Docket #0003 Date Filed: 1/6/2025

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 and BRANDON FACILITY OPERATIONS, LLC,	Adversary Proc. No. 25-05007 (PMB)
Plaintiffs,	
v.	
CREA BRANDON-C LLC and BRANDON HEALTH OPCO, LLC,	
Defendants.	

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

[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.veritaglobal.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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LaVie Care Centers, LLC ("LaVie") and Brandon Facility Operations, LLC ("Brandon" and, together with LaVie, the "Plaintiffs" or the "Debtor-Plaintiffs"), as debtors and debtors-in-possession (collectively, the "Debtors") in the above-captioned chapter 11 cases and the Plaintiffs in the above-captioned adversary proceeding (the "Adversary Proceeding"), hereby submit this brief (this "Brief") in support of (a) the *Debtor-Plaintiffs' Motion for Entry of Order Extending Automatic Stay and/or Preliminarily Enjoining Claims and Causes of Action Against Non-Debtor Defendants* (the "Motion"); (b) the *Complaint* (the "Complaint") initiating this Adversary Proceeding; and (c) the *Declaration of Sydney Reitzel in Support of the Debtor-Plaintiffs' Motion for Entry of Order Extending Automatic Stay and/or Preliminarily Enjoining Claims and Causes of Action Against Non-Debtor Defendants* (the "Reitzel Declaration"), each of which are being filed contemporaneously herewith and fully incorporated herein by reference. In support of thereof, the Debtor-Plaintiffs respectfully state as follows:

PRELIMINARY STATEMENT[1]

1. Prior to the Chapter 11 Cases, CREA Brandon-C LLC and Brandon Health OpCo, LLC (together, the "Brandon Entities" or the "Defendants") sued the Debtor-Plaintiffs, for allegations relating to loss of value in a single facility previously divested by the Debtor-Plaintiffs (the "2023 Brandon Action"). The Brandon Entities filed a $25 million proof of claim against the Debtor-Plaintiffs in their respective Chapter 11 Cases. The 2023 Brandon Action was stayed in June 2024 as a result of the Debtors' bankruptcy filing, but approximately three months *after* the Petition Date, the Brandon Entities filed a new action in state court (the "2024 Brandon Action"), merely repackaging the breach of contract claims previously alleged against the Debtor-Plaintiffs

[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 Complaint.

as tort claims against non-Debtors, Pourlessoins, LLC d/b/a Synergy Healthcare Services and Jared Elliott (the former CEO of Brandon's management company) (together, the "Non-Debtor Defendants") in a clear attempt to impermissibly circumvent the automatic stay and the bankruptcy process. Accordingly, the Debtor-Plaintiffs hereby seek a limited extension of the automatic stay and/or a preliminary injunction of the claims and causes of action asserted against the Non-Debtor Defendants in the 2024 Brandon Action through the effective date of the Plan for several reasons.

2. ***First***, the Brandon Entities did not opt out of, and are therefore bound by, the Third-Party Release contained in the Debtors' confirmed chapter 11 plan (the "Plan"). Subject to the Plan going effective, all claims and causes of action asserted in the 2024 Brandon Action have been released pursuant to the Third-Party Release, meaning that the Brandon Entities' continued prosecution of such released claims against the Non-Debtor Defendants is a futile and wasteful abuse of process and warrants immediate judicial intervention. In a similar vein, it appears based upon discovery served to date in the 2024 Brandon Action, the Brandon Entities may attempt to seek recovery through the Debtors' directors' and officers' insurance, even though these claims will belong to the GUC Trust following the effective date of the Plan. Even if the Brandon Entities could bring such claims in advance of the effective date, such actions would only serve to deplete the universe of D&O Claims that are being assigned to the GUC Trust to the detriment of unsecured creditors (including, ironically, the Brandon Entities on account of their "Class 6B DivestCo General Unsecured Claims" under the Plan).

