated as an Indemnified Representative** by the Member (which may, but need not, include any person serving at the request of the Company, as a **member, manager, officer, employee, agent, fiduciary or trustee of another limited liability company, corporation, partnership, joint venture, trust, employee benefit plan or other entity or enterprise**).

See id. at § 17(a)(ii) (emphasis added). Mr. Dias, NSPIRE, and Synergy each constitute an "Indemnified Representative" based on their roles as managers, agents, and persons serving at the request of Debtor Defendant LaVie.

16. The LVCC Operating Agreement defines "Indemnified Capacity" as:

> [A]ny and all **past, present and future service by an Indemnified Representative in one or more capacities** as a member, manager, officer, employee or agent of the Company, or, at the request of the Company, as a member, manager, officer, employee, agent,

[9] A true and correct copy of the LVCC Operating Agreement is attached to the Jones Declaration as Exhibit 2.

> fiduciary or trustee of another limited liability company, corporation, partnership, joint venture, trust, employee benefit plan or other entity or enterprise.

See id. at § 17(a)(i) (emphasis added).

17. Finally, the LVCC Operating Agreement defines "Proceeding" as:

> [A]ny threatened, pending or completed action, suit, appeal or other proceeding of any nature, whether civil, criminal, administrative or investigative, whether formal or informal, and whether brought by or in the right of the Company, a class of its members, or security holders or otherwise.

See id. at § 17(a)(iv).

18. Accordingly, Debtor Defendant LaVie's indemnification obligations under the LVCC Operating Agreement are implicated for certain of the Non-Debtor Defendants, including Mr. Dias, Synergy, and NSPIRE.

B. The Support Services Agreements

19. Certain of the Debtor Defendants (each, an "Operator" and collectively, the "Operators")[10] are party to a support services agreement (each, a "Support Services Agreement" and collectively, the "Support Services Agreements") through which the Operator

[10] The Operators include the following Debtor Defendants: 1010 Carpenters Way Operations LLC; 1120 West Donegan Avenue Operations LLC; 11565 Harts Road Operations LLC; 12170 Cortez Boulevard Operations LLC; 1465 Oakfield Drive Operations LLC; 15204 West Colonial Drive Operations LLC; 1550 Jess Parrish Court Operations LLC; 1615 Miami Road Operations LLC; 1851 Elkcam Boulevard Operations LLC; 216 Santa Barbara Boulevard Operations, LLC; 2333 North Brentwood Circle Operations, LLC; 2826 Cleveland Avenue Operations LLC; 3001 Palm Coast Parkway Operations LLC; 3101 Ginger Drive Operations LLC; 3735 Evans Avenue Operations LLC; 4200 Washington Street Operations LLC; 4641 Old Canoe Creek Road Operations LLC; 518 West Fletcher Avenue Operations LLC; 5405 Babcock Street Operations LLC; 6305 Cortez Road West Operations LLC; 6414 13th Road South Operations LLC; 6700 NW 10th Place Operations LLC; 702 South Kings Avenue Operations LLC; 710 North Sun Drive Operations LLC; 741 South Beneva Road Operations LLC; 777 Ninth Street North Operations LLC; 7950 Lake Underhill Road Operations, LLC; 9311 South Orange Blossom Trail Operations, LLC; 9355 San Jose Boulevard Operations LLC; Baya Nursing And Rehabilitation, LLC; Brandon Facility Operations, LLC; Floridian Facility Operations, LLC; Jacksonville Facility Operations, LLC; Kissimmee Facility Operations, LLC; Melbourne Facility Operations, LLC; Miami Facility Operations, LLC; New Port Richey Facility Operations, LLC; North Fort Myers Facility Operations, LLC; Orange Park Facility Operations, LLC; Port Charlotte Facility Operations, LLC; Tallahassee Facility Operations, LLC; and West Altamonte Facility Operations, LLC.

engaged Non-Debtor Defendant NSPIRE (the "Consultants"), as applicable, to provide advice and recommendations regarding various aspects of facility operations and property maintenance.

20. Pursuant to the Support Services Agreements, the Operators and NSPIRE are contractually obligated to broadly indemnify each other for liabilities incurred in connection with any Proceeding[11] arising out of the operations of the applicable facility. In an illustrative example, one such Support Services Agreement was entered into between Debtor Defendant 11565 Harts Road Operations LLC, as Operator, and NSPIRE, as Consultant (as amended, supplemented, or otherwise modified from time to time, the "Harts Harbor Support Services Agreement").[12] Section 8.2 of the Harts Harbor Support Services Agreement provides:

> **Operator agrees to indemnify and hold harmless Consultant, and its directors, officers, employees, representatives, and agents** from, against, for and in respect of any and all penalties, fines, interest and monetary sanctions, losses, obligations, **liabilities**, demands, deficiencies, costs and expenses, including, without limitation, reasonable attorneys' fees and other costs and expenses incident to any investigation, claim or Proceeding sustained by any of them **arising out of . . . any claim asserted against any of them in connection with the operations of the Business**. . . .

See Jones Decl., Ex. 3, at § 8.2 (emphasis added).

21. Accordingly, under the Harts Harbor Support Services Agreement, Debtor Defendant 11565 Harts Harbor Road Operations LLC must indemnify Non-Debtor Defendant NSPIRE for, among other things, any and all liabilities incurred in connection with any Proceeding related to the operation of its business, which includes the Recovery Corp. Action. The same can

---

[11] "Proceeding" is defined in the Support Services Agreements as "any pending or completed action or proceeding, whether civil, criminal, administrative or investigative, any appeal in such an action or proceeding, and any inquiry or investigation that could lead to such an action or proceeding." *See* Jones Decl., Ex. 3, at § 11.6(P).

[12] A true and correct copy of the sample Harts Harbor Support Services Agreement is attached to the Jones Declaration as Exhibit 3. The Harts Harbor Support Services Agreement is representative of all other Support Services Agreements between an Operator and NSPIRE.

be said for at least 19 other Debtor Defendants, each of which were previously party to Support Services Agreements with NSPIRE and accordingly owe the same indemnification obligations to NSPIRE.[13]

22. Importantly, though the operations of many of the underlying facilities have since been divested to new operators, effectively terminating the engagement between the Operators and the Consultants, the indemnification provisions in the Support Services Agreements expressly survive such termination. *See id.* at § 7.2 ("All other rights and obligations of the Parties under this Agreement will terminate, except for the rights and obligations of any party under . . . Article VIII hereof . . ."). As such, the Operators referenced above still owe indemnification obligations to Non-Debtor Defendant NSPIRE notwithstanding operations divestitures, further justifying an extension of the automatic stay.

