IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
AMERICAN PHYSICIAN PARTNERS, LLC, *et al.*[1]	)	Case No. 23-11469 (BLS)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	Hearing Date: TBD
	)	Objection Deadline: May 8, 2024 at 5:00 p.m. EST

MOTION OF JAKE ESCHENBRENNER FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d) OF THE BANKRUPTCY CODE

Jake Eschenbrenner ("Movant"), by and through his undersigned counsel, hereby moves this court (the "Motion") pursuant to Section 362(d) of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), Federal Rule of Bankruptcy Procedure 4001, and Local Rule 4001-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), for entry of an Order granting relief from the automatic stay imposed by Section 362(a) of the Bankruptcy Code in order to permit Movant to prosecute a personal injury action pending in the 3rd Judicial District Court, County of Dona Ana, State of New Mexico against Debtor American Physician Partners, LLC (together with the above-captioned co-debtors, the "Debtors") and to proceed to collection any award against the Debtors' and/or the Debtors' applicable insurance policies. In support of this Motion, Movant respectfully states as follows:

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' proposed claims and noticing agent at https://dm.epiq11.com/AmericanPhysicianPartners. The location of American Physician Partners, LLC's principal place of business and the Debtors' service address in these Chapter 11 Cases is 5121 Maryland Way, Suite 300, Brentwood, TN 37027.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this judicial district is proper under 28 U.S.C. §1408 and 1409.

2. This is a core proceeding within the meaning of 28 U.S.C. § 157(b).

3. The statutory predicate for the relief requested herein is 11 U.S.C. § 362(d)(1) and § 365(d)(2), Bankruptcy Rule 4001, and Local Bankruptcy Rule 4001-1.

FACTS

4. On August 8, 2023 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors' have requested join administration of their bankruptcy cases.

5. Prior to the Petition Date, Movant was seriously and permanently injured as a result of medical negligence of Debtors, and/or its employees or agents.

6. As a result of the injuries sustained by Movant and the Debtors' negligence, on July 13, 2023, the Movant commenced a civil action in the 3rd Judicial District Court, County of Dona Ana, State of New Mexico against Debtors and non-debtor co-defendants at Docket No.: D-307-CV-2023-01471 (the "State Court Action"). A copy of the Amended Complaint is attached hereto as Exhibit A.

7. The Movant's claim in the State Court Action has been delayed as a consequence of the Debtors' chapter 11 filings and the automatic stay provisions set forth in 11 U.S.C. §362(a).

8. Upon information and belief, the Debtors are covered by insurance policies applicable to Movant's claim in the event Movant is successful in the State Court Action.

RELIEF REQUESTED

9. Through this Motion, Movant seeks the entry of an Order pursuant to §362(d) of the Bankruptcy Code and 4001 of the Federal Rules of Bankruptcy Procedure, granting relief from the automatic stay so that he may file and prosecute his claim to judgment in the State Court Action and satisfy any award or other resolution he may obtain against the Debtors, the Debtors' applicable insurance policies any other responsible individual or entity.

BASIS FOR RELIEF REQUESTED

10. Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). Section 362(d) of the Bankruptcy Code provides in relevant part:

> On request of a party in interest and after notice and a hearing, the Court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay… (1) for cause, including the lack of adequate protection of an interesting property for such party interest.

11 U.S.C. § 362(d).

13. "Cause" is not defined in the Bankruptcy Code, it must be determined on a case-by-case basis. *Int'l Bus. Machines v. Fernstrom Storage and Van Co*., 938 F.2d 731, 735 (7th Cir. 1991). Courts have found that cause for lifting or modifying the automatic stay exists in order to permit litigation in another forum to liquidate a claim. *See, e.g., In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) (noting that the legislative history of § 362(d) shows that cause may be established by a single factor such as "a desire to permit an action to proceed … in another tribunal."); *In re Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830, 838 n.8 (Bankr. S.D.N.Y. 1990) (citing liquidation of a claim as "cause" for relief); *In re Holtkamp*, 669 F.2d 505 (7th Cir. 1982) (affirming the lifting of the automatic stay by the Bankruptcy Court to allow a personal injury suit against debtor to proceed to judgment).

14. At a hearing for relief from automatic stay under Section 362(d), the party opposing stay relief bears the burden of proof on all issues with the exception of the debtors' equity in property. *See In re Domestic Fuel Corp.*, 70 B.R. 455, 462-463 (Bankr. S.D.N.Y. 1987); 11 U.S.C. §362(g). If a creditor seeking relief from the automatic say makes a *prima facie* case of "cause" for lifting the stay, the burden going forward shifts to the trustee pursuant to Bankruptcy Code Section 362(g). *See In re 234-6 West 22nd Street Corp*., 214 B.R. 751, 756 (Bankr. S.D.N.Y. 1997).

15. Courts often follow the logic of the intent behind §362(d) which is that it is often appropriate to allow litigation to proceed in a non-bankruptcy forum, if there is no prejudice to the estate, "in order to leave the parties to their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere." *In re Tribune Co.*, 418 B.R. 116, 126 (Bankr. D. Del. 2009) (quoting legislative history of §362(d)) (internal citations omitted).

16. Courts in this District rely upon a three-pronged balancing test in determining whether "cause" exists for granting relief from the automatic stay to continue litigation:

> (1) Whether prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit;
>
> (2) Whether the hardship to the non-bankrupt party by maintenance of the stay outweighs the debtor's hardship; and
>
> (3) The creditor's probability of success on the merits.

See In re Tribune Co., 418 B.R. at 126.