3. ***Second***, the Debtor-Plaintiffs are undoubtedly indispensable parties to the 2024 Brandon Action, without which no nexus to the Non-Debtor Defendants exist. The 2024 Brandon Action is a blatant and transparent attempt to merely repurpose breach of contract claims asserted previously against the Debtor-Plaintiffs in the 2023 Brandon Action as tort claims against the Non-

Debtor Defendants, in an obvious attempt to circumvent the automatic stay and obtain an alternative recovery. By filing a new complaint that names only non-Debtor entities but relies on identical underlying facts and allegations, the Brandon Entities still seek a judgment or findings against the Debtors, both because such claims depend on adverse findings against the Debtor-Plaintiffs, and are inextricably interwoven with, and present common questions of fact and law. Despite the Brandon Entities' assertions to the contrary, the 2024 Brandon Action, as well as the discovery, depositions, and other litigation workstreams associated therewith, simply cannot proceed without the Debtor-Plaintiffs' involvement, meriting an extension of the automatic stay.

4. ***Finally***, the Debtor-Plaintiffs (and other Debtors) owe broad indemnification obligations to the Non-Debtor Defendants, meaning that the Debtor-Plaintiffs are the "real party defendants" in the 2024 Brandon Action and any judgment against the Non-Debtor Defendants will effectively be a judgment against the Debtor-Plaintiffs, further meriting an extension of the automatic stay.

5. Ultimately, the 2024 Brandon 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. If the Plan goes effective, the 2024 Brandon Action is subject to the release and injunction provisions in the Plan, unless the Court orders otherwise. Even if the Brandon Entities can show that they somehow should not be bound by the third-party release provisions in the Plan, the Court can determine *at that time*, that the action cannot proceed because the Debtors—whose assets will have transferred by that time—are indispensable parties, therefore rendering any action against Synergy (its back-office service provider) and Mr. Elliott (a former CEO of the Debtors' management company) futile. Accordingly, the Debtor-Plaintiffs respectfully request that this Court (a) extend the automatic stay to apply to the claims and causes of action asserted against the

Non-Debtor Defendants in the 2024 Brandon Action through and including the effective date of the Plan; (b) temporarily enjoin the 2024 Brandon 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

6. 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

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"). *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 2023 Brandon Action

9. On May 18, 2023, the Brandon Entities filed a complaint (the "2023 Brandon Complaint")[2] in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida Business Court, captioned *CREA Brandon-C LLC and Brandon Health OpCo, LLC v. Brandon Facility Operations, LLC and LaVie Care Centers, LLC*, No. 2023-CA-12242-O, commencing the 2023 Brandon Action.

10. On April 19, 2024, the Brandon Entities filed their *Motion for Leave to Amend Complaint* [ECF No. 196615941], seeking to add three additional defendants to the 2023 Brandon Action: Pourlessoins, LLC d/b/a Synergy Healthcare Services, Lidenskab, LLC d/b/a Raydiant Health Care, and Jared Elliott. On May 20, 2024, the Debtor-Plaintiffs filed their *Response in Opposition to Plaintiff's Motion for Leave to Amend* [ECF No. 198736108]. The 2023 Brandon Action, which named both Plaintiffs as defendants, was automatically stayed as a result of the commencement of the Chapter 11 Cases.

11. On June 3, 2024—one day after the Petition Date—the Debtors filed a suggestion of bankruptcy in the 2023 Brandon Action, apprising the Florida Business Court and all parties to the 2023 Brandon Action of the Chapter 11 Cases.

[2] A true and correct copy of the 2023 Brandon Complaint (without exhibits) is attached to the Complaint as Exhibit A. The full 2023 Brandon Complaint, including exhibits, is attached to the Brandon POC (as defined below).

12. On June 6, 2024—four days after the Petition Date—the Brandon Entities filed *Plaintiffs' Reply Memorandum to Defendants' Response in Opposition to Motion for Leave to Amend Complaint* [ECF No. 199989817] (the "Reply") in the 2023 Brandon Action. The Reply attempted to add the same non-Debtors discussed above to the 2023 Brandon Action.