C. The Administrative Services Agreements

23. Debtor Defendants Josera, LLC and Lidenskab, LLC are each party to an administrative services agreement with Non-Debtor Defendant Synergy (each, an "Administrative Services Agreement" and together, the "Administrative Services Agreements").[14] Pursuant to Article VIII of the Administrative Services Agreements, Debtor Defendants Josera, LLC and

[13] Such Debtor Defendants include: 12170 Cortez Boulevard Operations, LLC; 1465 Oakfield Drive Operations, LLC; 15204 West Colonial Drive Operations, LLC; 216 Santa Barbara Boulevard Operations, LLC; 2826 Cleveland Avenue Operations, LLC; 3101 Ginger Drive Operations, LLC; 3735 Evans Avenue Operations, LLC; 4641 Old Canoe Creek Road Operations, LLC; 5405 Babcock Street Operations, LLC; 6305 Cortez Road West Operations, LLC; 702 South Kings Avenue Operations, LLC; 710 North Sun Drive Operations, LLC; 741 South Beneva Road Operations, LLC; 777 Ninth Street North Operations, LLC; 7950 Lake Underhill Road Operations, LLC; Floridian Facility Operations, LLC; Melbourne Facility Operations, LLC; Orange Park Facility Operations, LLC; and Tallahassee Facility Operations, LLC.

[14] A true and correct copy of the Administrative Services Agreement between Debtor Josera, LLC and Synergy, dated as of December 1, 2021 (as amended, supplemented, or otherwise modified from time to time, the "Josera Administrative Services Agreement") is attached to the Jones Declaration as Exhibit 4-A, and a true and correct copy of the Administrative Services Agreement between Debtor Lidenskab, LLC and Synergy, dated as of May 1, 2023 (as amended, supplemented, or otherwise modified from time to time, the "Lidenskab Administrative Services Agreement") is attached to the Jones Declaration as Exhibit 4-B.

Lidenskab, LLC and Synergy are contractually obligated to broadly indemnify each other for, among other things, "third-party claims" which are caused in whole or in part by any negligent act or omission of the other party in connection with performance of their duties. Specifically, section 8.1 of the Administrative Services Agreements provides as follows:

> [Synergy] and [Debtor Defendants Josera, LLC and Lidenskab, LLC, as applicable] shall **indemnify and hold each other and their respective officers, directors, members, employees and affiliates** (each, an "Protected Party") harmless from any and all claims, losses, judgments, actions, proceedings, damages, expenses and liabilities whatsoever incurred by a Protected Party, including reasonable attorneys' fees, arising out of a material breach of this Agreement or **any third-party claims which are caused in whole or in part by any negligent act or omission of the other party in connection with the performance of its duties under this Agreement**. . . .

See Jones Decl., Exs. 4-A, 4-B at § 8.1 (emphasis added). Accordingly, pursuant to the Administrative Services Agreements, Debtor Defendants Josera, LLC and Lidenskab, LLC are each obligated to indemnify Non-Debtor Defendant Synergy for "third-party claims" caused in whole or in part by any negligent act or omission in connection with the performance of its duties, including those "third-party claims" alleged in the Recovery Corp. Action.

24. Importantly, the indemnification provisions in the Administrative Services Agreements expressly survive termination. *See id.* at § 8.1 ("The obligations under this Section 8.1 shall survive termination or expiration of this Agreement.").

D. The OTAs

25. In connection with their prepetition facility operations divestitures, certain of the Debtor Defendants[15] entered into operations transfer agreements (collectively, the "OTAs") with

[15] The applicable Debtor Defendants include: 1120 West Donegan Avenue Operations LLC; 12170 Cortez Boulevard Operations LLC; 1465 Oakfield Drive Operations LLC; 15204 West Colonial Drive Operations LLC; 1615 Miami Road Operations LLC; 216 Santa Barbara Boulevard Operations LLC; 2333 North Brentwood Circle Operations LLC; 3001 Palm Coast Parkway Operations LLC; 3101 Ginger Drive Operations LLC; 3735 Evans Avenue Operations LLC; 4641 Old Canoe Creek Road Operations LLC; 518 West Fletcher Avenue Operations

new facility operators, many of which are affiliates of Non-Debtor Defendant Aspire Healthcare, LLC ("Aspire"). Pursuant to the OTAs, the former operators (*i.e.*, certain of the Debtor Defendants) agreed to broadly indemnify the new facility operators and related parties (including affiliates) for any losses incurred at the facility prior to the operations divestiture closing date.

26. For illustrative purposes, one such Operations Transfer Agreement was entered into between Debtor Defendant 216 Santa Barbara Boulevard Operations LLC, as existing operator, Santa Barbara Blvd Opco LLC, as new operator, LaVie, as existing operator guarantor, and Altranais Care Centers LLC, as new operator guarantor (the "SNF OTA").[16] The SNF OTA provides that:

> Existing Operator will hold harmless and indemnify **New Operator and its officers, directors, employees, members, affiliates, designees, successors and assigns** from and against any Loss that . . . (ii) arises from any tort, general liability, or professional liability claim made by any third party . . . with respect to the Facility as a result of operation of the Facility prior to the Operations Closing Date, whether such obligation accrues before or after the Operations Closing Date. . . .

See Jones Decl., Ex. 5, Art. IX.A (emphasis added).

27. Based on the foregoing, as affiliate of the new operators and new operator guarantors, Non-Debtor Defendant Aspire is an indemnitee under the OTAs. Non-Debtor Defendant Aspire is entitled to indemnification by the Debtor Defendants party to the OTAs for the claims asserted by the plaintiffs in the Recovery Corp. Action because such claims arose prior to the operations divestiture closing date.