17. Here, the facts weigh heavily in Movant's favor on each of these three prongs. First, the Debtors will not suffer prejudice should the stay be lifted because Movant's claim must eventually be liquidated before he can recover from the bankruptcy estate and/or any applicable insurance coverage maintained by the Debtors. Movant's claim against this Debtor is a

negligence/and personal injury claim which does not present any factual or legal issues that will impact or distract the Debtors from their reorganization or liquidation process. Indeed, because Movant's claim involves personal injury, it must be liquidated in a forum outside the Bankruptcy Court. 11 U.S.C. §157(b)(5) ("personal injury tort…claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claims arose…"). Furthermore, Movant has demanded a jury trial in the State Court Action and a jury trial is not available in this Court.

18. Upon information and belief, the Debtors' liability in this matter is covered by insurance. As such, any recovery by Movant will not affect the Debtors' estates, or to the extent the Debtors' applicable insurance policies contain any self-insured retention, any direct recovery against the Debtors by Movant would result in a prepetition claim, treated as any other prepetition claim in the Debtors' cases. Any liability over and above any self-insured retention would be borne by the Debtors' insurers. *See In re 15375 Memorial Corp.*, 382 B.R. 652, 687 (Bankr. D. Del. 2008), *rev'd on other grounds,* 400 B.R. 420 (D. Del. 2009) ("when a payment by an insurer cannot inure to the debtor's pecuniary interest, then that payment should neither enhance nor decrease the bankruptcy estate" (quoting *In re Edgeworth*, 993 F.2d 51, 55-56 (5th Cir. 1993)); *see also In re Allied Digital Tech Corp.,* 306 B.R. 505, 510 (Bankr. D. Del 2004) (ownership by a bankruptcy estate is not necessarily determinative of the ownership of the proceeds of that policy. "[W]hen the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate." *In re Edgeworth,* 993 F.2d 51, 55-56 (5th Cir. 1993).

19. Movant agrees that he is not seeking immediate recovery against the Debtors' or the Debtors' estate for any amount owed to him that is not covered by Debtors' primary, excess or umbrella insurance as a result of any settlement or judgment of the claims against the Debtors in

the State Court Action. Upon information and belief, any settlement or judgment in the State Court action that results in liability of the Debtors not covered by applicable insurance would be limited in the amount of any self-insured retention, which would result in a allowed general unsecured claim against the Debtors estates, would be treated as any other allowed general unsecured claim in the Debtors' bankruptcy cases and as prescribed in any order confirming the Debtors' plan of reorganization or liquidation. Any liability over and above any self-insured retention would be borne by the Debtors' insurers. As such, relief would not prejudice the Debtors and would permit the immediate enforcement of any judgment against the Debtors' applicable insurance.

20. Second, Movant will face substantial hardship if the stay is not lifted. Movant's injuries were caused as a result of the Debtors' negligence and Movant will be prejudiced by the continued delay resulting from the automatic stay due to the possibility of witnesses moving to unknown locations or who may pass away and the memory of events becoming less clear. Any delay in permitting Movant to prosecute the State Court Action increases the likelihood that these witnesses will not be located.

21. Movant resides in the State of New Mexico and the events which form the basis of his claim occurred exclusively in New Mexico. If Movant is forced to litigate his claim in Delaware, he would incur the increased expense of bringing attorneys, witnesses, and physical evidence to Delaware. "[O]ne of the primary purposes in granting relief from the say to permit claim liquidation is to conserve judicial resources." *In re Peterson*, 116 B.R. 247, 250 (D. Colo. 1990). Judicial economy would be served by lifting the automatic stay and allowing Movant's claim to be liquidated in the forum where he is presently postured to be filed and adjudicated quickly. In addition, Movant is entitled to a jury trial for his claims and damages and a jury trial is not available in this Court. A jury trial in the 3rd Judicial District Court, County of Dona Ana, State

of New Mexico is best suited to try all issues raised in the State Court Action. Accordingly, as the court in *Rexene* suggests, "[i]t will be often be more appropriate to permit proceedings to continue in their place of origin …." *In re Rexene*, 141 B.R. at 576.

22. Lastly, the likelihood of success on the merits prong is satisfied by "even a slight probability of success on the merits may be sufficient to support lifting an automatic stay." *In re Continental Airlines, Inc.*, 152 B.R. 420, 426 (D. Del. 1993). This prong also weighs in Movant's favor. The facts regarding the Debtors' serious negligence set forth in the attached Complaint speak for themselves. No defenses, much less strong defenses, appear to exist here. "Only strong defenses to state court proceedings can prevent a bankruptcy court from granting relief from the stay in cases where…the decision- making process should be relegated to bodies other than [the bankruptcy] court." *In re Fonseca v. Philadelphia Housing Authority*, 110 B.R. 191, 196 (Bankr. E.D. Pa. 1990).

23. When weighing the above factors, the Court should lift the automatic stay to permit Movant to prosecute his claim against the Debtors and any other responsible individual or entity to judgment in the State Court Action and satisfy any award or other resolution he may obtain against the Debtors from the Debtors' applicable insurance policies and any other individuals or entities that are responsible for the injuries sustained.

NOTICE

24. Pursuant to Local Rule 4001-(a), notice of this Motion has been provided to: (i) counsel for the Debtors; (ii) counsel for the Official Committee of Unsecured Creditors; (iii) counsel for the debtor-in-possession financing lenders; (iv) the Office of the United States Trustee; and the Chapter 7 Trustee. The Movant submits that no other or further notice need be provided.

