Docket #0003 Date Filed: 1/7/2025

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 11
	)	
LAVIE CARE CENTERS, LLC, *et al.*,[1]	)	CASE NO. 24-55507-pmb
	)	
Debtors.	)	JOINTLY ADMINISTERED
	)	
FC ENCORE ST. CLOUD, LLC,	)	
	)	
Plaintiff,	)	
v.	)	Adv. Pro. No. 25-05008-pmb
	)	
WILLIAM BURNHAM,	)	
	)	
Defendant	)	
	)	

BRIEF IN SUPPORT OF MOTION FOR ENTRY OF ORDER EXTENDING THE AUTOMATIC STAY AND/OR PRELIMINARILY ENJOINING CLAIMS AND CAUSES OF ACTION AGAINST NON-DEBTOR DEFENDANT

[1] The last four digits of LaVie Care Centers, LLC's federal tax identification number are 5592. There are 282 debtors (the "**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.

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FC Encore St. Cloud, LLC ("**FCE**"), a Released Party[1] under the Plan and the Confirmation Order (as defined herein) in the above-captioned Chapter 11 cases (the "**Chapter 11 Cases**"), and the Plaintiff in the above-captioned adversary proceeding (the "**Adversary Proceeding**"), hereby submits this brief (this "**Brief**") in support of (a) the *Motion for Entry of Order Extending the Automatic Stay and/or Preliminarily Enjoining Claims and Causes of Action Against Non-Debtor Defendant* (the "**Motion**"); and (b) the *Complaint* (the "**Complaint**") initiating this Adversary Proceeding, each of which are being filed contemporaneously herewith and fully incorporated herein by reference. In support of thereof, FCE respectfully states as follows:

PRELIMINARY STATEMENT

1. Prior to the Chapter 11 Cases, William Burnham ("**Burnham**") commenced a Florida state court action against FCE and one of the above-captioned debtors (the "**Debtors**"), 4641 Old Canoe Creek Road Operations, LLC ("**OpCo Debtor**") styled as *William Burnham v. FC Encore St. Cloud, LLC and 4641 Old Canoe Creek Road Operations, LLC*, Case No. 23-CA-004407 (the "**State Court Action**"), pending in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida (the "**State Court**"), for damages allegedly sustained as a result of a fall on property owned at the time by FCE. However, at all times relevant to claims asserted in the State Court Action, FCE, as landlord, leased the subject facility to LVE Master Tenant 4, LLC ("**Tenant Debtor**"), which in turned subleased the subject facility to OpCo Debtor and, as such, Tenant Debtor and OpCo Debtor were in complete possession and control of the property in question.

[1] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in *Debtors' Modified Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization*, filed on December 4, 2024 [Dkt. No. 730] (the "**Plan**").

2. Under the terms of that certain Master Lease and Security Agreement, dated July 1, 2016, by and between, among others, FCE and Tenant Debtor (as subsequently amended from time to time, the "**Master Lease**"), Tenant Debtor was obligated to indemnify FCE with respect to, among other things, "any and all foreseeable or unforeseeable liability, expense, loss, costs, deficiency, fine, penalty, or damage (including, without limitation, punitive or consequential damages) of any kind or nature, including reasonable attorneys' fees, from any suits, claims or demands regardless of the merits of any such alleged suit, claim or demand, on account of any matter or thing, action or failure to act arising out of or in connection with this Lease (including, without limitation, the breach by Tenant of any of its obligations hereunder), any Property, the Premises, or the operations of Tenant on any portion of the Premises" during the term of the Master Lease. In addition, pursuant to the terms of that certain Guaranty by and between, among others, FCE and Debtor LaVie Care Centers, LLC, dated July 29, 2016 (the "**LaVie Guaranty**"), Debtor LaVie Care Centers, LLC ("**LaVie**") guaranteed all of the obligations of Tenant Debtor to FCE under the terms of the Master Lease, including the indemnity obligations described above. Similarly, pursuant to the terms of that certain Guaranty by and between, among others, FCE and Debtor LV Operations II, LLC, dated July 29, 2016 (the "**LV Operations Guaranty**"), Debtor LV Operations II, LLC ("**LV Operations**") guaranteed all of the obligations of Tenant Debtor to FCE under the terms of the Master Lease, including the indemnity obligations. Finally, pursuant to the terms of that certain Cross-Default Guaranty of Subtenants, dated July 1, 2016 by and between, among others, Tenant Debtor and various Debtor subtenants, including OpCo Debtor (as subsequently amended from time to time, the "**Subtenant Guaranty**"), the various Debtor subtenants, including OpCo Debtor (collectively, the "**Debtor Subtenants**") all guaranteed to Tenant Debtor all of the obligations owed by each of the Debtor Subtenants under the various