LLC; 5405 Babcock Street Operations LLC; 6305 Cortez Road West Operations LLC; 6414 13th Road South Operations LLC; 6700 NW 10th Place Operations LLC; 702 South Kings Avenue Operations LLC; 710 North Sun Drive Operations LLC; 741 South Beneva Road Operations LLC; 9355 San Jose Boulevard Operations LLC; Jacksonville Facility Operations, LLC; North Fort Myers Facility Operations, LLC; Orange Park Facility Operations, LLC; Tallahassee Facility Operations, LLC.

[16] A true and correct copy of the sample SNF OTA is attached to the Jones Declaration as Exhibit 5. The SNF OTA is representative of all other Aspire OTAs.

ARGUMENT

28. It is axiomatic that the automatic stay prohibits the continued prosecution of claims and causes of action against the Debtors outside of the bankruptcy court. Specifically, Bankruptcy Code section 362(a) operates to stay:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . .

11 U.S.C. § 362(a)(1), (2), (3), (6).

29. The legislative history of Bankruptcy Code section 362 indicates that Congress intended for the scope of the automatic stay to be sweeping in order to effectuate its protective purpose on behalf of debtors:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> . . .
>
> The automatic stay is one of the most important protections provided by the Bankruptcy laws. **Nevertheless, the Bankruptcy Courts must have the power to enjoin actions not covered by the**

> **automatic stay, in order that the bankruptcy case may proceed unembarrassed by multiple litigation**.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977) (emphasis added); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840–41, 5973; *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 503 (indicating that the automatic stay is "one of the most fundamental protections provided [to the debtor] by the bankruptcy laws").

30. It is well established that the automatic stay may be extended to claims against non-debtors in certain situations, including, pursuant to Bankruptcy Code section 362(a)(3), to stay causes of action asserted by a third party against a non-debtor that belong to the debtor's estate. *See Baillie Lumber Co., LP v. Thompson (In re Icarus Holdings, LLC)*, 413 F.3d 1293, 1294 (11th Cir. 2005).

31. The Court also has discretion to invoke Bankruptcy Code section 362 to stay proceedings against non-debtor third parties "when there is such an identity of interest between the debtor and another defendant that the debtor may be said to be the real party defendant and that a judgment against the other defendant would be in effect a judgment against or a finding against the debtor." *Dillard v. Baker*, No. 1:08-cv-1740-JOF, 2009 WL 1025337, at *1 (N.D. Ga. Apr. 14, 2009) (quoting *A.H. Robins Co. v. Piccinin, (In re A.H. Robins Co.)*, 788 F.2d 994, 999 (4th Cir.), *cert. denied*, 479 U.S. 876, (1986)). The automatic stay may also be extended to a non-debtor to avoid an adverse impact on the debtor's restructuring efforts:

> The broader rule here is that a debtor's stay may extend to a non-debtor only **when necessary to protect the debtor's reorganization**. The threatened harm may be to needed debtor funds (*e.g.*, when non-debtors are entitled to indemnification) or personnel (*e.g.*, when debtor needs the services of non-debtors facing crushing litigation). **The question is whether the action against the non-debtor is sufficiently likely to have a 'material effect upon . . . reorganization effort[s],' that debtor protection requires an exception to the usual limited scope of the stay.**

In re Uni-Marts, LLC, 399 B.R. 400, 416 (Bankr. D. Del. 2009) (emphasis added); *see also In re W.R. Grace & Co.*, 115 F. App'x 556, 570 (3d Cir. 2004) (internal citations omitted) (indicating that courts may also extend the stay to halt litigation against third-parties where continued litigation "could interfere with the reorganization of the debtor" or "would frustrate the statutory scheme of [c]hapter 11 or diminish the debtor's ability to formulate a plan of reorganization"); *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997) (indicating that "unique circumstances" justifying extension of the automatic stay also arise "where stay protection is essential to the debtor's efforts to reorganize").

32. The Court should stay the Recovery Corp. Action for the following reasons:

(a) ***First***, certain claims and causes of action asserted in the Recovery Corp. Action are unequivocally property of the Debtors' estates, meaning that such claims and causes of action may not be pursued by anyone other than the Debtors at this stage in the Chapter 11 Cases.

(b) ***Second***, the Debtors are the "real party defendant" in the Recovery Corp. Action, as there is a clear identity of interest between certain of the Debtor Defendants and the Non-Debtor Defendants due to the expansive indemnification obligations.

(c) ***Finally***, the Court should exercise its equitable powers pursuant to Bankruptcy Code section 105(a) to stay the Recovery Corp. Action against the Non-Debtor Defendants to protect the Debtors' ability to successfully reorganize and avoid irreparable harm.

Accordingly, each of Recovery Corp.'s asserted claims and causes of action should be stayed against the Non-Debtor Defendants:[17]

[17] The Debtors dispute the allegations set forth in the Recovery Corp. Action and reserve all rights, counterclaims, and defenses with respect thereto.

I. THE AUTOMATIC STAY APPLIES TO CLAIMS AGAINST THE NON-DEBTOR DEFENDANTS IN THE RECOVERY CORP. ACTION BECAUSE THE CLAIMS ASSERTED ARE PROPERTY OF THE DEBTORS' ESTATES.

33. Bankruptcy Code section 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The foregoing stay applies to two types of claims: claims that belong to the debtor under applicable state (or federal) law, and claims that seek to recover property of the estate that is controlled by a person or entity other than debtor. *See Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1150 (5th Cir. 1987). It is well established in the Eleventh Circuit that Bankruptcy Code section 362(a)(3) automatically stays causes of action asserted by a third party against a non-debtor if that cause of action belongs to the debtor's estate. *See Baillie Lumber Co., LP v. Thompson (In re Icarus Holdings, LLC)*, 413 F.3d 1293, 1294 (11th Cir. 2005) (holding that a creditor's state veil piercing or "alter ego" action against a third-party was property of a debtor's bankruptcy estate and thus subject to an automatic stay); *see also In re Sigma-Tech Sales, Inc.*, No. 14-11366 (JKO), 2016 WL 4224090, at *3 (Bankr. S.D. Fla. Aug. 1, 2016) (holding a trustee has standing to bring an alter ego claim under Florida law on behalf of a corporate debtor as property of the estate). For claims to be property of a debtor's estate, the "claim should (1) be a general claim that is common to all creditors and (2) be allowed by state law." *See Baillie Lumber Co., LP v. Thompson (In re Icarus Holdings, LLC)*, 391 F.3d 1315, 1321 (11th Cir. 2004).