WHEREFORE, Movant respectfully requests the entry of an order: (a) lifting the automatic stay for cause to allow the State Court Action to continue through to judgment or other resolution; (b) permitting Movant to liquidate and satisfy such judgment or other resolution granted, if any, from applicable insurance coverage available to the Debtors, to the extent insurance is available; (c) directed that relief from the automatic stay be effective immediately upon entry of an order granting this motion and that the 14 day stay provided in Bankruptcy Rule 4001(a)(3) not apply; and (d) granting such other and further relief as the Court deems appropriate.

REGER RIZZO & DARNALL LLP

/s/ Louis J. Rizzo, Jr., Esquire
Louis J. Rizzo, Jr., Esquire (#3374)
Brandywine Plaza West
1521 Concord Pike, Suite 305
Wilmington, DE 19803
(302) 477-7100
Attorney for Movant, Jake Eschenbrenner

Dated: April 24, 2024

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies on this 24th day of April, 2024, that a true and correct copy of the Motion for Relief from the Automatic Stay Pursuant to Section 362(d) of the Bankruptcy Code was caused to be served upon all parties required to receive notice pursuant to De. Bankr. LR 4001-1 via this Court's ECF filing system and/or by United States Mail, postage prepaid, upon the following parties:

Timothy P. Cairns, Esquire Laura Davis Jones, Esquire Peter J. Keane, Esquire Pachulski Stang Ziehl & Jones LLP 919 North Market Street, 17th Floor Wilmington, DE 19801	Donald J. Detweiler, Esquire Elazar A. Kosman, Esquire Morgan L. Patterson, Esquire Womble Bond Dickinson LLP 1313 North Market Street Suite 1200 Wilmington, DE 19801
Joseph F. Cudia, Esquire Richard L. Schepacarter, Esquire Office of the United States Trustee 844 King Street, Suite 2207 Wilmington, DE 19801	Todd C. Meyers, Esquire Kelly Moynihan, Esquire David M. Posner, Esquire Kilpatrick Townsend & Stockton LLP The Grace Building 1114 Avenue of the Americas New York, NY 10036
Epiq Corporate Restructuring, LLC www.epiqsystems.com 777 Third Avenue, 12th Floor New York, NY 10017	

REGER RIZZO & DARNALL LLP

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Attorney for Movant, Jake Eschenbrenner

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
AMERICAN PHYSICIAN PARTNERS, LLC, *et al.*[1]	)	Case No. 23-11469 (BLS)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	Hearing Date: TBD
	)	Objection Deadline: May 8, 2024 at 5:00 p.m. EST

NOTICE OF MOTION OF JAKE ESCHENBRENNER FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d) OF THE BANKRUPTCY CODE

TO:

Timothy P. Cairns, Esquire Laura Davis Jones, Esquire Peter J. Keane, Esquire Pachulski Stang Ziehl & Jones LLP 919 North Market Street, 17th Floor Wilmington, DE 19801	Donald J. Detweiler, Esquire Elazar A. Kosman, Esquire Morgan L. Patterson, Esquire Womble Bond Dickinson LLP 1313 North Market Street Suite 1200 Wilmington, DE 19801
Joseph F. Cudia, Esquire Richard L. Schepacarter, Esquire Office of the United States Trustee 844 King Street, Suite 2207 Wilmington, DE 19801	Todd C. Meyers, Esquire Kelly Moynihan, Esquire David M. Posner, Esquire Kilpatrick Townsend & Stockton LLP The Grace Building 1114 Avenue of the Americas New York, NY 10036
Epiq Corporate Restructuring, LLC www.epiqsystems.com 777 Third Avenue, 12th Floor New York, NY 10017	

Jake Eschenbrenner ("Movant") has filed the attached Motion For Relief From Automatic Stay Pursuant to 11 U.S.C. § 362(d) of the Bankruptcy Code (the "Motion") which seeks an order lifting the stay to allow certain state court litigation to proceed in New Mexico.

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' proposed claims and noticing agent at https://dm.epiq11.com/AmericanPhysicianPartners. The location of American Physician Partners, LLC's principal place of business and the Debtors' service address in these Chapter 11 Cases is 5121 Maryland Way, Suite 300, Brentwood, TN 37027.

HEARING ON THE MOTION WILL BE HELD AT A DATE AND TIME TO BE SCHEDULED UPON FURTHER NOTICE OR ORDER OF THE COURT.

You are required to file a response (and the supporting documentation required by Local Rule 4001-1(c)) to the attached motion on or before May 8, 2024 at 5:00 PM EST with the Clerk of the Bankruptcy Court for the District of Delaware.

At the same time, you must also serve a copy of the response upon Movant's counsel:

Louis J. Rizzo, Jr., Esquire
Reger Rizzo & Darnall LLP
Brandywine Plaza West
1521 Concord Pike, Suite 305
Wilmington, DE 19803
(302) 477-7100

The hearing date specified above may be a preliminary hearing or may be consolidated with the final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as value of the property, and the extent and validity of any security instrument.

REGER RIZZO & DARNALL LLP

/s/ *Louis J. Rizzo, Jr., Esquire*
Louis J. Rizzo, Jr., Esquire (#3374)
Brandywine Plaza West
1521 Concord Pike, Suite 305
Wilmington, DE 19803
(302) 477-7100
Attorneys for Movant, Jake Eschenbrenner

Dated: April 24, 2024

EXHIBIT A

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

JAKE ESCHENBRENNER

Plaintiff,

No. D-307-CV-2023-01471

v.