subleases between those parties. Pursuant to the terms of that certain Sublease, dated July 29, 2016, by and between Tenant Debtor and OpCo Debtor (the "**Sublease**"),[2] OpCo Debtor covenanted to assume and perform all of the obligations of Tenant Debtor under the Master Lease. Accordingly, each of the Debtor Subtenants, including OpCo Debtor, owes the same indemnity obligations to FCE as does Tenant Debtor. All of the aforementioned indemnities and guarantees survived the termination of the Master Lease.

3. Because FCE is a Released Party under the Plan, and because Burnham did not opt out of such release and, thereby, FCE will be released upon the occurrence of the Effective Date, FCE hereby seeks a limited extension of the automatic stay and/or a preliminary injunction of the claims and causes of action asserted against FCE in the State Court Action through the Effective Date of the Plan for several reasons.

4. ***First***, as noted above, Burnham did not opt out of, and is therefore bound by, the Third-Party Release contained in the Debtors' Plan. Subject to the Plan going effective, all claims and causes of action asserted in the State Court Action have been released pursuant to the Third-Party Release, and, therefore, Burnham's continued prosecution of such released claims against FCE is futile and a waste of resources.

5. ***Second***, each of Tenant Debtor, Debtor LaVie, Debtor LV Operations and the Debtor Subtenants, including OpCo Debtor (collectively, the "**FCE Debtor Indemnitors**") are undoubtedly indispensable parties to the State Court Action. The State Court Action will necessarily involve discovery, depositions, and other litigation workstreams associated therewith,

[2] FCE has not attached copies of the Master Lease, the LaVie Guaranty, the LV Operations Guaranty, the Subtenant Guaranty, the Sublease and a related Lease Termination Agreement dated March 31, 2024 (collectively, the "**Lease Documents**") hereto, because such documents are voluminous and potentially confidential. However, copies will be made available to counsel for Burnham upon request and presented to the Court at any hearing on this Motion.

and simply cannot proceed without Tenant Debtor's and OpCo Debtor's involvement given that Tenant Debtor and OpCo Debtor were in possession and control of the subject property at all times relevant to the State Court Action, meriting an extension of the automatic stay.

6. ***Finally***, the FCE Debtor Indemnitors all owe broad indemnification obligations to FCE pursuant to the terms of the various agreements described above and, therefore, the FCE Debtor Indemnitors are the "real party defendants" in the State Court Action as any judgment against FCE will effectively be a judgment against the FCE Debtor Indemnitors, further meriting an extension of the automatic stay.

7. Ultimately, the State Court Action should be stayed in the short-term during this post-confirmation, pre-Effective Date period, to determine whether such actions are released under the Plan. Assuming the Plan goes effective, the State Court Action is subject to the release and injunction provisions in the Plan, unless the Court orders otherwise. Even if Burnham can show that he somehow should not be bound by the third-party release provisions in the Plan, the Court can determine *at that time* whether pursuit of the State Court Action is futile. Accordingly, FCE respectfully requests that this Court (a) extend the automatic stay to apply to the claims and causes of action asserted against FCE in the State Court Action through and including the Effective Date of the Plan; (b) temporarily enjoin the State Court Action through and including the Effective Date of the Plan; and (c) award all such other and further relief, at law or in equity, that this Court deems just and proper.

JURISDICTION AND VENUE

8. 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. 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, 7019, 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

9. On June 2, 2024 (the "**Petition Date**"), each Debtor, including the FCE Debtor Indemnitors, commenced a case by filing a petition for relief under Chapter 11 of the Bankruptcy Code 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.

10. 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**"). *See* Docket No. 112. To date, no Chapter 11 trustee or examiner has been appointed in the Chapter 11 Cases. 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 Burnham Action

11. Burnham is the Plaintiff in the State Court Action for damages allegedly sustained as a result of a fall. At all times relevant to claims asserted in the State Court Action, FCE, as landlord, leased the subject facility to Tenant Debtor, which in turned subleased the subject facility to OpCo Debtor and, as such, those parties were in complete possession and control of the property in question.