34. The Recovery Corp. Action is automatically stayed pursuant to Bankruptcy Code section 362(a)(3) because Recovery Corp. asserts claims and causes of action that unequivocally belong to the Debtors' estates. For example, Recovery Corp.'s first and second causes of action in the Recovery Corp. Action consist of fraudulent transfer claims under Florida's Uniform Fraudulent Transfer Act, codified at Florida Statutes §§ 726.101 et seq., and generally allege that the Debtors' corporate restructuring transactions constituted intentionally and constructively

fraudulent transfers. *See* Jones Decl., Ex. 1, at ¶¶ 32–41. This Court has held that fraudulent transfer actions are property of the estate, and only the debtor may prosecute such actions. *See In re Manton*, 585 B.R. 630, 635 (Bankr. N.D. Ga. 2018) ("Two well-established principles of bankruptcy law . . . are that fraudulent transfer actions become property of the estate, and that only the trustee has the power to prosecute a fraudulent transfer action.").

35. Additionally, Recovery Corp.'s third and fourth causes of action in the Recovery Corp. Action seek declarations that the Non-Debtor Defendants are liable as successors to the Debtors or under the de facto merger theory, as applicable. *See* Jones Decl., Ex. 1, at ¶¶ 42–70. Courts have routinely found that successor liability claims are property of a debtor's estate and therefore remain subject to the automatic stay. *See, e.g.*, *In re Emoral, Inc.*, 740 F.3d 875, 881 (3d Cir. 2014) (holding successor liability claim was "appropriately classified . . . as a generalized claim constituting property of the estate"); *In re Keene Corp.*, 164 B.R. 844, 853 (Bankr. S.D.N.Y. 1994) ("For the same reasons stated with respect to the piercing claims, claims based upon successor liability should be asserted by the trustee on behalf of all creditors.").

36. Furthermore, Recovery Corp.'s fifth cause of action seeks to pierce the Debtors' corporate veil in an attempt to hold certain of the Non-Debtor Defendants liable for alleged fraudulent transfers by the Debtors. *See* Jones Decl., Ex. 1, at ¶¶ 71–86. The Eleventh Circuit has held that state veil piercing or "alter ego" actions against third parties are property of a debtor's estate and thus remain subject to the automatic stay. *See In re Icarus Holdings, LLC*, 413 F.3d at 1295 ("[W]e concluded that the alter ego action by the corporation against the principal is allowed under state law. Thus, the alter ego action here is property of the bankruptcy estate and is subject to an automatic stay.").

37. Accordingly, because they constitute property of the Debtors' estates, the majority of the causes of action enumerated in the Recovery Corp. Action are automatically stayed under Bankruptcy Code section 362(a)(3).

II. THE AUTOMATIC STAY SHOULD BE EXTENDED TO CLAIMS AND CAUSES OF ACTION AGAINST THE NON-DEBTOR DEFENDANTS IN THE RECOVERY CORP. ACTION BECAUSE ANY JUDGMENT AGAINST THE NON-DEBTOR DEFENDANTS IS EFFECTIVELY A JUDGMENT AGAINST THE DEBTORS DUE TO THEIR INDEMNIFICATION OBLIGATIONS.

38. Even if Bankruptcy Code section 362(a)(3) did not automatically stay the Recovery Corp. Action against the Non-Debtor Defendants (which it does), the Court may invoke Bankruptcy Code section 362 to stay proceedings against non-debtors "when there is such an identity of interest between the debtor and another defendant that the debtor may be said to be the real party defendant and that a judgment against the other defendant would be in effect a judgment against or a finding against the debtor." *Dillard v. Baker*, 2009 WL 1025337, at *1.

39. Here, the Debtor Defendants are the "real party defendant," and failing to extend the automatic stay to the Non-Debtor Defendants would impede the Debtors' reorganization efforts in the Chapter 11 Cases for at least two reasons. ***First***, Recovery Corp. has alleged claims and causes of action against the Non-Debtor Defendants that seek "in effect a judgment or findings against the debtor" because such claims depend on adverse findings against the Debtor Defendants, and the claims and causes of action against the Non-Debtor Defendants and Debtors "are inextricably interwoven with, and present common questions of fact and law." *See In re Fiddler's Creek, LLC*, No. 9:10-bk-03846-ALP, 2010 WL 6618876, at *6 (Bankr. M.D. Fla. Sept. 15, 2010); *accord Eastern Air Lines, Inc. v. Rolleston (In re Ionosphere Clubs, Inc.)*, 111 B.R. 423, 434 (Bankr. S.D.N.Y. 1990) (extending automatic stay to apply to non-debtor codefendants when claims against them and claims against the debtor were "inextricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding"). Many, if not all,

of Recovery Corp.'s claims asserted in the Recovery Corp. Action arise out of settlement agreements entered into by the ***Debtors*** and rely on allegations of misconduct associated with certain transactions entered into prepetition by the ***Debtors***. A review of each claim makes this apparent:

(a) Count I alleges that the ***Debtors'*** prepetition transactions were made with the ***Debtors'*** "actual intent to hinder, delay, and defraud creditors." Jones Decl., Ex. 1, ¶ 34.

(b) Count II alleges that the ***Debtors'*** prepetition transactions "constitute constructively fraudulent transfer and unjustly inured to the benefit of" certain of the Non-Debtor Defendants. *Id*. at ¶¶ 37–41.

(c) Counts III and IV seek declaratory judgments that certain of the Non-Debtor Defendants are liable for the continuation of the ***Debtors'*** businesses. *Id*. at ¶¶ 42–70.

(d) Counts V seeks declaratory relief to pierce the corporate veil of the ***Debtors*** so as to hold certain of the Non-Debtor Defendants liable for alleged fraudulent transfers by the ***Debtors***. *Id*. at ¶¶ 71–86.

(e) Count VI alleges that each of the defendants named in the Recovery Corp. Action, including the ***Debtor Defendants***, engaged in unfair and deceptive trade practices. *Id.* at ¶¶ 87–95.