13. On June 7, 2024, counsel for the Debtors sent a letter to counsel for the Brandon Entities, advising that further action in the 2023 Brandon Action, including filing of the Reply, violated the automatic stay in the Chapter 11 Cases, and demanded that the Reply be withdrawn. The Reply was withdrawn by counsel to the Brandon Entities on June 10, 2024 and no filings have been made in the 2023 Brandon Action since that time.

14. On August 28, 2024, the Brandon Entities filed two proofs of claim, one against Plaintiff Brandon and one against Plaintiff LaVie (together, the "Brandon POC"), asserting a general unsecured claim in the amount of $25,389,782.52 for claims asserted in the 2023 Brandon Action. *See* Claim Nos. 2590, 2595.[3] The Brandon POC was executed by their counsel at Nelson Mullins Riley & Scarborough LLP.

III. The 2024 Brandon Action

15. On September 5, 2024, counsel for the Brandon Entities filed a new complaint (the "2024 Brandon Complaint") in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida Business Court, captioned *CREA Brandon-C LLC and Brandon Health OpCo, LLC v. Pourlessoins, LLC d/b/a Synergy Healthcare Services and Jared Elliott*, No. 2024-CA-007910-O (the "2024 Brandon Action").[4] The 2024 Brandon Action was filed against two non-Debtor entities, Pourlessoins, LLC d/b/a Synergy Healthcare Services ("Synergy") and Jared

[3] A true and correct copy of the Brandon POC is attached to the Complaint as Exhibit B.

[4] A true and correct copy of the 2024 Brandon Complaint is attached to the Complaint as Exhibit C.

Elliott ("Mr. Elliott"). Synergy provides critical back-office services to the Debtors, including financial, tax, consulting, and other services necessary for the operation of the Debtors' skilled nursing facilities. Mr. Elliott is a former employee of the Debtors, specifically the chief executive officer of Debtor Lidenskab, LLC d/b/a Raydiant Health Care.

16. The 2024 Brandon Complaint seeks the same relief based on the same alleged facts that the Brandon Entities pursued against the Plaintiffs in the 2023 Brandon Action. Rather than naming the Debtors directly, however, the Brandon Entities improperly recast their contractual claims previously raised against the Plaintiffs in the 2023 Brandon Action as tort claims against one of their affiliates and agents (Synergy) and one of their former employees (Mr. Elliott) in the 2024 Brandon Action, while noticeably avoiding reference to the Debtors, their bankruptcy cases, or the operator of the nursing home at issue.

17. Prior to the filing of the Complaint commencing this Adversary Proceeding, the Debtors demanded that the Brandon Entities withdraw the 2024 Brandon Complaint, or they would seek intervention by this Court. To date, the Brandon Entities have refused to withdraw the 2024 Brandon Complaint.

18. On October 30, 2024, the Non-Debtor Defendants filed their *Motion to Stay Action or, in the Alternative, Motion to Dismiss* [ECF No. 209928834] (the "Motion to Dismiss"). The Motion to Dismiss seeks a stay of the 2024 Brandon Action to prevent further violations of the automatic stay, or, in the alternative, dismissal of the 2024 Brandon Action.

19. On December 3, 2024, the Brandon Entities filed their *Memorandum in Opposition to Defendants' Motion to Stay/Dismiss* [ECF No. 212068868]. As ordered by the Florida Business Court on December 17, 2024, the Non-Debtor Defendants have until January 7, 2025 to file their reply. *See* ECF No. 213037746.

20. On December 13, 2024, the Brandon Entities filed a *Motion to Compel Production of Documents from Defendant Synergy* [ECF No. 212798962] (the "Motion to Compel"). Nearly all of the document requests referenced in the Motion to Compel refer to discovery in connection with the Debtors' operation of the facility, including as it relates to four individuals—Kimberly Lucadano, Leshana Clark, Catherine Anyon, and Barbara Monaco—all of whom were former employees of Debtor entities.

IV. The Third-Party Release

21. 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").