12. On June 24, 2024, OpCo Debtor filed a Suggestion of Bankruptcy in the State Court Action notifying the State Court and Burnham that the action was stayed pursuant to the Debtors' bankruptcy filings in this case. *See* Exhibit A to the Complaint, which is a true and correct copy of the *Suggestion of Bankruptcy as to 4641 Old Canoe Creek Road Operations LLC*.

13. On October 16, 2024, Burnham filed a Motion to Lift Stay in these bankruptcy proceedings and noticed it for hearing on December 16, 2024. *See Motion to Lift or Modify the Automatic Stay to (1) Liquidate Personal Injury Tort Claim in Pending Litigation, (2) Pursue Recovery to the Extent of Insurance Coverage, and (3) Grant Related Relief* [Dkt. 564] (the "**Stay Relief Motion**"). Burnham thereafter filed an Amended Notice of Hearing on October 29, 2024, resetting the hearing on the Stay Relief Motion to December 10, 2024. *See Amended Notice of Hearing* [Dkt. 599]. Subsequently, on December 9, 2024, Burnham withdrew the Motion. *See Notice of Withdrawal of Motion to Lift or Modify the Automatic Stay to (1) Liquidate Personal Injury Tort Claim in Pending Litigation, (2) Pursue Recovery to the Extent of Insurance Coverage, and (3) Grant Related Relief* [Dkt. No. 743].

14. Burnham was scheduled in the OpCo Debtor's case as an unsecured creditor holding a contingent, unliquidated and disputed claim. To the best of FCE's knowledge, Burnham

did not file a proof of claim in the Chapter 11 Cases prior the Bar Date and, thus, Burnham's claims against the FCE Debtor Indemnitors appear to be time barred.

15. Notwithstanding the foregoing, the State Court in the State Court Action subsequently denied FCE's Motion to Stay Action at a hearing on December 1, 2024. *See* Declaration of Antonio A. Cifuentes, ¶¶ 3, 4, which is attached to the Complaint as Exhibit B.

16. By electronic correspondence, dated December 23, 2024 (the "**December 23 Correspondence**"), Burnham's counsel in the State Court Action was informed of the need for Burnham to demonstrate in this Court why his claim(s) against FCE had not been released by virtue of the Plan and Confirmation Order. A true and correct copy of the December 23 Correspondence is attached to the Complaint as Exhibit C. Neither Burnham nor his counsel responded to the December 23 Correspondence. *See* Declaration of Antonio A. Cifuentes, ¶¶ 5, 6.[3]

III. The Third-Party Release

17. On October 1, 2024, the Court entered the *Order (I) Conditionally Approving Disclosure Statement, (II) Scheduling Combined Hearing for November 14, 2024 at 9:30 a.m. (Prevailing Eastern Time), (III) Establishing Procedures for Solicitation and Tabulation of Votes on Plan, (IV) Approving Certain Forms and Notices, and (V) Granting Related Relief* [Docket No. 480] (the "Solicitation Procedures Order"). On October 1, 2024, the Debtors filed the *Notice of (I) Combined Hearing with Respect to the Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization and (II) Related Objection Deadline* [Docket No. 483] (the "Combined Hearing Notice").

[3] FCE has moved to have the State Court reconsider its order lifting the stay against FCE. *See* Exhibit D to the Complaint, which is a true and correct copy (without the exhibits thereto) of FCE's *Motion for Reconsideration of Court Order Dated December 1, 2024 Denying Defendant's Motion for Stay*, dated December 31, 2024.

