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Proposed Counsel to the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
)	
Debtors.)	(Jointly Administered)
)	
Windstream Holdings, Inc. and Earthlink Holdings Corp.,)	
)	
Plaintiffs.)	Adversary Proceeding
)	
v.)	Case No. [●]
)	
Charlos Yadegarian, Robert Murray, Cindy Graham, and Larry Graham)	
)	
Defendants.)	
)	

¹ The last four digits of Debtor Windstream Holdings, Inc.’s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <http://www.kccllc.net/windstream>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.



**COMPLAINT TO EXTEND THE AUTOMATIC STAY OR, IN THE
ALTERNATIVE, TO OBTAIN AN INJUNCTION OR OTHER EQUITABLE RELIEF**

Windstream Holdings, Inc. (“Windstream Holdings”) and its related debtors, as debtors and debtors in possession and as plaintiffs in the above-captioned adversary proceeding (collectively, the “Debtors”), hereby bring this complaint (the “Complaint”) and allege, upon information and belief, as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

1. This is an adversary proceeding seeking extension of the Automatic Stay (as hereinafter defined) pursuant to section 362 of chapter 11 of title 11, United States Code (the “Bankruptcy Code”) or, in the alternative, injunctive relief under section 105(a) of the Bankruptcy Code and pursuant to Rule 7001(7) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), staying or enjoining, as applicable, continuation of four related cases.

2. Windstream Holdings, along with one of its debtor affiliates and several of their respective directors and officers are named defendants in two mirror putative class action lawsuits pending in the Georgia state Business Court Division and the Eastern District of Arkansas. The cases are styled as: (a) *Carlos Yadegarian, on behalf of himself and others similarly situated, vs. Julie A. Shimer, Marc F. Stoll, Walter L. Turek, Windstream Holdings, Inc., Carol B. Armitage, Samuel E. Beall III, Jeannie H. Diefenderfer, Jeffrey T. Hinson, Joseph F. Eazor, William G. LaPerch, Larry Laque, Kristi Moody, Michael G. Stoltz, Tony Thomas, Alan L. Wells* (the “GA Class Action Matter”); and (b) *Robert Murray, on behalf of himself and all others similarly situated, vs. Earthlink Holdings Corp., Susan D. Bowick, Joseph F. Eazor, Kathy S. Lane, Garry K. McGuire, R. Gerard Salemm, Julie A. Shimer, Marc F. Stoll, Walter L. Turek, Windstream Holdings, Inc., Carol B. Armitage, Samuel E. Beall III, Jeannie H. Diefenderfer, Robert E. Gunderman, Jeffrey T. Hinson, William G. LaPerch, Larry Laque, Kristi Moody, Michael G.*

Stoltz, Tony Thomas, and Alan L. Wells (the “AR Class Action Matter”). There are also two mirror shareholder derivative suits pending in the Eastern District of Arkansas which relate to essentially the same subject matter as the putative class actions. These cases are styled as: (c) *Cindy Graham, Derivatively on Behalf of Nominal Defendant Windstream Holdings, Inc., vs. Alan L. Wells, Tony Thomas, Samuel E. Beall, III, Jeannie H. Diefenderfer, Jeffrey T. Hinson, William G. LaPerch, Julia A. Shimer, Michael G. Stoltz, Walter L. Turek, Carol B. Armitage, Larry Laque, Marc F. Stoll, Bob Gunderman, and Windstream Holdings, Inc.* (“AR Shareholder Matter No. 1”); and (d) *Larry Graham, Derivatively on Behalf of Windstream Holdings, Inc., vs. Anthony W. Thomas, Kristi Moody, Robert E. Gunderman, Alan L. Wells, Jeffrey T. Hinson, Samuel E. Beall, III, William G. LaPerch, Michael G. Stoltz, Jeannie Diefenderfer, Julie A. Shimer, Walter L. Turek, Carol B. Armitage, Larry Laque, Marc F. Stoll, and Windstream Holdings, Inc.* (“AR Shareholder Matter No. 2”),” collectively with the GA Class Action Matter, AR Class Action Matter, and AR Shareholder Matter No. 1, the “Litigation”).

