Docket #0006 Date Filed: 7/5/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re Lordstown Motors Corp., *et al.*,[1] Debtors.	Chapter 11 Case No. 23-10831 (MFW) (Jointly Administered)
Lordstown Motors Corp., *et al.*, Plaintiffs, v. ATRI AMIN and BENJAMIN HEBERT, on behalf of themselves and similarly situated stockholders of Lordstown Motors Corp. (f/k/a DiamondPeak Holdings Corp.), Defendants.	Adv. Pro. No. 23-50428 (MFW)

BRIEF IN SUPPORT OF THE DEBTORS' MOTION TO EXTEND THE AUTOMATIC STAY AND FOR INJUNCTIVE RELIEF PURSUANT TO 11 U.S.C. § 105, AND REQUEST FOR HEARING DATE

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are: Lordstown Motors Corp. (3239); Lordstown EV Corporation (2250); and Lordstown EV Sales LLC (9101). The Debtors' service address is 27000 Hills Tech Ct, Farmington Hills, MI 48331.

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1
STATEMENT OF FACTS 4
A. The Actions 4
1. The Derivative Actions 5
2. The Ohio Securities Class Action 6
3. The Delaware Class Action 8
B. The Debtors' Indemnification and Insurance Obligations to the D&O Defendants 9
1. Indemnification Obligations 9
2. D&O Insurance Policies 11
ARGUMENT 12
I. Unusual Circumstances Exist To Extend the Automatic Stay Under Section 362 12
A. The Debtors Share An Identity of Interest With the Delaware D&O Defendants 14
1. The Claims Against the Delaware D&O Defendants Are Inextricably Intertwined With the Stayed Derivative Claims and the Claims in the Ohio Securities Litigation 14
2. A Judgment Against the Delaware D&O Defendants Is Effectively A Judgment Against the Debtor 15
B. If Allowed to Continue Against the D&O Defendants, the Delaware Class Action Will Adversely Affect the Debtors' Sale and Restructuring Efforts 17
1. Assets of the Bankruptcy Estate Will Be Depleted if the Delaware Class Action Is Not Stayed 18
2. An Adverse Ruling Would Likely Result in Collateral Estoppel and Evidentiary Prejudice 20
II. Alternatively, the Court Should enjoin the Delaware Class Action under Section 105 of the Bankruptcy Code 22
A. The Debtors Are Likely to Successfully Restructure 23
B. Absent an Injunction, the Debtors Will Be Irreparably Harmed 25
C. The Irreparable Harm to the Debtors Outweighs Any Potential Harm to the Delaware Class Action Plaintiffs 26
D. Injunctive Relief Is In the Public Interest 27
CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Casualty & Surety Co. v. Jasmine, Ltd. (In re Jasmine, Ltd.),
258 B.R. 119 (D.N.J. 2000) 19

Delman v. GigAcquisitions3, LLC,
288 A.3d 692 (Del. Ch. 2023) 8

In re ABC Learning Centres Ltd.,
445 B.R. 318 (Bankr. D. Del. 2010), *aff'd*, 728 F.3d 301 (3d Cir. 2013) 12

In re Allied Digital Techs., Corp.,
306 B.R. 505 (Bankr. D. Del. 2004) 19

In re American Film Techs., Inc. v. Taritero,
175 B.R. 847 (Bankr. D. Del. 1994) 14, 20, 25

In re Bernard L. Madoff Inv. Sec., LLC,
512 F. App'x 18 (2d Cir. 2013) 21, 22

In re CD Liquidation Co.,
462 B.R. 124 (Bankr. D. Del. 2011) 25

In re Circle K Corp.,
121 B.R. 257 (Bankr. D. Ariz. 1990) 18

In re Cont'l Airlines,
177 B.R. 475 (D. Del. 1993). 17

In re Loewen Group, Inc., Sec. Litig.,
2001 WL 530544 (E.D. Pa. May 16, 2001) 21

In re Lordstown Motors Corp. Sec. Litig.,
No. 4:21-cv-616-DAR (N. D. Ohio Mar. 18, 2021) 4, 5, 7