22. Pursuant to the Solicitation Procedures Order, on or about October 7, 2024, the Debtors commenced solicitation of votes on their proposed chapter 11 plan of reorganization by distributing, among other things, the appropriate ballot or notice of non-voting status, as applicable, on voting and non-voting creditors and the Combined Hearing Notice on all creditors. As reflected in the exhibits attached to and approved by the Solicitation Procedures Order, each ballot contained an opt-out election through which each voting creditor 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.

The Combined Hearing Notice, which was distributed to all of the Debtors' creditors, contained the same plain language disclaimer regarding the importance of the Third-Party Release, and stated:

> **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.**

23. Given that their claim was filed against a previously divested facility, the Brandon Entities were entitled to vote in Class 6B (DivestCo General Unsecured Claims). The Brandon Entities were served with the solicitation materials for holders of claims in Class 6B (DivestCo General Unsecured Claims) at the following address:[5]

CREA Brandon-C LLC and Brandon Health OpCo, LLC
Shane G. Ramsey
Nelson Mullins Riley and Scarborough LLP
1222 Demonbreun Street, Suite 1700
Nashville, TN 37203

The foregoing address was listed on the Brandon POC and above-listed counsel filed a notice of appearance in the Chapter 11 Cases [Docket No. 335] listing the same address and contact information. As such, the Combined Hearing Notice was also sent to above-listed counsel via email as part of the Limited Service List. *See Certificate of Service*, Docket No. 619, Ex. L. Finally, the Combined Hearing Notice was also sent to the address listed for the Brandon Entities

[5] As noted in footnote 4 of the *Certificate of Service* filed at Docket No. 619, Verita redacted all litigation parties listed therein out of an abundance of caution to preserve confidentiality. An unredacted copy of the *Certificate of Service* is available from Verita upon request.

in the Debtors' schedules and statements: 330 Madison Ave., 27th Floor, New York, NY 10017. *See id.*, Ex. N.

24. Notwithstanding service on the Brandon Entities and their counsel, no ballots, opt-out elections, objections, or responses of any kind were received by the Debtors' claims and noticing agent from the Brandon Entities or from their counsel on the Brandon Entities' behalf. *See Declaration of Jennifer Westwood, on Behalf of Kurtzman Carson Consultants LLC d/b/a Verita Global Regarding Solicitation and Tabulation of Ballots Cast on Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Reorganization* [Docket No. 647]. As a result, the Brandon Entities are 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 the Brandon Entities' 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). Both of the Non-Debtor Defendants are "Released Parties" under the Plan, given Synergy's status as a current affiliate, agent, consultant, and professional of the Debtors, and Mr. Elliott's former employment with the Debtors.

25. 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].

26. 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.

V. The D&O Claims

27. As set forth in the Plan, any and all claims or causes of action that are or may be covered claims under a current insurance policy of the Debtors or FC XXI against the current and former officers of the Debtors, among others (the "D&O Claims") are being assigned to the GUC Trust for the benefit of unsecured creditors. *See* Plan, Art. VI.H. Among other things, the 2024 Brandon Complaint states that Mr. Elliott and Synergy "breached their duty of care" in their management of the Brandon skilled nursing facility. *See* 2024 Brandon Compl., ¶ 16.

28. In connection with the 2023 Brandon Action, the Brandon Entities sought to make a claim on the Debtors' D&O policy.[6] In addition, in connection with discovery requests propounded in the 2024 Brandon Action, the Brandon Entities sought information relating to the Debtor-Plaintiffs directors' and officers' insurance coverage. Given that the Brandon Entities are attempting to seek recoveries on the Debtors' D&O coverage, they are effectively trying to "end-run" around all other Class 6.B creditors and obtain enhanced recoveries in a manner that would unjustly enrich the Brandon Entities to the detriment of all other unsecured creditors.