3. Debtor Windstream Holdings is a Defendant in each of these cases, and its debtor affiliate Earthlink Holdings Corp.² (“Earthlink,” and together with Windstream Holdings, the “Debtor Defendants”) is a Defendant in the AR Class Action Matter. All of the individual non-debtor codefendants (the “Non-Debtor Defendants”) are either current or prior directors or officers of the Debtor Defendants.

4. While the Debtors’ bankruptcy petition has automatically stayed the Litigation with respect to the Debtor Defendants, the Litigation continues against the Non-Debtor Defendants.

² In connection with a transaction that closed on February 27, 2017, EarthLink Holdings Corp. converted to a limited liability company and changed its name to Earthlink Holdings, LLC. On December 31, 2018, Earthlink Holdings, LLC changed its name again to Windstream Eagle Holdings, LLC.

5. The Debtors have an obligation to indemnify each of the Non-Debtor Defendants. The claims asserted against the Non-Debtor Defendants are entirely based on their alleged conduct as directors or officers of Debtors. Given that Debtors are required to indemnify the Non-Debtor Defendants for such actions, any litigation against the Non-Debtor Defendants in their capacity as directors and officers constitutes litigation against the Debtors themselves. Accordingly, allowing the Litigation to continue against the Non-Debtor Defendants will have material, immediate adverse economic consequences to the Debtors' estate in the form of both litigation costs and potential future judgments. Because the Debtor Defendants and the Non-Debtor Defendants share a total identity of interests with respect to the Litigation such that Debtor Defendants are essentially the real party defendants in these actions, the Bankruptcy Court should grant the relief requested herein.³

PARTIES

6. Plaintiff in the AR Class Action Matter is Robert Murray, on behalf of himself and all others similarly situated. Plaintiff in the GA Class Action Matter is Carlos Yadegarian, on behalf of himself and others similarly situated. Mr. Murray and Mr. Yadegarian both allegedly received Windstream Holdings' stock in exchange for their Earthlink stock as a result of the merger between Earthlink and one of Windstream Holdings' wholly-owned subsidiaries (which is described further herein). While they seek to represent themselves and a putative class of former Earthlink shareholders, neither class has been certified. Plaintiff in the AR Shareholder Matter No. 1 is Cindy Graham, derivatively on behalf of Windstream Holdings, Inc. Plaintiff in the AR

³ Nothing contained herein is intended or shall be construed as: (a) an admission that any prepetition claim against Debtors is valid; (b) a waiver of the Debtors' or any other party in interest's rights to dispute any prepetition claim on any grounds; (c) a promise or requirement to pay any prepetition claims; or (d) a waiver of the Debtors' or other party in interest's rights under the Bankruptcy Code or any other applicable law.

Shareholder Matter No. 2 is Larry Graham, derivatively on behalf of Windstream Holdings, Inc. Ms. Graham and Mr. Graham are both shareholders of Windstream Holdings, Inc., and assert claims in connection with the same Earthlink merger at issue in the putative class actions.

7. The Non-Debtor Defendants in all matters, along with their connection to the Debtors and their participation in the lawsuits, are listed below:

- **Defendants in All Matters (the AR Class Action Matter, GA Class Action Matter, AR Shareholder Matter No. 1, and AR Shareholder Matter No. 2)**
 - Carol B. Armitage (former Windstream Holdings director)
 - Samuel E. Beall III (current Windstream Holdings director)
 - Jeannie H. Diefenderfer (current Windstream Holdings director)
 - Joseph F. Eazor (former Earthlink director and Earthlink Chief Executive Officer)
 - Jeffrey T. Hinson (current Windstream Holdings director)
 - William G. LaPerch (current Windstream Holdings director)
 - Larry Laque (former Windstream Holdings director)
 - Julie A. Shimer (former Earthlink director and current Windstream Holdings director)
 - Marc F. Stoll (former Earthlink director and former Windstream Holdings director)
 - Michael G. Stoltz (current Windstream Holdings director)
 - Tony Thomas (current Windstream Holdings director and Chief Executive Officer)
 - Walter L. Turek (former Earthlink director and current Windstream Holdings director)
 - Alan L. Wells (current Windstream Holdings director)
- **Defendant in All Matters Except the AR Shareholder Matter No. 1**
 - Kristi Moody (current Windstream Holdings General Counsel)
- **Defendant in All Matters Except the GA Class Action Matter**
 - Robert E. Gunderman (current Windstream Holdings Chief Financial Officer)
- **Defendants in the AR Class Action Matter Only**
 - Susan D. Bowick (former Earthlink director)
 - Kathy S. Lane (former Earthlink director)
 - Garry K. McGuire (former Earthlink director)
 - R. Gerard Salemme (former Earthlink director)