18. Pursuant to the Solicitation Procedures Order, on or about October 7, 2024, the Debtors commenced solicitation of votes on the Plan. As reflected in the exhibits attached to and approved by the Solicitation Procedures Order, the Plan notice described how the Holder of a Claim could "opt-out" of the third-party release (the "**Third-Party Release**") contained in Article X.D.2 of the Plan, along with a plain language disclaimer explaining the importance and implication of the Third-Party Release and stated, among other things:

> **YOU HAVE THE CHOICE AS TO WHETHER YOU WILL BE BOUND BY THE THIRD-PARTY RELEASE, AND THE CHOICE IS YOURS ALONE. YOU WILL BE A RELEASING PARTY AND YOUR RIGHTS MAY BE COMPROMISED UNLESS YOU TAKE CERTAIN ACTIONS. IF YOU HOLD A CLAIM AGAINST THE DEBTORS AND WOULD LIKE TO OPT OUT OF THE THIRD-PARTY RELEASE, YOU MUST ELECT TO OPT OUT OF THE THIRD-PARTY RELEASE BY CHECKING THE OPT-OUT BOX ON THE BALLOT OR THE OPT-OUT NOTICE FORM THAT YOU RECEIVE. YOU MUST ALSO VOTE TO REJECT THE PLAN OR ABSTAIN FROM VOTING. IF YOU VOTE TO ACCEPT THE PLAN YOU WILL BE A RELEASING PARTY. IF YOU DO NOT RECEIVE EITHER A BALLOT OR OPT OUT NOTICE FORM YOU MUST OBJECT TO THE THIRD-PARTY RELEASE OR YOU WILL BE A RELEASING PARTY. OPTING OUT OF THE THIRD-PARTY RELEASE WILL NOT OTHERWISE MODIFY YOUR TREATMENT OR RECOVERY UNDER THE PLAN.**

19. As reflected in the certificate of service filed at Docket No. 619, Burnham's counsel in the State Court Action was served with the Plan Notice at the following address:

Morgan & Morgan
Alicia Smith, Esq.
20 North Orange Ave.
Suite 1600
Orlando, FL 32801

As such, the Combined Hearing Notice was sent to above-listed counsel via first class mail as part of the Creditor Matrix. *See* Docket No. 619, Ex. N. Further, as noted above, Burnham filed a motion for relief from stay and an amended notice of hearing regarding same (and then withdrew same) and, thus, was well aware of the Chapter 11 Cases and the Plan. Counsel for Burnham in the Chapter 11 Cases, David A. Geiger, is listed as an ECF recipient for the Chapter 11 Cases and, therefore, would have received notice of the Plan, the proposed Third Party Release and related issues.

20. Notwithstanding service on Burnham's counsel, no ballots, opt-out election, objections, or responses of any kind were received by the Debtors' claims and noticing agent from Burnham or his counsel. As a result, Burnham is now bound by the terms of the Third-Party Release, which provides, among other things:

> each Releasing Party (other than the Debtors or the Reorganized Debtors), in each case on behalf of itself and its respective successors, assigns, and representatives, and any and all other entities who may purport to assert any Claim, Cause of Action, directly or derivatively, by, through, for, or because of a Releasing Party, is **deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged each Debtor, Reorganized Debtor, and each other Released Party** from **any and all claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, including any derivative claims**, asserted or assertable on behalf of any of the Debtors, their Estates or their Affiliates, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to (including the formulation, preparation, dissemination, negotiation, entry into, or filing of, as applicable), or **in any manner arising from, in whole or in part, the Debtors (including the management, ownership or operation thereof)**, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Debtors' in- or out-of-court restructuring efforts, the decision to file the Chapter 11 Cases, any intercompany transactions, the Chapter 11 Cases, the Plan (including the Plan Supplement), the Disclosure Statement, the DIP Facility, the DIP Documents, the Disclosure Statement, the DIP Facility, the DIP Documents, the ABL Credit Agreement, the Omega Term Loan Credit Agreement, the Omega Master Lease, the Omega Note Agreement, the ABL Exit Facility, the ABL Exit Facility Credit Agreement, the pursuit of Confirmation and Consummation, the administration and implementation of the Plan, including the issuance or distribution of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, but not, for the avoidance of doubt, any legal opinion effective as of the Effective Date requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan, or upon any other act, omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, other than claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct, fraud or gross negligence.

Plan, Art. X.D.2 (emphasis added). As such, the Third-Party Release released all of Burnham's claims and causes of action against the following "Released Parties":

> (a) the Debtors and the Reorganized Debtors; (b) the UCC and each of its members (solely in their respective capacities as such); (c) **Omega**; (d) the ABL Secured Parties; (e) OHI DIP Lender, LLC; (f) TIX 33433 LLC; (g) the CRO; (h) the Independent Manager; and (i) with respect to each of the foregoing Entities, each such Entity's **current and former affiliates**, subsidiaries, officers, directors, managers, principals, members, equity investors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such . . .