VI. The Indemnification Obligations

29. Pursuant to various operating agreements and administrative services agreements, the Debtor-Plaintiffs and certain other Debtors are contractually obligated to indemnify the Non-Debtor Defendants for any damages and reasonable attorneys' fees incurred in connection with the

[6] A true and correct copy of the Brandon Entities' letter regarding D&O coverage is attached to the Complaint as Exhibit D.

claims asserted in the 2024 Brandon Action, creating an identity of interest and meriting extension of the automatic stay.

A. The Operating Agreements

30. Pursuant to their limited liability company operating agreements (each, an "Operating Agreement" and together, the "Operating Agreements"),[7] both LaVie and Brandon must indemnify the Non-Debtor Defendants for any liability under the 2024 Brandon Action. Sections 17(b)(i)-(ii) of the Operating Agreements provide:

> [A]n Indemnified Representative who has been successful, on the merits or otherwise, in the defense of any Proceeding, or in the defense of any claim, issue, or matter in the Proceeding, **shall be indemnified** against reasonable expenses incurred by the Indemnified Representative in connection with the Proceeding, claim, issue or matter in which the Indemnified Representative was successful.
>
> **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. . . .

See Compl., Exs. E-1, E-2 at § 17(b)(i)-(ii) (emphasis added).

31. The Operating Agreements define "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**).

[7] A true and correct copy of the Operating Agreement for LaVie is attached to the Complaint as Exhibit E-1 and a true and correct copy of the Operating Agreement for Brandon is attached to the Complaint as Exhibit E-2.

See id. at § 17(a)(ii) (emphasis added). Based on the foregoing, Synergy and Mr. Elliott each constitute an "Indemnified Representative" due to their roles as agent and/or employee of LaVie and/or Brandon, as applicable.

32. The Operating Agreements define "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, 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). The services provided by Synergy and Mr. Elliott, each as Indemnified Representatives, were provided in an "Indemnified Capacity", with the expectation of indemnification obligations from the Debtor-Plaintiffs.

33. Finally, the Operating Agreements define "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) (emphasis added). As a pending action, the 2024 Brandon Action easily fits within the definition of "Proceeding."

34. Accordingly, the Debtor-Plaintiffs' indemnification obligations under their Operating Agreements are clearly implicated for both of the Non-Debtor Defendants.

B. The Administrative Services Agreement

35. Debtor Lidenskab, LLC d/b/a Raydiant Health Care ("Raydiant") is party to an administrative services agreement with Non-Debtor Defendant Synergy dated as of December 1, 2021 (as amended, supplemented, or otherwise modified from time to time, the "Administrative

Services Agreement").[8] Pursuant to Article VIII of the Administrative Services Agreement, Raydiant 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 Agreement provides as follows:

> [Synergy] and [Raydiant] shall **indemnify and hold each other and their respective officers, directors, members, employees and affiliates** (each, a "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 Compl., Ex. F at § 8.1 (emphasis added). Accordingly, pursuant to the Administrative Services Agreement, Debtor Raydiant is 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 2024 Brandon Action. Importantly, the indemnification provisions in the Administrative Services Agreement expressly survive termination. *See id.* at § 8.1 ("The obligations under this Section 8.1 shall survive termination or expiration of this Agreement.").

ARGUMENT

I. THE AUTOMATIC STAY SHOULD BE EXTENDED TO CLAIMS AND CAUSES OF ACTION AGAINST THE NON-DEBTOR DEFENDANTS IN THE 2024 BRANDON ACTION.

36. Upon the commencement of a bankruptcy case, Bankruptcy Code section 362(a) operates to stay:

[8] A true and correct copy of the Administrative Services Agreement is attached to the Complaint as Exhibit F.

> (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 2024 Brandon Action are Released under the Plan, Meaning that their Further Prosecution is Futile.

37. 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).