- **Defendant in the GA Class Action Matter Only**

- Samuel R. DeSimone, Jr. (former Earthlink General Counsel)⁴

JURISDICTION AND VENUE

8. The United States Bankruptcy Court for the Southern District of New York (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the entry of a final order by the Court in connection with this Complaint to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

9. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

10. The bases for the relief requested herein are sections 105(a) and 362 of the Bankruptcy Code and Bankruptcy Rule 7001-7.

RELIEF REQUESTED

11. By this Complaint, the Debtors seek a declaratory judgment pursuant to sections 105 and 362 of the Bankruptcy Code to extend the Automatic Stay under Section 362(a)(1) and 362(a)(3) to the Actions, or in the alternative, to stay or enjoin the continuation of the Actions pursuant to section 105 of the Bankruptcy Code during the pendency of the Debtors’ chapter 11 cases.

⁴ While there are allegations against Mr. DeSimone in the GA Class Action Matter, he is not listed in the caption of that suit, has not been served, and is not the subject of a waiver of service. The identification of him here as a Non-Debtor Defendant is with all reservation of rights in the underlying suit.

FACTUAL ALLEGATIONS

12. The Debtors are a leading provider of advanced network communications and technology solutions for businesses across the United States. The Debtors also offer broadband, entertainment and security solutions to consumers and small businesses primarily in rural areas in 18 states. Additionally, the Debtors supply core transport solutions on a local and long-haul fiber network spanning approximately 150,000 miles and have over 11,000 employees.

13. As set forth in greater detail in the *Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc., (I) In Support of Debtors' Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 27] (the "First Day Declaration"), on February 15, 2019, the United States District Court for the Southern District of New York entered a *Memorandum Decision and Order* against Debtor Windstream Services, LLC after trial in the matter styled *U.S. Bank National Association v. Windstream Services, Inc. v. Aurelius Capital Master, Ltd.*, Case No. 17-cv-7857 (JMF), that recognized an event of default under the Debtors' prepetition unsecured bond indentures, which in turn resulted in a cross-default under the Debtors' secured term loan and revolver credit facilities. As of the date hereof, the Debtors are obligated for approximately \$5.6 billion in funded debt obligations. To avoid any precipitous action against the Debtors' assets that would have harmed the Debtors' businesses, and to gain access to much-needed liquidity in the form of debtor-in-possession financing, the Debtors commenced these chapter 11 cases.

14. On February 25, 2019 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On March 12, 2019, the Office of the United States Trustee for the Southern District of New York appointed an official committee of unsecured creditors in these

chapter 11 cases [Docket No. 136]. Additional information regarding the Debtors' business, their capital structure, and the circumstances leading to these chapter 11 filings is contained in the First Day Declaration.

15. The Debtors owe the Non-Debtor Defendants two indemnity obligations that are pertinent here: (a) Windstream Holdings' certificate of incorporation requires that it indemnify its current or former officers and directors "in connection with any proceeding involving such person by reason of the fact that the person is or was a director [or] officer"⁵ and (b) Windstream Holdings' and Earthlink's merger agreement requires that Windstream Holdings indemnify Earthlink's former officers and directors in any "litigation . . . pertaining to (i) the fact that such individual is or was a director or officer of [Earthlink] or any of its subsidiaries . . . or (ii) this [merger agreement] or any of the transactions contemplated hereby."⁶

16. The Litigation at issue in this Motion includes two putative class action securities lawsuits pending in the Georgia state court and the Eastern District of Arkansas, respectively, and two shareholder derivative lawsuits pending in the Eastern District of Arkansas. The claims in all matters are based on the same transaction: the merger of Earthlink into one of Windstream Holdings' wholly-owned subsidiaries. As alleged in the putative class action matters, Plaintiffs received Windstream Holdings' stock in exchange for Earthlink stock as a result of the merger. In the shareholder derivative suits, Plaintiffs are Windstream Holdings stockholders. Plaintiffs' allegations against the Debtor Defendants and the Non-Debtor Defendants in all four matters are largely the same: that documents drafted, filed, and issued in connection with the Earthlink merger

⁵ See Windstream Holdings, Inc., Form 8-K (Current Report), Amended and Restated Certificate of Incorporation, Ex. 3.1, at Article Eight (Aug. 30, 2013).