In re Lordstown Motors Corp. Shareholder Derivative Litig.,
No. 1:21-cv-604-SB (D. Del. Apr. 28, 2021) 5

In re Lordstown Motors Corp. Stockholder Derivative Litig.,
C.A. No. 2021-1049-LWW (Del. Ch. Dec. 2, 2021) 5

In re Lordstown Motors Corp. Stockholders Litig.,
C.A. No. 2021-1066-LWW (Del. Ch. Dec. 8, 2021) 4

In re LTL Mgmt., LLC,
640 B.R. 322 (Bankr. D.N.J. 2022) 15

In re LTL Mgmt., LLC,
No. 23-12825 (MBK), 2023 WL 3136666 (Bankr. D.N.J. Apr. 27, 2023) 23

In re Lyondell Chem. Co.,
402 B.R. 571 (Bankr. S.D.N.Y. 2009).....23

In re Mallinckrodt, LLC,
2021 WL 5275781 (D. Del. Nov. 10, 2021).....13

In re marchFIRST, Inc.,
288 B.R. 526 (Bankr. N.D. Ill. 2002) 18

In re Midway Games, Inc.,
428 B.R. 327 (Bankr. D. Del. 2010).....16, 17, 19

In re Phila. Newspapers,
407 B.R. 606 (E.D.N.Y. 2009) 23

In re Residential Cap., LLC,
480 B.R. 529 (Bankr. S.D.N.Y. 2012).....21

In re Sacred Heart Hosp. of Norristown,
182 B.R. 413 (Bankr. E.D. Pa. 1995) 19

In re Saxby's Coffee Worldwide, LLC,
440 B.R. 369 (Bankr. E.D. Pa. 2009) 22

In re SN Liquidation,
388 B.R. 579 (Bankr. D. Del. 2008) ..... passim

In re Soundview Elite Ltd.,
543 B.R. 78 (Bankr. S.D.N.Y. 2016).....22, 23

In re SVB Fin. Grp.,
No. 23-10367 (MG), 2023 WL 2962212 (Bankr. S.D.N.Y. Apr. 14, 2023) 23

In re Union Tr. Phila., LLC,
465 B.R. 765 (Bankr. E.D. Pa. 2011) 22, 25

In re Univ. Med. Ctr.,
973 F.2d 1065 (3d Cir. 1992).....12

In re Vistacare Grp., LLC,
678 F.3d 218 (3d Cir. 2012).....21

In re W.R. Grace & Co.,
115 Fed. App'x 565 (3d Cir. 2004).....16, 20, 24

In re W.R. Grace & Co.,
386 B.R. 17 (D. Del. 2008)..... passim

In re World Health Alternatives, Inc.,
369 B.R. 805 (Bankr. D. Del. 2007).....19

Kos Pharm., Inc. v. Andrz Corp.,
369 F.3d 700 (3d Cir. 2004).....22

McCartney v. Integra Nat. Bank N.,
106 F.3d 506 (3d Cir. 1997).....12, 13, 16, 24

Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec.,
443 B.R. 295 (S.D.N.Y. 2011).....16

Sudbury, Inc. v. Escott,
140 B.R. 461 (Bankr. N.D. Ohio 1992).....20

Thai v. Burns, et al.,
4:21-cv-01267-DAR (N.D. Ohio Jun. 30, 2021).....5

W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.),
2004 WL 954772 (Bankr. D. Del. Apr. 29, 2004).....15

Wedgewood Inv. Fund, Ltd. v. Wedgewod Realty Grp., Ltd. (In re Wedgewood Realty Grp., Ltd.),
878 F.2d 6931 (3d Cir. 1989).....21