(f) Count VII alleges that the Non-Debtor Defendants engaged in a civil conspiracy to interfere with the ***Debtors'*** prepetition settlement agreements. *Id.* at ¶¶ 96–100.

(g) Count VIII alleges that Non-Debtor Defendant Mr. Dias breached an alleged fiduciary duty to Recovery Corp. in connection with his role in the operations of the ***Debtors'*** businesses. *Id.* at ¶¶ 101–107.

(h) Count IX alleges that the Non-Debtor Defendants were unjustly enriched through the ***Debtors'*** prepetition transactions and the ***Debtors'*** related settlement negotiations. *Id.* at ¶¶ 108–113.

Accordingly, each of Recovery Corp.'s claims against the Non-Debtor Defendants relies on allegations that the ***Debtors*** performed some prohibited action in connection with their prepetition restructuring efforts. The Debtors will be prejudiced by Recovery Corp.'s continued prosecution of claims that seek findings of misconduct against them while they sit on the sidelines, and may

face collateral estoppel and *res judicata* concerns. Accordingly, where, as here, the claims against the Debtors and the Non-Debtor Defendants are interwoven and hinge on the conduct of the Debtors, "any judgment by this court against [the Non-Debtor Defendants] would in essence be a judgment against [the Debtors] and would thus be improper while [the Debtors'] bankruptcy is pending." *See Dillard v. Baker*, 2009 WL 1025337, at *1.

40. ***Second***, certain Debtor Defendants owe indemnification obligations to Non-Debtor Defendants pursuant to the indemnification provisions contained in the LVCC Operating Agreement, the Support Services Agreements, the Administrative Services Agreements, and the OTAs (collectively, the "Indemnification Obligations"). As held by the Fourth Circuit in *A.H. Robins Co., Inc.*, and as previously recognized by this Court, the classic example of a "real party defendant situation" occurs in "a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *A.H. Robins Co.*, 788 F.2d at 999; *see also Dillard v. Baker*, 2009 WL 1025337, at *1 ("The court finds that any judgment by this court against Financial Indices would in essence be a judgment against Defendant Baker and would thus be improper while Baker's bankruptcy is pending."); *see also In re Fiddler's Creek, LLC*, 2010 WL 6618876, at *5 ("[T]he indemnification example identified in *A.H. Robins* as a basis to extend and enforce the automatic stay exists in the present case as Mr. Ferrao asserts that he is entitled to indemnity from the Debtors . . . As a result, the existence of these potential claims clearly implicates the automatic stay . . . and provides further justification for this Court to enforce the stay in respect of the Class Action Lawsuit."); *In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 616 (Bankr. E.D. Pa. 2009) (staying action against non-debtors because (i) debtors owed potential indemnification obligations to their employees involved in state court litigation, such that the interests of the debtors and their employees were identical and (ii)

the diversion of resources involved with defending the pending state court litigation would divert debtors' resources and adversely impact the Debtors' attempted reorganization).

41. Here, the Indemnification Obligations require certain of the Debtor Defendants to broadly indemnify certain of the Non-Debtor Defendants—including Synergy, NSPIRE, and Aspire—from and against, among other things, liability for third-party claims raised in connection with the operations of the Debtors' facilities prior to the operations' divesture. *See* Jones Decl., Ex. 3, at § 8.2; Ex. 4-A, at § 8.1; Ex. 4-B, at § 8.1; Ex. 5, Art. IX.A. Pursuant to the LVCC Operating Agreement, the Debtors are also obligated to indemnify all Indemnified Representatives (as defined in the LVCC Operating Agreement)—including Mr. Dias, Synergy, and NSPIRE—against any liabilities incurred in connection with any pending lawsuits or proceedings of any nature. *See* Jones Decl., Ex. 2, § 17. As such, any judgment awarded against these Non-Debtor Defendants in the Recovery Corp. Action risks the imposition of liability on certain of the Debtor Defendants. This is exactly the type of situation where "[t]o refuse application of the statutory stay . . . would defeat the very purpose and intent of the statute." *A.H. Robins*, 788 F.2d at 999.

42. Accordingly, given the Indemnification Obligations, the Court should extend the automatic stay under Bankruptcy Code section 362(a)(1) to claims and causes of action against the Non-Debtor Defendants in the Recovery Corp. Action to the extent such claims are not otherwise automatically stayed as discussed above.

III. THE COURT SHOULD EXERCISE ITS EQUITABLE POWERS TO STAY THE RECOVERY CORP. ACTION AGAINST THE NON-DEBTOR DEFENDANTS.

43. If this Court does not believe an extension of the automatic stay is appropriate here, the Debtors submit that a preliminary injunction is warranted to prohibit Recovery Corp. from prosecuting claims against the Non-Debtor Defendants while the Debtors are focused on various aspects of their restructuring efforts, including, among others, their marketing and sale process and

formulation of their chapter 11 plan. Bankruptcy courts in this district and across the country have often recognized that, under certain circumstances, it is appropriate and in the best interest of a debtor's estate to extend the injunctive stay provisions automatically afforded to a debtor to certain non-debtors. *See, e.g.*, *In re GMI Grp., Inc.*, 598 B.R. 685, 686–87 (Bankr. N.D. Ga. 2019); *In re Galaxy Next Gen., Inc.*, No. 24-20552-JRS (Bankr. N.D. Ga. May 15, 2024) [Docket No. 15] at 1–3; *Saxby's Coffee Worldwide, LLC v. Larson (In re Saxby's Coffee Worldwide LLC)*, 440 B.R. 369 (Bankr. E.D. Pa. 2009); *In re Steven P. Nelson, D.C., P.A.*, 140 B.R. 814, 816 (Bankr. M.D. Fla. 1992); *McCartney v. Integra Nat'l Bank North*, 106 F.3d 506, 510 (3d Cir. 1997) (citing cases extending automatic stay to non-debtor third parties "where stay protection is essential to the debtor's efforts of reorganization."). Indeed, Bankruptcy Code section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

44. A bankruptcy court may enjoin a pending suit where, as here, the issues between the debtor and Non-Debtor Defendants are "inextricably interwoven" and where judicial economy would be served if the issues were fully litigated in a single proceeding. *See In re Friedmans, Inc.*, 336 B.R. 896, 897–98 (Bankr. S.D. Ga. 2005) (citing *A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins)*, 788 F.2d 994 (4th Cir. 1986) (listing other factors for granting injunctive relief as "(1) Existence of an indemnity provision between the non-debtor and debtor; (2) the possibility that liability established against the non-debtor would be imputed to the debtor . . . (4) the possibility of inconsistent results . . . (5) such identify of the parties as would make the debtor the real party in interest.")).