⁶ See Windstream Holdings, Inc., Form DEFM14A (Joint Proxy Statement/Prospectus), Agreement and Plan of Merger by and among Windstream Holdings, Inc., Europa Merger Sub, Inc., Europa Merger Sub, LLC and Earthlink Holdings Corp., dated as of November 5, 2016, Annex A at A-100 (Jan. 24, 2017).

contained false and misleading statements and material omissions regarding Windstream's financial health. Entirely by virtue of their positions as officers and directors, Plaintiffs allege that the Non-Debtor Defendants: (i) are strictly liable or negligent in preparing, reviewing, or disseminating documents in connection with the Earthlink merger; (ii) had the power to influence and control the decision-making of Windstream and Earthlink; (iii) should have known the documents included misstatements and omissions; (iv) received incentive compensation and fees that should be rescinded due to the false and misleading documents; (v) breached their fiduciary duties; (vi) engaged in corporate waste; and/or (vii) were unjustly enriched. All four actions seek compensatory damages and attorneys' fees and costs, among other relief. In both of the putative class actions, there currently are pending motions to dismiss that have been briefed but have not been argued.

17. If the Automatic Stay is not extended to the Non-Debtor Defendants or continued prosecution of the Litigation is not enjoined, the Debtors are likely to suffer irreparable harm, because, among other things:

- (a) any judgment against the Non-Debtor Defendants in the Litigation could affect property of the Debtors' estate because the Debtors have obligations to indemnify the Non-Debtor Defendants with respect to any liability they may incur in connection with the Litigation;
- (b) any decision on the pending dispositive motions in the Litigation could prejudice the Debtors from defending themselves in the future; and
- (c) the continued prosecution of the Litigation against the Non-Debtor Defendants will require the Debtors and their employees, particularly their legal department, to expend time and resources participating in the litigation to the detriment of the Debtors' reorganization efforts under chapter 11.

CLAIMS FOR RELIEF

COUNT I: EXTENSION OF AUTOMATIC STAY

18. The Debtors repeat and reallege the allegations contained in paragraphs 1-17 of this Complaint as if fully set forth herein.

19. The Automatic Stay should apply to the Non-Debtor Defendants because the Debtors share such an identity of interest with the Non-Debtor Defendants that an action against the Non-Debtor Defendants is essentially an action against the Debtors. The Debtors therefore seek to extend the Automatic Stay to the Non-Debtor Defendants, solely with respect to the Litigation, pursuant to section 362 of the Bankruptcy Code.

20. Section 362(a) protects estate assets by automatically staying any action “to recover a claim against the debtor” or “to exercise control over property of the estate.” 11 U.S.C. § 362(a)(1), (3). “[I]t is well settled that bankruptcy courts may extend the automatic stay to ‘enjoin suits by third parties against third parties if they threaten to thwart or frustrate the debtor’s reorganization efforts.’” *Calpine Corp. v. Nevada Power Co. (In re Calpine Corp.)*, 354 B.R. 45, 48 (Bankr. S.D.N.Y. 2006), *aff’d*, 365 B.R. 401 (S.D.N.Y. 2007) (quoting *In re Granite Partners, L.P.*, 194 B.R. 318, 337 (Bankr. S.D.N.Y. 1996)); *see also Oberg v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co., Inc.)*, 828 F.2d 1023, 1025 n.2, (4th Cir. 1987) (section 362(a)(3) “directs stays of any action, *whether against the debtor or third-parties*, to obtain possession or to exercise control over property of the debtor”) (emphasis added). The Litigation against the Non-Debtor Defendants will adversely impact property of the Debtors’ estate by (a) depleting available insurance reserves, (b) diverting valuable attention and funds through burdensome discovery, (c) prejudicing the Debtors’ interests by allowing a record to develop in the Litigation without the Debtors Defendants’ participation. For all of these reasons, the Court should extend the Automatic Stay to cover the Litigation with respect to the Non-Debtor Defendants pursuant to section 362(a).