Plan, § 1.243 (emphasis added). FCE is a Released Party under the Plan, as the term "Released Parties" includes "Omega." Plan, Article II (A), § 1.243. The term "Omega" includes the "Omega Note Agreement Lenders." *Id.*, § 1.170. The Omega Note Agreement Lenders are defined as "the list of lenders identified on Schedule 1 of the Omega Note Agreement." *Id.*, § 1.186. FCE is identified as a lender on Schedule 1 of the Omega Note Agreement. A true and correct copy of the Omega Note Agreement and Schedule 1 thereto is attached to the Complaint as Exhibit E.

21. On November 14, 2024, the Court held a hearing (the "**Combined Hearing**") on, among other things, confirmation of the *Debtors' Modified Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 680] (the "**Plan**"). On December 4, 2024, the Debtors filed a revised version of the Plan. *See* Docket No. 730. On December 5, 2024, the Court entered its order confirming the Plan [Docket No. 735] (the "**Confirmation Order**") and issued its memorandum opinion regarding the Third-Party Release [Docket No. 736].

22. The Debtors are currently in the process of preparing to "go effective" on the confirmed Plan, with the goal of consummating the transactions set forth therein and emerging from chapter 11 by April 2025.

IV. The Indemnification Obligations

23. Pursuant to the terms of the Lease Documents to which the FCE Debtor Indemnitors are parties, the FCE Debtor Indemnitors are contractually obligated to indemnify FCE for any

damages and reasonable attorneys' fees incurred in connection with the claims asserted in the State Court Action, creating an identity of interest and meriting extension of the automatic stay.

24. Accordingly, the FCE Debtor Indemnitors' indemnification obligations under the Lease Documents are clearly for the benefit of FCE.

ARGUMENT

I. THE AUTOMATIC STAY SHOULD BE EXTENDED TO CLAIMS AND CAUSES OF ACTION AGAINST FCE IN THE STATE COURT ACTION

25. Upon the commencement of a bankruptcy case, 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).

A. The Claims and Causes of Action in the State Court Action are Released under the Plan

26. As set forth above, Article X.D.2 of the Plan contains a Third-Party Release that provides, among other things:

> each Releasing Party (other than the Debtors or the Reorganized Debtors), in each case on behalf of itself and its respective successors, assigns, and representatives, and any and all other entities who may purport to assert any Claim, Cause of Action,

> directly or derivatively, by, through, for, or because of a Releasing Party, is **deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged each Debtor, Reorganized Debtor, and each other Released Party** from **any and all claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, including any derivative claims**, asserted or assertable on behalf of any of the Debtors, their Estates or their Affiliates, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to (including the formulation, preparation, dissemination, negotiation, entry into, or filing of, as applicable), or **in any manner arising from, in whole or in part, the Debtors (including the management, ownership or operation thereof)**, . . . other than claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct, fraud or gross negligence.

Plan, Art. X.D.2 (emphasis added).

27. Though Burnham (through his counsel) was served with the Combined Hearing Notice, which apprised him of his rights with respect to the Third-Party Release, Burnham elected not to opt out of or object to the Third-Party Release, or otherwise participate in the solicitation process. As such, all claims and causes of action asserted by Burnham in the State Court Action have been released pursuant to the Third-Party Release contained in Article X.D.2 of the confirmed Plan, subject to the occurrence of the Effective Date of the Plan. Accordingly, Burnham's continued prosecution of his released claims against FCE is futile and a waste of resources. *See In re Residential Capital, LLC*, 508 B.R. 838, 848 (Bankr. S.D.N.Y. 2014) (holding that litigating claims that were barred and discharged by the third-party release contained in the confirmed plan would be "futile" in any forum); *In re Charter Commc'ns*, 2010 WL 502764, at *5 (Bankr. S.D.N.Y. Feb. 8, 2010) ("Regardless of the merits of these allegations, one thing is certain—they constitute causes of action asserting claims against the defendants that were expressly released under the Plan . . . To rule otherwise would eviscerate the releases and contort their meaning.").