45. This Court should stay or enjoin prosecution of the Claims pursuant to its powers under Bankruptcy Code section 105 to protect the Debtors against proceedings that would

materially impact their efforts to reorganize. *See In re Steven P. Nelson, D.C., P.A.*, 140 B.R. at 816; *see also Noel Mfg. Co. v. Marathon Mfg. Co.,* 69 B.R. 120, 121 (N.D. Ala. 1985) (stating that Bankruptcy Code section 105(a) empowers a bankruptcy court to enjoin a creditor's action against a non-debtor where failure to do so would affect the bankruptcy estate and would detrimentally influence and pressure the debtor); *In re Kasual Kreation, Inc.*, 54 B.R. 915, 916 (Bankr. S.D. Fla. 1985) ("Additionally, case law is replete with instances where [§ 105(a)] has been utilized to enjoin court proceedings against Non-Debtor Defendants that would have an impact on the Debtor's bankruptcy case.").

46. When implementing a temporary injunction to extend the automatic stay to non-debtors, courts consider: (a) the danger of imminent, irreparable harm to the estate or the debtor's ability to reorganize; (b) a reasonable likelihood of a successful reorganization and success on the merits; (c) whether the balance of equities tips in favor of the debtor as opposed to the creditor who would be restrained; and (d) whether the public interest in a successful bankruptcy reorganization outweighs other competing societal interests. *See In re GMI Grp., Inc.*, 598 B.R. at 686–87; *see also In re SVB Fin. Grp.,* No. 23-10367 (MG), 2023 WL 2962212, at *5 (Bankr. S.D.N.Y. Apr. 14, 2023) (in determining whether to issue 105 (a) injunction against non-debtors, courts should consider "(1) whether there is a likelihood of successful reorganization; (2) whether there is an imminent irreparable harm to the estate in the absence of an injunction, although a limited exception permits an injunction to issue whether the action to be enjoined is one that threatens the reorganization process if the threat is not imminent; and (3) the balance of the comparative harms to the debtor, and to the debtor's reorganization, against that to be would-be-enjoined party.") (citations omitted). Further, none of the four factors has a fixed quantitative value, rather the evidence for each factor "is balanced by the court on a sliding scale analysis: a

much stronger showing on one or more of the necessary factors lessens the amount of proof required for the remaining factors." *Collins & Co., Gen. Contractors v. Claytor*, 476 F. Supp. 407, 409 (N.D. Ga. 1979).

47. Additional factors that courts consider in determining whether to grant an injunction in favor of non-debtors include:

(a) when the non-debtor owns assets which will either be a source of funds for the debtor or when the preservation of the non-debtor's credit standing will play a significant role in the debtor's attempt to reorganize;

(b) upon a showing that the non-debtor's time, energy and commitment to the debtor are necessary for the formulation of a reorganization plan; and

(c) where the relationship between the non-debtor and debtor is such that a finding of liability against the non-debtor would effectively be imputed to the debtor, to the detriment of the estate.

In re GMI Grp., Inc., 598 B.R. at 687 (citing *In re Saxby's*, 440 B.R. at 379).

48. Here, as set forth below, the Debtors easily satisfy each of the foregoing requirements, meriting a preliminary injunction against Recovery Corp.'s continued prosecution of the Recovery Corp. Action against the Non-Debtor Defendants.

A. The Debtors Will Suffer Immediate and Irreparable Harm in the Absence of a Stay.

49. Irreparable harm is an injury that is not "merely possible, but likely," and is one that "cannot be undone through monetary remedies." *See United States v. Jenkins*, 714 F. Supp. 2d 1213, 1221 (S.D. Ga. 2008). Here, an injunction is necessary to prevent irreparable harm to the Debtors and their estates for at least three reasons.

50. ***First***, the prosecution of the claims and causes of action at issue in the Recovery Corp. Action would risk depleting assets of the Debtors' estates, negatively impacting all parties-in-interest. *See* Jones Decl. ¶ 14. Many of the same claims that exist against the Debtor Defendants, are also asserted against the Non-Debtor Defendants. *See* Jones Decl., Ex. 1, ¶¶ 32–

41, 87–95. Recovery Corp. asserts claims for intentional and constructive fraudulent transfer, and unfair and deceptive trade practices against both the Debtor Defendants and Non-Debtor Defendants. *See id.* These claims, regarding specific asset transfers, go to the heart of potential disputes and primary focus of the Committee in the Chapter 11 Cases. *See Polyone Corp. v. Fla. Flexible Printing Prod., Inc.*, No. 14-24813-CIV, 2015 WL 2452306, at *2 (S.D. Fla. May 21, 2015) (extending automatic stay to non-debtors where the prepetition claims concern the property of the debtor at issue in the bankruptcy case). And, given the Indemnification Obligations owed by the Debtor Defendants to the Non-Debtor Defendants, the Debtor Defendants would be forced to defend against such claims absent injunctive relief, risking irreparable harm in the form of losses to creditors and parties-in-interest, and the diversion of funds away from their estates. *See* Jones Decl. ¶ 14; *In re GMI Grp., Inc.*, 598 B.R. at 687 (stating that courts have granted injunctions where a "non-debtor owns assets which will either be the source of funds for the debtor or when the preservation of the non-debtor's credit standing will play a significant role" in reorganization and where "a finding of liability against the non-debtor would effectively be imputed to the debtor, to the detriment of the estate."); *see also Gulfmark Offshore, Inc. v. Bender Shipbuilding & Repair Co.,* No. CIV. A. 09-0249-WS-N, 2009 WL 2413664, at *3 (S.D. Ala. Aug. 3, 2009) (extending automatic stay to non-debtor defendants where non-debtors were entitled to indemnification from debtors and continuing litigation would "be extraordinarily inefficient, setting the stage for duplicative trials . . . [causing] litigation costs for both sides [to] be increased substantially . . . [and] [t]here would be a non-trivial risk of inconsistent judgments."). Continued prosecution of Recovery Corp.'s claims and causes of action would likely result in additional claims by the Non-Debtor Defendants against the Debtor Defendants' estates for, among other things, attorneys' fees, expenses, resulting judgments, and other indemnified costs, and could lead to additional

discovery burdens on the Debtor Defendants, which risks impeding the success of the Debtors' marketing and sale process as well as their ability to confirm a chapter 11 plan that maximizes recovery and provides equitable treatment to the Debtors' creditors. *See* Jones Decl. ¶ 14.