ALAN C. DAVIS, M.D., ALAN C. DAVIS, M.D, P.A., CHARLES DAVIS, M.D., ONLINE RADIOLOGY, BENJAMIN WILSON, M.D., LAS CRUCES MEDICAL CENTER, LLC d/b/a MOUNTAINVIEW REGIONAL MEDICAL CENTER, OMAR HASHMI, M.D., APOGEE MEDICAL GROUP-NM, INC., and LAS CRUCES PHYSICIAN SERVICES, LLC

Defendants.

FIRST AMENDED COMPLAINT FOR MEDICAL MALPRACTICE, NEGLIGENCE, NEGLIGENT CREDENTIALING AND VIOLATION OF THE UNFAIR PRACTICES ACT

COMES NOW Plaintiff, JAKE ESCHENBRENNER, individually, by and through his undersigned attorneys, and for his cause of action against Defendants, states as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff JAKE ESCHENBRENNER is a resident of Dona Ana County, New Mexico.

2. At all times material to this claim, Defendant Alan C. Davis, M.D., resides in and practiced orthopedic surgery and medicine in Las Cruces, New Mexico, and, for times material hereto, he caused to be established a physician-patient relationship with the Plaintiff.

3. Alan C. Davis, M.D., P.A, ("Davis Corp") is a New Mexico corporation with its principal place of business in Las Cruces, New Mexico. Davis Corp employed Defendant Alan

Davis at all times material hereto. [Hereinafter, Alan Davis, M.D., and Davis Corp shall be referred to collectively as "Defendant Alan Davis" or "Alan Davis, M.D."].

4. Las Cruces Medical Center, LLC d/b/a MountainView Regional Medical Center (hereafter "Hospital") is a foreign limited liability company organized under the laws of state of Delaware and registered to do business in the state of New Mexico. The Hospital's principal place of business is located at the facility known as MountainView Regional Medical Center, located at 4311 East Lohman Ave., Las Cruces, NM 88011. The Hospital can be served with process through its Registered Agent, CSC OF LEA COUNTY, INC., located at 1819 N. Turner Street, Suite G, Hobbs, NM 88240.

5. At all times material to this claim, Charles Davis, M.D., was a physician practicing radiology, and, in this instance, tele-radiology, and performing services directly or indirectly for Hospital in Las Cruces, New Mexico. Unbeknownst to Plaintiff, he provided radiological medical services for the Plaintiff and, so, caused to be established a physician-patient relationship with the Plaintiff.

6. On information and belief, Defendant Charles Davis does not reside in the state of New Mexico, but intentionally practices medicine in the state of New Mexico, is a licensed physician in the state of New Mexico, and renders his tele-radiology services via the internet.

7. Online Radiology ("Online") is a corporation whose principal place of business is unknown, and its place of incorporation is unknown, but it is the company which hired Defendant Charles Davis, MD. It's full name and information regarding incorporation will be submitted when discovered. [Hereinafter, Charles Davis, M.D., and Online shall be referred to collectively as "Defendant Charles Davis" or "Charles Davis, M.D."].

8. Defendant Apogee Medical Group-NM, Inc. ("Apogee") is a foreign corporation

doing business through various hospitalist physicians at Hospital and who provided acute hospitalist services to Plaintiff.

9. Defendant Benjamin Wilson, M.D., is and was at times material hereto a physician who practices exclusively in the Emergency Department at Hospital.

10. Upon information and belief, Dr. Wilson is and at times material hereto was a resident of the state of New Mexico.

11. When Plaintiff was being treated by Dr. Wilson, Dr. Wilson was acting in the course and scope of his apparent agency for Hospital, and he caused to be established a physician-patient relationship with the Plaintiff.

12. At all times material to this claim, Defendant Omar Hashmi, M.D., resides in and practices general surgery and medicine in Las Cruces, New Mexico, and he caused to be established a physician-patient relationship with the Plaintiff.

13. Las Cruces Physician Services, LLC ("LCPS") is a Delaware limited liability company with its principal place of business in Las Cruces, New Mexico. LCPS employed Defendant Omar Hashmi at all times material hereto, and Dr. Hashmi was acting in the course and scope of his employment for LCPS when providing medical services on behalf of Plaintiff.

14. The acts of which Plaintiff complains occurred in Las Cruces, New Mexico.

15. This Court has jurisdiction over the parties and the subject matter herein, and venue is proper in Dona Ana County, New Mexico.

FACTS COMMON TO ALL COUNTS

16. Plaintiff was admitted as a patient of the Hospital on or about October 3, 2020 with injuries from a motorcycle accident.

17. Physicians in the Emergency Department of Hospital, including Dr. Wilson,

ordered radiological images. The ordered images included images of the Plaintiff's injured right ankle and foot.

18. The X-rays ordered by physicians at the Hospital showed that foreign material and debris (later found to be gravel and dirt) were retained within the open wound on the Plaintiff's foot.

19. Defendant Charles Davis, M.D., in his capacity as radiologist, reviewed and interpreted the images ordered by the physicians at Hospital and rendered a radiologic report.

20. Dr. Charles Davis was the apparent agent of Hospital. At all times material, he was also in the course and scope of his actual agency for Online Radiology, and his apparent agency for Hospital.

21. Plaintiff did not distinguish or know that any radiologist was not the employee of Hospital.

22. Dr. Charles Davis misread the subject x-rays and/or incorrectly reported in his October 3, 2020 radiology reports that "no foreign body" had been retained in the soft tissue lacerations on the Plaintiff's ankle and foot. He misread and misreported the x-rays in other ways too.

23. The foreign debris (gravel rocks and dirt) was visible in the x-rays that had been ordered by Dr. Wilson; therefore, his decision to close the laceration with sutures before and without cleansing the wound of the foreign debris and referring the matter to general surgery was below the standard of care.