B. The FCE Debtor Indemnitors are "Indispensable Parties" to the State Court Action

28. Even if the Third-Party Release does not release Burnham's claims and causes of action, a limited extension of the automatic stay to FCE in the State Court Action is necessary because the FCE Debtor Indemnitors are "indispensable parties" to such litigation and, therefore, the State Court Action cannot and should not proceed absent the FCE Debtor Indemnitors' involvement.

29. To determine whether a party is an "indispensable" party as defined by Federal Rule of Civil Procedure 19, made applicable to this adversary proceeding by Bankruptcy Rule 7019, a court "must first determine whether a party should be joined if 'feasible' under Rule 19(a). If the party should be joined but joinder is not feasible . . . the court must then determine whether the absent party is 'indispensable' under Rule 19(b). If the party is indispensable, the action therefore cannot go forward." *Whittaker, Clark & Daniels, Inc.*, 2024 WL 4579207, at *7 (Bankr. D.N.J. Oct. 24, 2024) (internal citations omitted); *see also Martin v. Tap Rock Resources, LLC*, 519 F. Supp. 3d 961, 967 (D.N.M. 2021) (describing similar three-step analysis). To determine what constitutes an indispensable party, courts ask whether (a) relief can be afforded to the plaintiff without the presence of the other party and (b) the case can be decided on its merits without prejudicing the rights of the other party. *See Matter of Johns-Manville Corp.*, 26 B.R. 405, 414 (Bankr. S.D.N.Y. 1983) (citing *Pickett v. Paine*, 199 S.E.2d 223, 230 (Ga. 1973)). A party is indispensable if "in equity and good conscience," the court should not allow the action to proceed in its absence. *See* Fed. R. Civ. P. 19(b); *Phillips v. Choate*, 456 So.2d 556, 557 (Fla. 4th DCA 1984) (defining "indispensable parties" as "[p]ersons who have not only an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may

be wholly inconsistent with equity and good conscience"); *Gonzalez v. MI Temps of Fla. Corp.*, 664 So. 2d 17, 18 (Fla. 4th DCA 1995) (stating that "[a]n indispensable party is one whose interest in the subject matter of the action is such that if he is not joined, a complete and efficient determination of the equities and rights and liabilities of the other parties is not possible").

30. Courts have recognized that an extension of the automatic stay may be necessary "where a debtor is an indispensable party to litigation between a creditor and a third party." *See In re Lennington*, 286 B.R. 672, 674 (Bankr. C.D. Ill. 2001); *Matter of James Wilson Assocs.*, 965 F.2d 160, 170 (7th Cir. 1992) (indicating that an extension of automatic stay to non-debtor third party may exist "if the debtor is an indispensable party, protected by the stay from involvement in the litigation" such that "the litigation cannot proceed in his absence and therefore must be stayed as against the third party" as well); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 n.3 (9th Cir. 1993) (citing, among others, the indispensable party exception set forth in *Wilson* but declining to apply because party failed to assert that such exception applied); *Cincinnati Ins. Co. v. Am. Glass Indus., Inc.*, 2008 WL 2117148, at *1 (E.D. Va. May 16, 2008) ("The automatic stay does not extend to non-debtor co-defendants unless the bankrupt party is an indispensable party to the suit."); *Whittaker, Clark & Daniels, Inc.*, 2024 WL 4579207, at *7 (holding that extension of automatic stay was justified where, continuation of the actions, without debtors' participation, would have "very real consequences" for debtors and "certainly will impair or prejudice debtors' interests"); *Concrete Prods., Inc. v. Centex Homes*, 308 Ill. App. 3d 957, 960 (2d Dist. 1999) (finding that the automatic stay required abatement of entire action until either general contractor was discharged in bankruptcy or plaintiff obtained relief from automatic stay because debtor was necessary party to the litigation); *see also HML Holdings, LLC v. Romero*, 2021 WL 4751168, at *3 (S.D. Cal. Oct. 12, 2021) (extending automatic stay to non-debtor defendant because liability

was predicated entirely upon the merits of plaintiff's cause of action for fraud against debtor defendants, which was stayed as a result of the bankruptcy).