21. *First*, the indemnified Non-Debtor Defendants will have claims against the Debtors' estate for their defense costs and damages related to the Litigation. These indemnity obligations create an identity of interests between the Debtor and the Non-Debtor Defendants such that a judgment against the Non-Debtor Defendants will essentially be a judgment against the Debtors. Under these circumstances, it is appropriate and necessary to extend the Automatic Stay. *See Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 328 F. Supp. 2d 439, 441-42 (S.D.N.Y. 2004) (“[A] § 362(a) stay may be imposed against a non-bankrupt party when such an identity of interest exists between the debtor and third party non-debtor that a judgment against the third party will directly affect the debtor.”); *Plessey Precision Metals, Inc. v. Metal Ctr., Inc. (In re Metal Ctr., Inc.)*, 31 B.R. 458, 462 (Bankr. D. Conn. 1983) (“Clearly, the debtor’s protection must be extended to enjoin litigation against others if the result would be binding upon the debtor’s estate.”); *W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.)*, No. 01-01139(JKF), 2004 WL 954772, at *2 (Bankr. D. Del. Apr. 29, 2004) (stating that the automatic stay can be extended “where an action against one party is essentially an action against the bankruptcy debtor, as in the case where a third-party is entitled to indemnification by the debtor for any judgment taken against it”); *Nat’l Oilwell Varco, L.P. v. Mud King Prods., Inc.*, No. CIV. 4:12-3120, 2013 WL 1948766, at *2 (S.D. Tex. May 9, 2013) (recognizing that the automatic stay “should extend” where a formal or contractual relationship makes a judgment against the non-debtor a finding against the debtor) (internal quotation omitted). Under the circumstances here, declining to apply the automatic stay would defeat the very purpose of the statute. *See In re Metal Ctr., Inc.*, 31 B.R. at 462 (“Where, however, a debtor and a nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide

relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code.”); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986).

22. Indeed, the Debtor Defendants and the Non-Debtor Defendants are covered by the same insurance policies with respect to the Litigation. Any amounts paid under these policies with respect to the Non-Debtor Defendants will therefore inevitably deplete the insurance proceeds available to fund any judgment or settlement entered into by the Debtor Defendants. The only way to protect the Debtors from the exposure, costs, and distractions associated with the Litigation is to extend the Automatic Stay to cover the Non-Debtor Defendants as well.

23. **Second**, allowing the Litigation to proceed while claims against the Debtors are stayed risks prejudicing the Debtors’ in the Litigation. Dispositive motions to dismiss are currently pending in both putative class actions. Any substantive ruling will become the law of the case, and will thus effectively become a ruling against the Debtors as well, while depriving the Debtors of the opportunity to contemporaneously be heard with regard to any such rulings. Thus, allowing the Litigation to continue during the pendency of these chapter 11 proceedings limits the Debtors’ ability to be heard with regard to rulings that might later be pivotal in the defense of the claims in the Litigation.⁷ Bankruptcy courts recognize the need to halt litigation against non-debtor defendants where, as here, that litigation might disadvantage the debtor in future proceedings. *See, e.g., In re Calpine Corp.*, 354 B.R. at 50 (noting that if the litigation at issue advanced without the debtor, “issues regarding [the debtor’s] liability, its defenses and any damages that may be awarded, will be determined in [its] absence exposing [the debtor] to a significant risk of collateral estoppel, stare decisis and evidentiary prejudice”).

⁷ And should the Debtors participate in the Litigation to avoid such outcomes, this would defeat the Congressional intent of the automatic stay.

24. *Third*, while discovery in the Litigation has not yet begun, the Debtors and the Non-Debtor Defendants could face burdensome discovery. The Debtors could be forced to respond to voluminous requests for documents that are in their sole possession. Further, many of the Non-Debtor Defendants are the same individuals who are the current directors or officers of the Debtors, and these individuals could be distracted by discovery in the Litigation at a time when their full attention to these chapter 11 proceedings, particularly the proposed sale process, is critical. *See, e.g., In re Calpine Corp.*, 354 B.R. at 50 (extending automatic stay to nondebtors where “continuation of the case w[ould] distract key personnel” from their chapter 11 obligations). A stay of the Litigation would allow the Debtors’ directors and officers to focus on their primary responsibility to the Debtors’ stakeholders and shepherd the Debtors through these chapter 11 proceedings.