38. Though the Brandon Entities were solicited with the solicitation materials and the Combined Hearing Notice, each of which apprised them of their rights with respect to the Third-Party Release, the Brandon Entities 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 the Brandon Entities in the 2024 Brandon 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, the Brandon Entities' continued prosecution of their released claims against the Non-Debtor Defendants is a futile and wasteful abuse of process and warrants immediate judicial intervention. *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*, No. 09-11435 (JMP), 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."). Absent the relief requested herein, the Brandon Entities could potentially recover on both their proof of claim filed against the Debtor-Plaintiffs in the Chapter 11 Cases and against the Non-Debtor Defendants in the 2024 Brandon Action, further demonstrating the need for judicial intervention and a limited extension of the automatic stay.

B. The Debtor-Plaintiffs are "Indispensable Parties" to the 2024 Brandon Action, Meriting an Extension of the Automatic Stay.

39. Even if the Third-Party Release does not release the Brandon Entities' claims and causes of action, a limited extension of the automatic stay to the Non-Debtor Defendants in the

2024 Brandon Action is necessary because the Debtor-Plaintiffs are "indispensable parties" to such litigation, meaning that it cannot and should not proceed absent the Debtor-Plaintiffs' involvement.

40. 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.*, No. 23-13575 (MBK), 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").

41. 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*, No. 21-cv-00380-BAS-BLM, 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).

42. Here, the Debtor-Plaintiffs are indispensable parties to the 2024 Brandon Action because the Debtor-Plaintiffs are the necessary nexus in connection with any tort claims or duties

owed by the Non-Debtor Defendants, given the overlap in factual allegations and claims raised in the 2023 Brandon Action. Due to the Chapter 11 Cases, however, joinder of the Debtor-Plaintiffs to the 2024 Brandon Action is not feasible. Nevertheless, the Debtor-Plaintiffs submit that they are indispensable parties to the 2024 Brandon Action pursuant to Federal Rule 19(b), meaning that it cannot proceed in their absence and must be stayed until after the effective date of the Plan. As discussed herein, a judgment rendered in the 2024 Brandon Action against the Non-Debtor Defendants may prejudice the Debtor-Plaintiffs' interests, given the potential *res judicata* or collateral estoppel concerns with respect to outstanding litigation involving the same factual allegations. Even if the Debtor-Plaintiffs are never joined as parties to the 2024 Brandon Action, the Debtor-Plaintiffs will have to monitor the proceedings, including any depositions and hearings, to ensure that their interests, including the Debtors' privilege, are adequately protected. Additionally, though the Brandon Entities' discovery requests in the 2024 Brandon Action are currently directed at only the Non-Debtor Defendants, such requests will inevitably necessitate the Debtor-Plaintiffs' involvement in the discovery process, given that any documents in the possession of either Synergy or Mr. Elliott are Debtor documents. Accordingly, the 2024 Brandon Action should be stayed against the Non-Debtor Defendants through and including the effective date of the Plan.

C. There is an Identity of Interest Between the Debtor-Plaintiffs and the Non-Debtor Defendants.

43. 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 Brandon Entities' asserted claims and causes of action should be stayed against the Non-Debtor Defendants:[9] Here, the Debtor-Plaintiffs are the "real party defendants" in the 2024 Brandon Action 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.

44. ***First***, the Brandon Entities have alleged claims and causes of action against the Non-Debtor Defendants that seek "in effect a judgment or findings against the debtor" because

[9] The Debtor-Plaintiffs and all of the Debtors dispute the allegations set forth in the 2023 Brandon Action and the 2024 Brandon Action and reserve all rights, counterclaims, and defenses with respect thereto.

such claims depend on adverse findings against the Debtor-Plaintiffs, and the claims and causes of action against the Non-Debtor Defendants and the Debtor-Plaintiffs "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").