24. His failures, including a failure to thoroughly cleanse the wound so as to remove foreign debris before suturing it closed, was a breach of the standard of care.

25. Extensive foreign debris remained in the foot after the suturing of the lacerated

wound by Dr. Wilson.

26. Dr. Wilson was the apparent agent of Hospital.

27. Plaintiff did not distinguish or know that the doctor in the emergency department rendering medical services to him was not the employee of Hospital.

28. Dr. Omar Hashmi was on call at the Hospital at the time of Plaintiff's admission, in his capacity as surgeon, as required by Hospital, which meant he must be available for emergency consult if the need arose.

29. On information and belief, Dr. Benjamin sought a consultation with general surgeon Dr. Hashmi about Plaintiff's condition while Plaintiff lay in the Emergency Department before the laceration was sutured shut.

30. On information and belief, Defendant Apogee caused its employees or agents to provide services to Plaintiff, including services by Nurse Practitioner Cynthia Carantia, and others, particularly at the outset of Plaintiff's hospitalization and these agents stood by while Plaintiff's foot remained sutured with debris inside and visible on x-ray.

31. On information and belief, Dr. Hashmi confirmed the decision of Dr. Wilson to close the wound without proper cleaning and removal of the debris.

32. Over the course of Plaintiff's hospitalization, Dr. Hashmi continued to consult for Plaintiff in the subspecialty of general surgery.

33. Over the course of Plaintiff's hospitalization, Mr. Eschenbrenner developed an infection originating in the wound on Plaintiff's right foot.

34. Over the course of his hospitalization, Mr. Eschenbrenner's right foot and right lower leg swelled to two to three times its normal size.

35. Over the course of his hospitalization, his right lower leg became red and warm to

touch.

36. Over the course of his hospitalization, the right foot and right lower leg became "exquisitely tender to touch."

37. Over the course of his hospitalization, Mr. Eschenbrenner had difficulty even having a blanket touching it.

38. Over the course of his hospitalization, Plaintiff complained of fever and chills.

39. Over the course of his hospitalization, Plaintiff's white blood count – an indicator of infection – was high.

40. Plaintiff experienced a number of symptoms of infection.

41. Prior to his discharge from the Hospital, radiology reports disclosed the presence of foreign debris and Defendants and their agents negligently failed to take action based thereon.

42. Prior to Mr. Eschenbrenner's discharge from the Hospital, physicians examining the Plaintiff's foot at the Hospital knew or should have known of the presence of the foreign debris in Plaintiff's wound, the worsening condition of the Plaintiff's foot, but they took inadequate steps to treat Plaintiff. A consultation by an orthopedic surgeon, orthopedic surgeon Davis, was ordered, and these Defendants continued to rely on the continuing consultations by general surgeon Hashmi. Imaging via computerized tomography (CT) was ordered, which report clearly alerted all Defendants to the existence of foreign debris in the wound.

43. Dr. Hashmi examined Mr. Eschenbrenner on October 4 and October 5, 2020 (but not October 6, 2020, the day of discharge).

44. In his last visit of Plaintiff, Dr. Hashmi did not indicate he was aware of either the x-rays or the CT imaging which showed the subcutaneous debris (the gravel rocks and dirt trapped in the foot wound).

45. On information and belief, Dr. Hashmi did not view the images nor read the related radiographic reports available by October 5, 2020.

46. Dr. Hasmi failed to diagnose and/or treat the radidly-spreading infection in Plaintiff's lower leg.

47. Dr. Alan Davis was called upon for the orthopedic consultation regarding the worsening condition of the Plaintiff's right foot.

48. Dr. Alan Davis has privileges at Hospital and was also on "city call."

49. Defendant Hospital has historically struggled to find an adequate number of orthopedic surgeons to cover "city call," and, so, has permitted Dr. Alan Davis to retain his privileges at Hospital despite knowing and being aware of many instances of malpractice and repeated instances of substandard medical care by him.

50. The CT image and report which had been ordered reflected the following findings:

> Extensive high attenuation debris along the calcaneal region extending medial and lateral.
>
> Diffuse soft tissue swelling lateral greater than medial presume cellulitis and extending to the dorsum of the foot.
>
> IMPRESSION:
> Essentially nondisplaced fractures of calcaneus, superomedial talar dome. Cuboid tarsal bone.
>
> Extensive soft tissue swelling consistent with cellulitis with retained subcutaneous debris.

51. Dr. Alan Davis consulted on the Plaintiff's case as an orthopedic doctor and surgeon.

52. Dr. Alan Davis entered into the Plaintiff's Hospital room in the late evening hours of October 5, 2020, the night before Plaintiff was discharged home.

53. At the time of his consultation, the CT image and report were available at the

Hospital to be viewed and considered by Defendant Alan Davis.

54. At the time of his consulation, the x-rays and CT showed retained foreign debris in the wound.

55. At the time of his (and Dr. Hashmi's) consultations, the radiologic imaging had confirmed that Plaintiff had a fracture of his heel bone, as well as the "high attenuation debris" in the same location where Plaintiff's foot had become lacerated in the motorcycle wreck.

56. As general and orthopedic surgeons, Defendants Alan Davis and Omar Hashmi knew or should have known of the likelihood of bone infection.

57. Dr. Alan Davis did not view the CT taken on October 5 or the earlier x-rays taken on October 3, 2020 before or after he went into the Plaintiff's room.

58. Dr. Alan Davis did not physically examine or touch or unwrap the wound dressing on Plaintiff's foot.

59. In the one and only patient encounter by Alan Davis, M.D., with Plaintiff, Dr. Alan Davis spent less than two minutes in the Plaintiff's room before leaving.