25. In sum, allowing the Litigation to continue would not only expose the Debtors to indemnification obligations and require the Debtors to expend resources on litigation against insurance carriers. It could also prejudice the Debtors’ strategic position in the Litigation and would distract Debtors’ key personnel from their efforts to successfully and expeditiously move through these bankruptcy proceedings. Accordingly, this Bankruptcy Court should order the Automatic Stay extended to cover all defendants in the Litigation pursuant to 11 U.S.C. §§ 362(a)(1) and 362(a)(3).

COUNT II: SECTION 105 INJUNCTIVE RELIEF

26. The Debtors repeat and reallege the allegations contained in paragraphs 1-25 of this Complaint as if fully set forth herein.

27. If this Court determines that the Automatic Stay cannot be extended to the Non-Debtor Defendants in the Litigation, the Debtors seek an injunction staying the continued

prosecution of the Litigation under section 105(a) of the Bankruptcy Code until the effective date of a chapter 11 plan of the Debtors or further order of this Court.

28. Section 105(a) of the Bankruptcy Code authorizes the Bankruptcy Court to issue “any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a); *see Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 409 n.20 (S.D.N.Y. 2007) (“Courts consistently have found that section 105(a) may be used to stay actions against non-debtors even where section 362 otherwise would not provide such relief, recognizing that section 105 grants broader authority than section 362.”). Courts in this Circuit recognize that a section 105 injunction to stay lawsuits against non-debtors is necessary if, for example, allowing the litigation to advance is essentially a suit against the debtor. *Sec. Inv’r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 443 B.R. 295, 316 (Bankr. S.D.N.Y. 2011), *aff’d sub nom. In re Bernard L. Madoff Inv. Sec. LLC*, No. 11 CV 2392 AKH, 2011 WL 7975167 (S.D.N.Y. Dec. 15, 2011) (“[C]ourts have consistently utilized section 105(a) to extend section 362 to third-party actions against non-debtor entities ‘when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor’s estate.’”) (quoting *Queenie, Ltd. v. Nygard Int’l*, 321 F.3d 282, 287 (2d Cir. 2003)).

29. Bankruptcy Courts in this Circuit have applied a modified version of the traditional tests for preliminary injunctions: “(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; (3) whether the balance of harms tips in favor of the moving party; and (4) whether the public interest weighs in favor of an injunction.” *In re Calpine Corp.*, 365 B.R. at 409; *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc. (In re Lyondell Chemical)*, 402 B.R. 571, 588-89

(Bankr. S.D.N.Y. 2009); *Haw. Structural Ironworkers Pension Tr. Fund v. Calpine Corp.*, No. 06 CIV. 5358 (PKC), 2006 WL 3755175, at *4 (S.D.N.Y. Dec. 20, 2006).

30. Courts in this Circuit have also analyzed the following five factors when considering whether to issue a section 105 injunction to stay litigation against non-debtors: “whether the suits would (i) threaten the debtor’s insurance coverage, (ii) increase the debtor’s indemnification liability, (iii) result in inconsistent judgments, (iv) expose the debtor to risks of collateral estoppel or *res judicata*, and (v) burden and distract the debtor’s management by diverting its manpower from reorganization to defending litigation.” *McHale v. Alvarez (In re The 1031 Tax Grp., LLC)*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008); *Drennen v. Certain Underwriters at Lloyd’s of London (In re Residential Capital, LLC)*, 563 B.R. 756, 774 (Bankr. S.D.N.Y. 2016). Under either test, the result is clear: the Litigation should be stayed with respect to the Non-Debtor Defendants.

A. Allowing the Litigation to Proceed Will Pose a Substantial Likelihood of Irreparable Injury.

31. As discussed above, the Debtors would be subject to irreparable harm if the Litigation is not stayed as to the Non-Debtor Defendants. This harm corresponds to the factors for issuing a section 105 injunction to stay litigation against non-debtors.