45. Lest there be any doubt about the claims against the Non-Debtor Defendants—and the underlying facts—being inextricably interwoven with claims against the Debtor-Plaintiffs, the Brandon Entities first tried to bring the same lawsuit against the Debtor-Plaintiffs (the 2023 Brandon Action), meaning that the 2024 Brandon Action serves no purpose other than to attempt to evade the automatic stay. In the 2023 Brandon Action, the Brandon Entities claimed that the Debtor-Plaintiffs mismanaged the Brandon entities. They pled in the first paragraph of the 2023 Brandon Complaint: "Following the sale and turnover of operations, [the Brandon Entities] discovered that [the Debtor-Plaintiffs] ran the Brandon facility into the ground resulting in the government-mandated removal and relocation of most facility residents around the end of June 2022." 2023 Brandon Compl., ¶ 1. In the 2024 Brandon Action, the Brandon Entities pled in summary in the first paragraph: "Following the sale, [the Brandon Entities] discovered that [the Non-Debtor Defendants] ran the Brandon facility into the ground, resulting in the government-mandated removal and relocation of most facility residents around the end of June 2022." 2024 Brandon Compl, ¶ 1. In essence, the Brandon Entities tell the same story and seek the same relief in both lawsuits—they merely swap in the Non-Debtor Defendants for the Debtor-Plaintiffs and

swap in tort claims instead of breach of contract claims. Accordingly, each of the Brandon Entities' claims against the Non-Debtor Defendants relies on allegations that the Debtor-Plaintiffs committed some wrongs against the Brandon Entities. The Debtor-Plaintiffs will be prejudiced by Brandon Entities' continued prosecution of claims that seek findings of misconduct against them while they sit on the sidelines, and also may face collateral estoppel and *res judicata* concerns.

46. Accordingly, where, as here, the claims against the Debtor-Plaintiffs and the Non-Debtor Defendants are interwoven and hinge on the conduct of the Debtor-Plaintiffs, "any judgment by this court against [the Non-Debtor Defendants] would in essence be a judgment against [the Debtor-Plaintiffs] and would thus be improper while [the Debtor-Plaintiffs'] bankruptcy is pending." *See Dillard v. Baker*, 2009 WL 1025337, at *1; *HML Holdings, LLC v. Romero*, 2021 WL 4751168, at *3 ("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.").

47. ***Second***, the Debtor-Plaintiffs are the "real party defendants" in the 2024 Brandon Action, as there is a clear identity of interest between the Debtor-Plaintiffs and the Non-Debtor Defendants due to the expansive indemnification obligations owed to the Non-Debtor Defendants by the Debtor-Plaintiffs and Debtor Raydiant. As set forth above, the Debtor-Plaintiffs and certain of the Debtors owe indemnification obligations to the Non-Debtor Defendants pursuant to the

indemnification provisions contained in the Operating Agreements and the Administrative Services Agreement (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 (a) 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 (b) the diversion of resources involved with defending the pending state court litigation would divert debtors' resources and adversely impact the debtors' attempted reorganization).

48. Here, the Indemnification Obligations require the Debtor-Plaintiffs and Debtor Raydiant to broadly indemnify the Non-Debtor Defendants 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* Compl., Exs. E-1, E-2 at § 8.2; Ex. F, at § 8.1. As such,

any judgment awarded against these Non-Debtor Defendants in the 2024 Brandon Action risks the imposition of liability on the Debtors, including the Debtor-Plaintiffs. In other words, the action against the Non-Debtor Defendants 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.

49. Accordingly, the Court should extend the automatic stay under Bankruptcy Code section 362 to claims and causes of action against the Non-Debtor Defendants in the 2024 Brandon Action through and including the effective date of the Plan.

II. THE COURT SHOULD EXERCISE ITS EQUITABLE POWERS TO STAY THE 2024 BRANDON ACTION AGAINST THE NON-DEBTOR DEFENDANTS.

50. If this Court does not believe an extension of the automatic stay is appropriate here, the Debtor-Plaintiffs submit that a preliminary injunction is warranted to prohibit Brandon Entities from prosecuting claims against the Non-Debtor Defendants while the Debtors work to consummate the transactions set forth in the confirmed Plan. Bankruptcy courts, including this one, 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).

51. 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.")).

52. This Court should stay or enjoin prosecution of the Claims pursuant to its powers under Bankruptcy Code section 105 to protect the Debtor-Plaintiffs—and all 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.").

53. 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).

54. 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).