51. ***Second***, continued prosecution of Recovery Corp.'s claims would distract the Debtors' key employees and divert time and resources away from the Debtors' restructuring efforts, threatening the Debtors' ability to resolve their Chapter 11 Cases swiftly and efficiently. *See* Jones Decl. ¶ 15; *In re Steven P. Nelson, D.C., P.A.*, 140 B.R. at 616 (granting injunction where ancillary litigation would force debtor to divert efforts to defense and "ability to contribute to [d]ebtors' reorganization will drastically diminish."); *see also Lazarus Burman Assoc., L.B. v. Nat. Westminster Bank USA (In re Lazarus Burman Assoc., L.B.)*, 161 B.R. 891, 900 (Bankr. E.D.N.Y. 1993) ("Without a stay against pending proceedings, the Principals will be unable to devote their full time and energy towards implementing the Debtor's reorganization, and the Debtor's reorganization will suffer . . . [and it] would distract the Principals from their key roles in maintaining, operating, and managing the Debtor's assets.").

52. ***Third***, continued prosecution and resolution of Recovery Corp.'s claims and issues against the Non-Debtor Defendants could improperly bind the Debtor Defendants under various preclusion doctrines such as collateral estoppel and *res judicata*. *See In re Jefferson Cnty., Ala.*, 491 B.R. 277, 286 (Bankr. N.D. Ala. 2013) (citing *In re Lomas Fin. Corp.*, 117 B.R. 64, 68 (S.D.N.Y. 1990) (finding that debtor's reorganization efforts would be irreparably harmed if the suit against a non-debtor was not stayed because "[i]t [was] not possible for [the company] to be a bystander to a suit which may have a $20 million issue preclusion effect against it.")). To avoid this, the Debtor Defendants would be forced to participate in the Recovery Corp. Action in order to ensure that their interests are adequately protected, notwithstanding the existence of the

automatic stay, which would undermine its very purpose and consume valuable time and resources of the estates and their professionals. *See* Jones Decl. ¶ 16; *see also In re Jefferson Cnty., Ala.*, 491 B.R. at 286.

53. For the foregoing reasons, continued prosecution of Recovery Corp.'s claims and causes of action against the Non-Debtor Defendants enumerated in the Recovery Corp. Action would frustrate the purpose of the automatic stay—to provide Debtors with a "breathing spell" to allow them to focus on the bankruptcy proceedings—and necessitates injunctive relief. *See* Jones Decl. ¶ 17; *Ellison v. Nw. Eng'g Co.*, 707 F.2d 1310, 1311 (11th Cir. 1983).

B. The Debtors are Likely To Succeed in their Reorganization Efforts.

54. To obtain a preliminary injunction, a plaintiff must only show a likelihood of success on the merits rather than actual success. *See Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held . . . [a] party thus is not required to prove his case in full at a preliminary-injunction hearing."). Further, in the bankruptcy context, "the likelihood of success on the merits has been defined by numerous courts as the probability of a successful reorganization." *In re Steven P. Nelson, D.C., P.A.*, 140 B.R. at 816–17; *see also SVB Fin. Grp.*, 2023 WL 2962212, at *7. Where a chapter 11 case is still in its "embryonic" stage, it is "clearly unreasonable" to require the debtor to make detailed projections of the terms or anticipated feasibility of its plan of reorganization. *In re Steven P. Nelson, D.C., P.A.*, 140 B.R. at 816–817 (citing *In re Gathering Rest., Inc.*, 79 B.R. 992, 998 (Bankr. N.D. Ind. 1986)); *see GMI Grp.*, 598 B.R. at 687 n.2 ("[A]lthough this Chapter 11 case is in its early stages and thus no specific reorganization has been proposed by the Debtor, there is not presently any evidence that would suggest that the Debtor will not be able to reorganize.").

55. Here, as set forth above, the Debtors have demonstrated that the automatic stay already applies, and/or should be extended to apply, to the claims and causes of action against the Non-Debtor Defendants set forth in the Recovery Corp. Action. Moreover, the Debtors' prospects for engaging in a successful marketing and sale process, then subsequently confirming a chapter 11 plan of reorganization are strong, and an injunction would only enhance such prospects of doing so. *See* Jones Decl. ¶ 18. The Debtors are currently in the process of preparing to commence their marketing and sale process while also analyzing various estate claims and causes of action in order to maximize creditor recoveries and will utilize such analysis in negotiating a chapter 11 plan. *Id.* Thus, though still early in the process, there is every reason to believe that the Debtors will be able to engage in a successful marketing and sale process, then confirm a chapter 11 plan, reorganize, and subsequently emerge from these Chapter 11 Case. Accordingly, this second factor weighs in favor of injunctive relief.

C. The Balance of Equities Weighs Strongly in the Debtors' Favor.

56. The balance of equities overwhelmingly favors the Debtors' request for injunctive relief. In contrast to the immediate and irreparable harm the Debtors and their estates would face if injunctive relief were denied, the only potential harm faced by Recovery Corp. is mere delay of a lawsuit that was just filed approximately nine weeks ago. *See* Jones Decl. ¶ 19. Mere delay as a result of an injunction issued until bankruptcy proceedings are resolved is not a significant harm. *See In re St. Petersburg Harbourview Hotel Corp.*, 168 B.R. 770, 773 (Bankr. M.D. Fla. 1994) (extending injunctive relief to non-debtor sister company where, among other things, a "delay" in litigation "certainly would not create an extreme hardship."); *see also In re Lazarus Burman*, 161 B.R. at 901 ("The preliminary injunction will not invalidate the rights" of a creditor against non-debtors, "[i]t will merely delay the enforcement of those rights at least until a plan or plans of reorganization are confirmed or in the event these Chapter 11 cases are dismissed or converted to

Chapter 7 cases."). Furthermore, given the fact that the piecemeal prosecution of claims and causes of action outside of this Court's purview would erode value of the Debtors' estates, all parties-in-interest will benefit from the relief requested herein. Thus, the balance of equities clearly weighs in the Debtors' favor, further justifying injunctive relief.