60. Dr. Alan Davis looked at the leg as Plaintiff lay on his hospital bed, and Dr. Davis said to Plaintiff and present family members, only, that the Plaintiff did not have compartment syndrome (one of the potential causes for the worsening condition of the Plaintiff's foot in the Hospital doctors' differential diagnoses), and that compartment syndrome would have manifested on the first day. Dr Davis then left and Plaintiff never heard nor saw him again.

61. On information and belief, Dr. Davis and Davis Corp billed for a full consultation of a new patient. Dr. Hashmi also billed for consultations not provided as billed.

62. Dr. Alan Davis failed to diagnose and/or treat the radidly-spreading infection in Plaintiff's lower leg.

63. The signs and symptoms of infection were apparent.

64. The Plaintiff was discharged from the Hospital on October 6, 2020.

65. The Hospital's actual and apparent agents failed to engage in responsible interdisciplinary care, failed to alert responsible providers of Mr. Eschenbrenner's serious symptoms and signs of worsening infection, and failed to prudently engage in discharge duties on behalf of Mr. Eschenbrenner.

66. The Plaintiff's wound dressing was not changed on October 6, 2020, the day of Plaintiff's discharge. Hospital staff explained to Plaintiff that they did not change the dressing on the day of his discharge because Hospital nurses and staff had been informed that a medical provider from a local home health company would examine and treat Mr. Eshenbrenner's wound promptly on discharge.

67. The home healthcare company's service was not arranged for and confirmed by the Hospital prior to Plaintiff's discharge or thereafter.

68. No home health company representative (i.e., no nurse or therapist) came to see the Plaintiff on October 6, 7 or 8, 2020, and Plaintiff's infected foot remained unexamined and untreated by home healthcare on those dates.

69. Neither the order for home healthcare nor the order for Plaintiff to receive a wheelchair were promptly filled due to a knowing error by Hospital.

70. The Hospital had been told upon admission, and frequently during Plaintiff's stay, that the Hospital had incorrectly recorded Plaintiff's date of birth as December 28, 1998, when his true date of birth was December 28, 1996.

71. Plaintiff's mother, Yvette Eschenbrenner, told various individuals in the Hospital's clerical, administrative and medical staff that the Hospital was persisting in

erroneously recording the incorrect year of Plaintiff's birth.

72. Various officials, agents and employees of Hospital knew that Plaintiff's birthdate was wrongly recorded.

73. Various officials, agents and employees of Hospital were informed more than once that Plaintiff's birthdate was wrongly recorded.

74. Hospital, through its agents, knew that using incorrect information about the Plaintiff would likely interfere with prompt and effective post-discharge treatment and provision of medical equipment needed by the Plaintiff.

75. Despite all attempts by Plaintiff's mother to correct the error in recording of Plaintiff's birthdate in Hospital records (including billing and claim form records), Hospital failed and refused to correct the error.

76. A Hospital has a duty to perform the administrative tasks necessary to properly discharge a patient.

77. Plaintiff was improperly discharged, including without proper coordination of care.

78. All of Hospital's actual and apparent agents were acting in the course and scope of their agencies when they acted negligently.

79. With no respite from the intense pain, swelling and infection when Plaintiff was discharged to his home, Plaintiff finally sought help from his primary care physician and received a prescription for home healthcare from Plaintiff's primary care physician.

80. On October 11, 2020, the home health nurse directed the Plaintiff to immediately return to the emergency department due to the infected condition of the Plaintiff's foot.

81. Plaintiff was readmitted into the Hospital on October 11, 2020 with gangrene of

the right foot, with a bone infection of the right foot, with cellulitis and with other serious conditions.

82. The readmission to the Hospital occurred only five days after Plaintiff's prior discharge from Hospital.

83. Hospital wrongly charged for care in the second Hospitalization that resulted from a preventable condition that arose in and required treatment in the original Hospital admission.

84. On information and belief, Hospital did not fairly and truthfully enter billing codes that reflected Hospital's admitting of Plaintiff the second time for a preventable condition related to his previous Hospital admission.

85. On and after October 11, 2020, Plaintiff underwent numerous surgeries to debride and irrigate the wound in Plaintiff's right foot, including an initial surgery on October 12, 2020 that resulted in the removal of gravel rocks from under the skin on Plaintiff's right foot.

86. Plaintiff was not properly examined, assessed or treated by Defendants Alan Davis, Charles Davis, Benjamin Wilson and by Omar Hashmi, and by numerous agents, employees and apparent agents of Hospital, APP, LCPS and Davis Corp. They committed malpractice.

87. In addition to physician negligence, occupational and physical therapists and other staff members employed by Hospital knew and observed on October 5 and 6, 2020 that Plaintiff was not in a condition to be discharged home, and that he was in intense pain, that he could not lower his leg from a horizontal position without screaming in uncontrollable pain, that he cried in pain during the entire physical therapy session, that the CT report was available (which was reported to show and did show foreign debris had been retained in the wound), that the right foot was red and warm, that even with medication his pain remained uncontrolled, and

other facts which gave rise to a duty to act, to communicate with other providers and advocate on behalf of Mr. Eshenbrenner.

88. The health care providers employed by Hospital (or apparent agents of Hospital), had a duty to act with the reasonable care and prudence on Plaintiff's behalf, and Hospital's employees and agents failed to do so, including therapists who saw the Plaintiff on October 5, 2020.

89. All Defendant employers are vicariously responsible for the negligence of their agents and employees, including apparent agents, under the doctrine of *respondeat superior*.