55. Here, as set forth below, the Debtor-Plaintiffs easily satisfy each of the foregoing requirements, meriting a temporary preliminary injunction against Brandon Entities' continued prosecution of the 2024 Brandon Action against the Non-Debtor Defendants through and including the effective date of the Plan.

A. The Debtor-Plaintiffs (and All Debtors) Will Suffer Immediate and Irreparable Harm in the Absence of a Stay.

56. 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 Debtor-Plaintiffs, the Debtors, and their estates for a few reasons.

57. As an initial matter, given the Indemnification Obligations owed by certain of the Debtors (including the Debtor-Plaintiffs) to the Non-Debtor Defendants, the Debtor-Plaintiffs 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, 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, the Brandon Entities were solicited but declined to opt out of the Third-Party Release contained in the Plan. Continued prosecution of the Brandon Entities' claims and causes of action would likely result in additional claims by the Non-Debtor Defendants against the Debtor-Plaintiffs. estates for, among other things, attorneys' fees, expenses, resulting judgments, and other indemnified costs, and would lead to additional discovery burdens on the Debtor-Plaintiffs, which would inequitably deplete the assets of the estate to be administered by the confirmed Plan.

58. Furthermore, continued prosecution and resolution of the Debtor-Plaintiffs' claims and issues against the Non-Debtor Defendants could improperly bind the Debtor-Plaintiffs (as well as other Debtors) 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-Plaintiffs would be forced to participate in the 2024 Brandon 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 In re Jefferson Cnty., Ala.*, 491 B.R. at 286.

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

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

60. 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.

61. Here, as set forth above, the Debtor-Plaintiffs have demonstrated that the automatic stay should be extended to apply to the claims and causes of action against the Non-Debtor Defendants set forth in the 2024 Brandon Action. Moreover, the Debtor-Plaintiffs—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 the Debtor-Plaintiffs' Favor.

62. The balance of equities overwhelmingly favors the Debtor-Plaintiffs' request for injunctive relief. In contrast to the immediate and irreparable harm the Debtor-Plaintiffs, the Debtors, and their estates would face if injunctive relief were denied, the only potential harm faced by Brandon Entities is mere delay in prosecuting an action that is a blatant "end-run" around the automatic stay. 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, including the D&O Claims that are to be assigned to the GUC Trust for the benefit of general unsecured creditors, all parties-in-interest will benefit from the relief requested herein. Thus, the balance of equities clearly weighs in the Debtor-Plaintiffs' favor, further justifying injunctive relief.

D. A Preliminary Injunction is in the Public Interest.

63. 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.").

64. Accordingly, an injunction barring Brandon Entities from prosecuting the claims in the 2024 Brandon Action against the Non-Debtor Defendants 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.

65. 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).

66. Here, good cause exists to expedite the proceedings because the Debtor-Plaintiffs 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 the Brandon Entities because, as discussed herein, the only potential harm faced by the Brandon Entities is mere delay of the 2024 Brandon Action. The Debtor-Plaintiffs believe the Motion can be resolved on the papers and no discovery is necessary. As such, the Debtor-Plaintiffs have met the standard for expedition. Accordingly, the Debtor-Plaintiffs request that the Court schedule a hearing on the Motion at the Court's earliest convenience.

RESERVATION OF RIGHTS

67. The Debtor-Plaintiffs and all of the Debtors expressly reserve all rights, claims, causes of action, counter-claims, and defenses with respect to the 2023 Brandon Action and the 2024 Brandon Action and nothing contained herein shall constitute a waiver or release of the foregoing.

[Remainder of page intentionally left blank]

CONCLUSION

WHEREFORE, the Debtor-Plaintiffs 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
January 6, 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 on counsel to the Brandon Entities via electronic mail. The Debtors' claims and noticing agent will be filing a supplemental certificate of service on the docket to reflect any additional service of the foregoing document via electronic mail or first-class mail, including on the Brandon Entities and the Limited Service List.

Dated: Atlanta, Georgia
January 6, 2025

MCDERMOTT WILL & EMERY LLP

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