31. Here, the FCE Debtor Indemnitors are indispensable parties to the State Court Action because Tenant Debtor and OpCo Debtor, who were in possession and control of the subject property, provide the necessary nexus in connection with any tort claims or duties owed by FCE, given the overlap in factual allegations and claims against these parties. Due to the Chapter 11 Cases, however, proceeding against Tenant Debtor and OpCo Debtor in the State Court Action is not feasible (indeed, Burnham elected to withdraw his previously filed motion for relief from stay). Further, FCE submits that all of the FCE Debtor Indemnitors are indispensable parties to the State Court Action pursuant to Federal Rule 19(b), meaning that it cannot proceed in its absence and must be stayed until after the Effective Date of the Plan. As discussed herein, a judgment rendered in the State Court Action against FCE may prejudice the FCE Debtor Indemnitors' interests, given the potential *res judicata* or collateral estoppel concerns with respect to outstanding litigation involving the same factual allegations. Even if the State Court were to allow the State Court Action to proceed without the participation of the FCE Debtor Indemnitors, the FCE Debtor Indemnitors would still have to monitor the proceedings, including any depositions and hearings, to ensure that their interests, including the Debtors' privilege, are adequately protected. Additionally, though Burnham's discovery requests in the State Court Action are currently directed at only FCE, such requests will inevitably necessitate the FCE Debtor Indemnitors' involvement in the discovery process. Accordingly, the State Court Action should be stayed against FCE through and including the Effective Date of the Plan.

C. There is an Identity of Interest Between the FCE Debtor Indemnitors and FCE

32. It is well established that the automatic stay may be extended 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"). Accordingly, each of Burnham's asserted claims and causes of action should be stayed against FCE. Here, the FCE Debtor Indemnitors are the

"real party defendants" in the State Court Action and failing to extend the automatic stay to FCE would impede the Debtors' reorganization efforts in the Chapter 11 Cases for at least two reasons.

33. First, Burnham's alleged claims and causes of action against FCE seek "in effect a judgment or findings against the debtor" because such claims depend on adverse findings against certain of the FCE Debtor Indemnitors (Tenant Debtor and OpCo Debtor), and the claims and causes of action against FCE and the FCE Debtor Indemnitors "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").

34. Accordingly, where, as here, the claims against the FCE Debtor Indemnitors and FCE are interwoven and hinge on the conduct of the FCE Debtor Indemnitors (or certain of them), "any judgment by this court against [FCE] would in essence be a judgment against [the FCE Debtor Indemnitors] and would thus be improper while [the FCE Debtor Indemnitors'] bankruptcy is pending." *See Dillard v. Baker*, 2009 WL 1025337, at *1; *HML Holdings, LLC v. Romero*, 2021 WL 4751168, at *3 (S.D. Cal. Oct. 12, 2021) ("Specifically, this Court finds that the claims against Defendant Denise Romero and Debtor Defendants are so intertwined that it would neither be efficient nor fair to the parties to proceed. . . . Put differently, Defendant Denise Romero's liability in this action is predicated entirely upon the merits of Plaintiffs' cause of action for fraud against the Debtor Defendants, which has been automatically stayed by their bankruptcy petition. Thus, a later trial of claims against Debtor Defendants would require relitigation of most, if not all the

issue litigated in the first proceeding, wasting judicial resources, and, moreover, inviting inconsistent determinations and judgments across the actions.").

35. Second, the FCE Debtor Indemnitors are the "real party defendants" in the State Court Action, as there is a clear identity of interest between the FCE Debtor Indemnitors and FCE due to the expansive indemnification obligations owed to FCE by the FCE Debtor Indemnitors. As set forth above, the FCE Debtor Indemnitors owe indemnification obligations to FCE pursuant to the indemnification provisions contained in the Lease Documents. 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).

36. Here, the indemnification obligations require the FCE Debtor Indemnitors to broadly indemnify FCE from and against, among other things, liability for third-party claims raised in connection with the operations of the subject property prior to the operations' divesture. As such, any judgment awarded against FCE risks the imposition of liability upon the FCE Debtor Indemnitors. In other words, the action against FCE will have a material effect upon the Debtors' efforts to consummate the transactions contemplated in the confirmed Plan. 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.

37. Accordingly, the Court should extend the automatic stay under Bankruptcy Code Section 362 to claims and causes of action against FCE through and including the effective date of the Plan.

II. THE COURT SHOULD EXERCISE ITS EQUITABLE POWERS TO STAY THE STATE COURT ACTION AGAINST FCE

38. If this Court does not believe an extension of the automatic stay is appropriate here, FCE submits that a preliminary injunction is warranted to prohibit Burnham from prosecuting claims against FCE while the Debtors work to consummate the transactions set forth in the confirmed Plan. Bankruptcy courts in this district and across the country have often recognized that, under certain circumstances, it is appropriate 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).