90. Plaintiff reasonably believed all apparent agents were employees of the Hospital, including Drs. Charles Davis and Dr. Wilson.

91. Plaintiff was unfairly treated and deceived by Defendant Hospital and others identified below. They committed unfair practices.

COUNT I
MEDICAL MALPRACTICE/NEGLIGENCE and NEGLIGENT CREDENTIALING

92. The Plaintiff realleges all paragraphs of this complaint as if restated in this count.

93. Throughout the treatment of the Plaintiff, the Defendants Alan Davis and Charles Davis, Benjamin Wilson, and Defendant Hashmi, and agents and apparent agents of Davis Corp, LCPS, and Hospital, and Apogee failed to apply the knowledge and use the skill and care ordinarily used by reasonably well qualified health care professionals practicing under similar circumstances.

94. The negligence of these Defendants, and their agents and employees, occurred in the course and scope of those agents' agency or employment.

95. As a proximate result of the negligence of these Defendants, Jake Eschenbrenner

suffered injuries, including, but not limited to, physical and emotional pain and suffering, disability, medical expenses, loss of services, loss of income and income capacity, partial loss of enjoyment of life, future medical expenses and other damages.

96. In treating Plaintiff Jake Eschenbrenner, the Defendants, including their agents or apparent agents, acted with utter indifference to or in conscious disregard for Jake Eschenbrenner's rights, health and safety, warranting an award of punitive damages.

97. Hospital is also liable for proximately contributing to the injuries of Plaintiff by negligently credentialing and/or retaining Dr. Alan Davis with privileges to practice medicine within its walls when it knew, or should have known, that he engaged in negligent and reckless patterns of practice including, but not limited to, failing and refusing to attend to and prudently treat patients in need of personal treatment and care.

COUNT II
VIOLATIONS OF THE NEW MEXICO UNFAIR PRACTICES ACT BY HOSPITAL, BY HASHMI, BY DAVIS and DAVIS CORP

98. All prior and subsequent allegations in this complaint are hereby re-alleged and re-stated as if fully set forth herein.

99. Plaintiff invokes the New Mexico Unfair Practices Act, § 57-12-1 et seq. NMSA 1978 and hereby alleges generally that Hospital, Hashmi, LCPS, Davis and Davis Corp (the "UPA Defendants") have committed violations of that Act.

100. Specifically, each of the UPA Defendants is a "person" as defined in § 57-12-2.A engaged in "trade" or "commerce" as defined in § 57-12-2.C. It/he offers for sale services and other things of value; to wit: medical services and adjunctive sales of medical devices and support goods and support services.

101. A support service for which Hospital charged, and was required by law to provide, and which it knowingly did not provide, was proper case management and proper discharge with coordination of care after discharge.

102. This unfair, unconscionable, and deceptive trade practice engaged in by Hospital was primarily or centrally connected to the entrepreneurial and economic aspects of its business. It involved billing for services not provided.

103. Another unfair, unconscionable, and deceptive trade practices engaged in by Hospital, by Hashmi, by LCPS, and by Davis Corp (assisted by Davis) -- also part of each of their entrepreneurial and economic businesses -- involved billing for services for which each knew or should have known it had no right to bill, for overbilling, and/or for false billing, to include:

- Hospital billing and collecting for services in a second hospital admission arising from a preventable complication of a condition that required treatment in an earlier hospital admission;
- Davis Corp and Hashmi and LCPS billing for a patient consultation of a certain time period, a certain complexity level, and a certain service component which each such provider did not provide; and
- LCPS for billing for services it did not provide, including, without limitation, for surgical services to the neck and throat that did not occur.

104. The objectives included a motive to charge for and to collect monetary fees for performing services the UPA Defendants knew or should have known each could not charge for.

105. Defendant Hospital caused and created the conditions which resulted in its own unfair practices here when, through multiple employees, it knowingly falsely represented

material facts, including providing the incorrect birth year information of Plaintiff to payors and indemnifiers.

106. All UPA Defendants knowingly made false and misleading oral and written statements and representations in connection with the sale of medical goods and medical services in the regular course of the UPA Defendant's provision of medical services, which tended to and did deceive and mislead Plaintiff and others.

107. The UPA Defendants remained silent when each had a duty to speak, when failing to speak misled others, and, ultimately, prejudiced Plaintiff.

108. The UPA Defendants used "exaggeration, innuendo or ambiguity as to material facts and fail[ed] to state material facts" and, by so doing, deceived Plaintiff and others (§ 57-12-2.D(14)). In addition, the UPA Defendants stated that charges were for professional health care services which were "needed" and/or given when, in fact, each charged for services which it did not provide, or provided under false circumstances and misrepresentations (§ 57-12-2.D(16)).

109. Hospital failed to provide case management and discharge services for Plaintiff, including the failure to engage coordination of care or the procurement of a wheelchair as ordered by physicians.

110. These failures were caused by Hospital's knowing and repeated failure to correct and amend information that would entitle Plaintiff to post-discharge care.

111. The UPA Defendant's unfair trade practices as alleged herein at this time involved administrative and business management failures (like billing and claim reporting), and supervisory failures of administrative functions, not related to their medical and general negligence.

112. Plaintiff did not receive the quality or quantity of case management and post-discharge services (including coordination of care) which he had been promised by Hospital, or which had been advertised, and which was to be expected.

113. The UPA Defendants were under a duty to disclose to Plaintiff the truth regarding what services were and were not provided or compensable services.

114. These misrepresentations and failures to disclose material facts were made knowingly in connection with the sale of professional medical goods and services.