D. A Preliminary Injunction is in the Public Interest.

57. Finally, the public interest in efficient reorganization requires the disputes over the Debtors' capital structure to be adjudicated in a single court: this Court. Indeed, there is a strong public interest in protecting estate assets and resolving claims against the Debtors in a fair and equitable manner in their Chapter 11 Cases to maximize the value of the Debtors' estates and ensure equitable distributions. *See, e.g.*, *SVB Fin. Grp.*, 2023 WL 2962212, at *11 ("In the bankruptcy context, the relevant public interest is the interest in successful reorganizations, since reorganizations preserve value for creditors and ultimately the public.") (citations omitted); *In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1016 (Bankr. M.D. Fla.) ("Finally, there is no question that public policy would strongly support the issuance of an injunction. The remedial features of the Bankruptcy Code, especially the provisions dealing with reorganization under Chapter 11, have been recognized repeatedly as serving a very strong public interest."). To move efficiently through the reorganization process (and, in doing so, maximize creditors' recoveries), the Debtors need to focus their time, resources, and funds on the Chapter 11 Cases. The automatic stay is a fundamental protection that allows debtors to do just that. Application of the automatic stay is particularly necessary here because, as discussed above, the Debtors anticipate that the ancillary litigation will only serve to destroy value of the Debtors' estates and hinder their reorganization efforts. *Id.*; *see also In re Steven P. Nelson, D.C., P.A.*, 140 B.R. at 817 ("Finally, this Court is satisfied that the public interest is better served by the Debtor's reorganization rather than by its possible liquidation should this Court refuse to issue an injunction.").

58. Accordingly, an injunction barring Recovery Corp. from prosecuting the claims in the Recovery Corp. Action against the Non-Debtor Defendants until the earlier of (a) the confirmation of a chapter 11 plan, or (b)(i) conversion or (ii) dismissal of the Debtors' Chapter 11 Cases is appropriate and essential to the orderly and effective administration of the Debtors' estates.

IV. THE COURT SHOULD GRANT EXPEDITION.

59. Expedited proceedings are warranted where "good cause" exists. *See, e.g., Xfinity Mobile v. Devin Tech Inc.*, No. 1:19-CV-03294-JPB, 2019 WL 9831670, at *1 (N.D. Ga. Aug. 20, 2019) ("The Eleventh Circuit Court of Appeals also has not set forth a standard for expedited discovery requests. Several district courts within the Eleventh Circuit, however, apply a good cause standard for such requests.") (collecting cases). In the context of requests for expedited discovery, courts consider the following factors to determine whether good cause exists:

(1) whether a motion for preliminary injunction is pending;

(2) the breadth of the requested discovery;

(3) the reason(s) for requesting expedited discovery;

(4) the burden on the opponent to comply with the request for discovery; and

(5) how far in advance of the typical discovery process the request is made.

Id. "Because of the expedited nature of injunctive proceedings, expedited discovery is more likely to be appropriate when a plaintiff is seeking a preliminary injunction." *See Mullane v. Almon*, 339 F.R.D. 659, 663 (N.D. Fla. 2021).

60. Here, good cause exists to expedite the proceedings because the Debtors seek a preliminary injunction by the Motion and face immediate and irreparable harm in the absence of the relief sought therein. An expedited schedule to rule on the Motion will not burden Recovery

Corp. because, as discussed herein, the only potential harm faced by Recovery Corp. is mere delay of a lawsuit in its nascent stages. The Debtors believe the Motion can be resolved on the papers and no discovery is necessary. The Debtors have met the standard for expedition. Accordingly, the Debtors request that the Court schedule a hearing on the Motion at the Court's earliest convenience.

RESERVATION OF RIGHTS

61. The Debtors expressly reserve all rights, claims, causes of action, counter-claims, and defenses with respect to the Recovery Corp. Action and nothing contained herein shall constitute a waiver or release of the foregoing.

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Order, attached to the Motion as Exhibit A, granting the relief requested and any such other and further relief as may be just and proper.

Dated: Atlanta, Georgia
June 30, 2024

MCDERMOTT WILL & EMERY LLP

/s/ Daneil M. Simon
Daniel M. Simon (Georgia Bar No. 690075)
1180 Peachtree St. NE, Suite 3350
Atlanta, Georgia 30309
Telephone: (404) 260-8535
Facsimile: (404) 393-5260
Email: dsimon@mwe.com

- and -

Emily C. Keil (admitted *pro hac vice*)
Jake Jumbeck (admitted *pro hac vice*)
Catherine Lee (admitted *pro hac vice*)
444 West Lake Street, Suite 4000
Chicago, Illinois 60606
Telephone: (312) 372-2000
Facsimile: (312) 984-7700
Email: ekeil@mwe.com
jjumbeck@mwe.com
clee@mwe.com

Proposed Counsel for the Debtors and Debtors-in-Possession

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Brief was served by the Court's CM/ECF system on all counsel of record registered in these Chapter 11 Cases through CM/ECF. The Debtors' claims and noticing agent, Kurtzman Carson Consultants LLC, will be filing a supplemental certificate of service on the docket to reflect any additional service of the foregoing Brief, including on the Limited Service List.

Dated: Atlanta, Georgia
June 30, 2024

MCDERMOTT WILL & EMERY LLP

/s/ Daniel M. Simon

Daniel M. Simon (Georgia Bar No. 690075)
1180 Peachtree St. NE, Suite 3350
Atlanta, Georgia 30309
Telephone: (404) 260-8535
Facsimile: (404) 393-5260
Email: dsimon@mwe.com

Proposed Counsel for the Debtors and Debtors-in-Possession