32. **First**, continuation of the Litigation likely will cause irreparable injury by triggering the Debtors’ continued indemnification obligations to all of the Non-Debtor Defendants, for which, if incurred, the Debtors will have no recourse to reverse their impact. The indemnification provisions will further harm the Debtors by depleting estate resources to enforce insurance coverage to fulfill those obligations.

33. **Second**, allowing the Litigation to continue opens up the Debtors to the possibility of strategically disadvantageous applications of *res judicata* and collateral estoppel. *See In re*

Residential Capital, LLC, 563 B.R. at 775 (“The possibility of inconsistent judgments and exposing the Plaintiffs to the risks of collateral estoppel or res judicata weigh in favor of staying the arbitration proceedings.”). Any substantive ruling on the pending dispositive motions could adversely impact the Debtors’ opportunity and ability to defend itself against the Litigation. That prejudice may not only result in an adverse judgment against the Debtors for damages, but also punish the Debtors for taking advantage of the Automatic Stay to which it is entitled as it focuses on its chapter 11 responsibilities. This, too, would constitute irreparable injury.

34. **Third**, continuing the Litigation will undermine the Debtors’ chapter 11 scheme by distracting key personnel from their efforts to navigate the Debtors through bankruptcy. Forcing the Non-Debtor Defendants to split their attention between the chapter 11 proceedings and the Litigation risks further injury to the Debtors and counsels in favor of enjoining the Litigation. *See, e.g., Gillman v. Continental Airlines, Inc. (In re Continental Airlines)*, 177 B.R. 475, 481 (D. Del. 1993) (staying securities class actions based in part on distraction to key personnel).

B. The Remaining Elements for a Preliminary Injunction in the Bankruptcy Context Are Readily Satisfied.

35. The additional elements necessary for an injunction—namely, the reasonable likelihood of a successful reorganization, a balance of equities favoring the Debtors, and a benefit to the public interest—are readily satisfied here. *See In re Calpine Corp.*, 365 B.R. at 409.

36. Here, Debtors have a reasonable likelihood of successfully reorganizing. *See In re Lyondell Chem. Co.*, 402 B.R. 571 at 590 (stating that “where debtors are proceeding ‘on track’ and have met the challenges they have faced so far, that is sufficient” to show a reasonable likelihood of a successful reorganization). While the Debtors are still in the first stages of their chapter 11 cases, they have successfully obtained the relief they sought in their “first day hearing”

on February 26, 2019 (including access to approximately \$400 million out of the approximately \$1 billion in debtor-in-possession financing available to the Debtors in these chapter 11 cases), are on track to seeking further “second day” relief during their “second day hearing” on April 16, 2019, and are in the process of devising, with the assistance of their various professional advisors, a path forward in their restructuring.

37. The likelihood of irreparable harm to the Debtors from the continuation of the Litigation, as established above, far outweighs any risk of harm to the Plaintiffs in the Litigation should the Bankruptcy Court enjoin the Litigation until completion of the Debtors’ chapter 11 process. The Litigation Plaintiffs will suffer no material harm, as they would be free to pursue their claims against the Non-Debtor Defendants at that time.

38. Finally, “[e]valuation of the public interest factor of the analysis ‘requires a balancing of the public interest in successful bankruptcy reorganizations with other competing societal interests.’” *In re Calpine Corp.*, 365 B.R. at 413 (quoting 2 Collier on Bankruptcy ¶ 105.02[2]). The injunctive relief sought will serve the public interest by promoting the Debtors’ speedy and successful conclusion of these bankruptcy proceedings—a benefit to all constituencies—and will advance the objective of the automatic stay.

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PRAYER FOR RELIEF

WHEREFORE, the Debtors respectfully request as follows:

- i. entry of an order extending the Automatic Stay to the Non-Debtor Defendants pursuant to section 362 of the Bankruptcy Code;
- ii. in the alternative, entry of an order granting an injunction pursuant to section 105(a) of the Bankruptcy Code enjoining and prohibiting the continued prosecution of the Litigation against the Non-Debtor Defendants until the effective date of a chapter 11 plan of the Debtors or further order of the Court; and/or
- iii. such other relief as this Court deems just and proper under the circumstances.

Dated: April 5, 2019
New York, New York

/s/ Stephen E. Hessler, P.C.

Stephen E. Hessler, P.C.

Marc Kieselstein, P.C.

Cristine Pirro Schwarzman

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- and -

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