115. As to Defendant Hospital, these misrepresentations were made with the successful intention of deceiving and persuading Plaintiff to continue to submit his care to the Hospital, including the care of his infection and wound on and after October 11, 2020, and to pay charges to Hospital for which Hospital had no right to charge.

116. These misrepresentations were also part of an "unconscionable trade practice," as defined by § 57-12-2.E, which specifically includes "services provided by licensed professionals," which representations took advantage of the "lack of knowledge, ability, experience or capacity" of Plaintiff to a grossly unfair degree.

117. In so doing, and in making the knowing misstatements and omissions set forth above, each UPA Defendant preyed upon Plaintiff's lack of healthcare-related business knowledge and took advantage of its position of trust in order to take unfair advantage of Plaintiff.

118. As a direct result of the UPA Defendants' unfair, deceptive, and unconscionable trade practices, as aforesaid, Plaintiff has suffered loss, including the loss of money and actual damages to include the cost of the treatment, care, and procedures by Hospital and other costs in amounts to be proven at trial.

119. The UPA Defendants' unfair, deceptive, and unconscionable trade practices, as aforesaid, were committed and practiced willfully and with the successful intent of deceiving Plaintiff. Accordingly, under § 57-12-10 NMSA 1978, Plaintiff is entitled to an award from the court of up to three times actual damages or -- should he so elect, punitive damages.

120. Plaintiff is also entitled, under § 57-12-10 NMSA 1978 to an award of attorney's fees in connection with the prosecution of these claims.

121. The UPA Defendants also engaged in negligent misrepresentations that caused loss to Plaintiff.

122. The Unfair Practices Act violations were accompanied by a culpable mental state which was and is willful, reckless, wanton, fraudulent, or in bad faith and, therefore, Plaintiff is entitled to an award of punitive damages in amounts sufficient, proper, and just to achieve the purposes of punishment and to deter others from the commission of like misconduct. The UPA Defendants, and each of them, by and through its employees, caused, authorized and participated in and ratified the unfair acts and omissions, and Plaintiff is entitled to an award of punitive damages against them as well, under theories of direct and vicarious liability.

DAMAGES AND PUNITIVE DAMAGES

123. Plaintiff re-alleges and incorporates all paragraphs of this complaint.

124. The misconduct of Defendants have proximately caused all damages available, and all medical and incidental expenses, pain and suffering incurred by Plaintiff, loss of enjoyment of life, lost wages, lost income potential, emotional pain and suffering of the Plaintiff, and all other available damages.

125. In addition, the misconduct of the Defendants, and of each agent and apparent agent for which any Defendant employer is responsible, is vicariously, jointly and severally, and

warrants the award of punitive damages in amounts found just by the finder of fact.

JURY DEMAND

126. Demand for jury by six is hereby made, and payment therefor is tendered with the filing fee for this Complaint.

PRAYER FOR RELIEF

127. Plaintiff, therefore, prays for relief as follows:

- Judgment against Defendants for all available statutory, compensatory, special, consequential damages caused by their misconduct, and the misconduct of each and every employee, agent or apparent agent, delegate, including any delegate of any non-delegable duty;
- Judgment for punitive damages, in such amount as may be found appropriate, because of the culpable mental states accompanying their misconduct;
- Judgment for fees, costs and any other statutory remedies, including treble damages and, if warranted, injunction;
- For such other and further relief as may be appropriate under the circumstances of this case.

WHEREFORE, Plaintiff requests judgment for all amounts recoverable, and for all any and all compensatory and punitive damages against the Defendants, costs, pre- and post-judgment interest and other relief the court deems just.

Respectfully submitted,

JOEL T. NEWTON, P.A.

By: _____

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Attorney for Plaintiff

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
AMERICAN PHYSICIAN PARTNERS, LLC, *et al.*[1]	)	Case No. 23-11469 (BLS)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	Related to Docket No.: _____
_____	)	

ORDER GRANTING MOTION OF JAKE ESCHENBRENNER FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO SECTION 362(d) OF THE BANKRUPTCY CODE

AND NOW, upon consideration of the Motion of Jake Eschenbrenner ("Movant"), for an Order granting relief from the automatic stay pursuant to Section 362(d) of the Bankruptcy Code in order to allow certain state court litigation to proceed in the 3rd Judicial District Court, County of Dona Ana, State of New Mexico at Docket No. D-307-CV-2023-01471 (the "Motion"), and any opposition thereto, and good cause to modify the stay having been found, and the Court having determined that granting the relief requested in the Motion is appropriate.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The stay is lifted and the action pending in the 3rd Judicial District Court, County of Dona Ana, State of New Mexico at Docket No.: D-307-CV-2023-01471 (the "State Court Action") shall be permitted to proceed to adjudication.
3. That Movant shall be entitled to liquidate and satisfy and judgment or other

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' proposed claims and noticing agent at https://dm.epiq11.com/AmericanPhysicianPartners. The location of American Physician Partners, LLC's principal place of business and the Debtors' service address in these Chapter 11 Cases is 5121 Maryland Way, Suite 300, Brentwood, TN 37027.

resolution granted, if any, from applicable insurance coverage available to the Debtors.

4. To the extent that insurance proceeds are unavailable, or insufficient, Movant will return to this Court for disposition of his claim.

5. Relief from the automatic stay shall be effective immediately upon entry of this Order and the 14 day stay provided in Bankruptcy Rule 4001(a)(3) shall not apply.

6. This Court shall retain jurisdiction over any and all issues arising among or related to the implementation and interpretation of this Order.

BY THE COURT:

_____

The Honorable Brendan Linehan Shannon
United States Bankruptcy Judge

Dated: May ____, 2024