39. A bankruptcy court may enjoin a pending suit where, as here, the issues between the FCE Debtor Indemnitors and FCE 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.")).

40. This Court should stay or enjoin prosecution of the Claims pursuant to its powers under Bankruptcy Code Section 105 to protect the FCE Debtor Indemnitors, and all 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.").

41. 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).

42. 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).

43. Here, as set forth below, FCE easily satisfies each of the foregoing requirements, meriting a temporary preliminary injunction against Burnham's continued prosecution of the State Court Action against FCE through and including the Effective Date of the Plan.

A. FCE and the FCE Debtor Indemnitors Will Suffer Immediate and Irreparable Harm in the Absence of a Stay

44. 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 FCE and the FCE Debtor Indemnitors for a few reasons.

45. As an initial matter, given the indemnification obligations owed by the FCE Debtor Indemnitors to FCE, the FCE Debtor Indemnitors 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 its estate. *See, e.g.*, *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."). This equitable consideration weighs even more heavily in favor of extension where, as here, Burnham was aware of but declined to opt out of the Third-Party Release contained in the Plan. Continued prosecution of Burnham's claims and causes of action would likely result in additional claims by FCE against the FCE Debtor Indemnitors' estates for, among other things, attorneys' fees, expenses, resulting judgments, and other indemnified costs, and would lead to additional discovery burdens on the FCE Debtor Indemnitors, which would inequitably deplete the assets of the estate to be administered by the confirmed Plan.

46. Accordingly, this first factor weighs in favor of injunctive relief.

B. The FCE Debtor Indemnitors (and the Debtors) Have Already Succeeded in their Reorganization Efforts.

47. 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.

48. Here, as set forth above, FCE has demonstrated that the automatic stay should be extended to apply to the claims and causes of action against FCE. Moreover, the FCE Debtor

Indemnitors – along with all of the Debtors – ***have already confirmed*** the Plan and are in the process of preparing to consummate the transactions contemplated therein. An injunction is necessary to preserve and protect the inevitable success that has already obtained. Accordingly, this second factor weighs in favor of injunctive relief.

C. The Balance of Equities Weighs Strongly in FCE's Favor

49. The balance of equities overwhelmingly favors FCE's request for injunctive relief. In contrast to the immediate and irreparable harm FCE and the FCE Debtor Indemnitors would face if injunctive relief were denied, the only potential harm faced by Burnham is mere delay in prosecuting an action that is indubitably released upon the Effective Date. 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."). Thus, the balance of equities clearly weighs in FCE's favor, further justifying injunctive relief.

D. A Preliminary Injunction is in the Public Interest

50. 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.").

51. Accordingly, an injunction barring Burnham from prosecuting the claims in the State Court Action against FCE until the Effective Date of the Plan is appropriate and essential to the orderly and effective administration of the Debtors' estates.

III. THE COURT SHOULD GRANT EXPEDITION

52. 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:

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

(b) the breadth of the requested discovery;

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

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

(e) 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).

53. Here, good cause exists to expedite the proceedings because FCE seeks a preliminary injunction by the Motion and faces immediate and irreparable harm in the absence of the relief sought therein. An expedited schedule to rule on the Motion will not burden Burnham because, as discussed herein, the only potential harm faced by Burnham is mere delay of a lawsuit that has already been pending for over a year. FCE believes the Motion can be resolved on the papers and no discovery is necessary. As such, FCE has met the standard for expedition. Accordingly, FCE requests that the Court schedule a hearing on the Motion at the Court's earliest convenience.

RESERVATION OF RIGHTS

54. FCE expressly reserves all rights, claims, causes of action, counter-claims, and defenses with respect to the State Court Action and nothing contained herein shall constitute a waiver or release of the foregoing.

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CONCLUSION

WHEREFORE, FCE respectfully requests 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.

This 7th day of January, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing document was served by the Court's CM/ECF system on all counsel of record registered in these Chapter 11 Cases through CM/ECF. I further certify that I have this day served a true and correct copy of the foregoing document via email and U.S. Mail upon the following parties:

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This 7th day of January, 2025.

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