STATUTES AND RULES

15 U.S.C.S. § 78u-4(b)(3)(B).....7

11 U.S.C. § 105.....1, 2, 3, 21

11 U.S.C. § 105(a).....21, 22

11 U.S.C. § 362.....11, 12

11 U.S.C. § 362(a)(1).....15

11 U.S.C. § 362(a)(3).....11, 12

11 U.S.C. § 541(a)(1).....12

On June 27, 2023 (the "**Petition Date**"), the Debtors filed voluntary petitions in this Court commencing cases for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "**Bankruptcy Code**"). As part of these Chapter 11 cases, the Debtors are conducting a sale process with respect to their assets (the "**Sale Process**"). To that end, on the Petition Date, the Debtors also filed a motion seeking approval of bidding procedures with respect to the Sale Process (the "**Bidding Procedures Motion**"). The Bidding Procedures Motion is scheduled to be heard on July 27, 2023. On July 5, 2023, the Debtors filed their Complaint (the "**Compl.**") and *Motion to Extend the Automatic Stay and for Injunctive Relief Pursuant to 11 U.S.C. § 105, and Request for Hearing Date* (the "**Motion**") [Adv. D.I. 2].[2]

The Debtors submit this opening brief in support of their Motion to prevent Defendants from continuing to prosecute a consolidated putative class action against the D&O Defendants. In support of the Motion, the Debtors rely upon: (i) the *Declaration of David M. Turetsky in Support of Debtors' Motion for Injunctive Relief Pursuant to 11 U.S.C. § 105* [Adv. D.I. 3] (the "**Turetsky Declaration**"); (ii) the *Declaration of Adam Kroll in Support of Debtors' Motion for Injunctive Relief Pursuant to 11 U.S.C. § 105* [Adv. D.I. 5] (the "**Kroll Declaration**"); and (iii) the *Declaration of Adam Kroll, in Support of Chapter 11 Petitions and First Day Motions* (the "**First Day Declaration**"), which is filed on the main docket for the Debtors' chapter 11 cases.

PRELIMINARY STATEMENT

Prior to the Petition Date, 15 separate actions were filed against the Debtors and 20 of

[2] Docket numbers with a "D.I." reference refer to documents filed in the lead jointly administered chapter 11 case, Case No. 23-10831 (MFW) (Bankr. D. Del.). Docket numbers with an "Adv. D.I." reference refer to documents filed in this adversary proceeding.

their current and former directors and officers (the "**D&O Defendants**"),[3] asserting claims arising from the same alleged misconduct. The crux of each claim is that the Debtors and the D&O Defendants misrepresented the production capabilities, timeline, and customer pre-orders for LMC's flagship electric vehicle, the Endurance, in order to drive up LMC's stock price leading up to and after its SPAC transaction. These actions were consolidated into five litigation proceedings, including three shareholder derivative suits and two putative class actions (collectively, the "**Actions**").

Having filed their petitions, the Debtors now benefit from the automatic stay as to all claims against the Debtors and the pending derivative actions. A uniform stay is necessary to allow the Debtors to conduct their Sale Process and consummate a plan that fairly and equitably resolves the claims of all stakeholders, including shareholder-plaintiffs in the Actions. But a putative class action pending in the Delaware Court of Chancery (the "**Delaware Class Action**") against a sub-set of the D&O Defendants, specifically the five directors and officers that served on the board of the Debtors' predecessor entity, which was then known as DiamondPeak Holding Corp.[4] (the "**Delaware D&O Defendants**") threatens to undermine that protection by litigating claims that will necessarily involve the Debtors and their property. Courts in this Circuit and elsewhere routinely extend the stay to non-debtors in such circumstances, and the Debtors respectfully request that this Court do the same here.

Bankruptcy courts may extend the stay to non-debtors having an "identity of interest" with a debtor, that is, when proceeding against the non-debtor would, as a practical matter,

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3 *See* Compl. Ex. B.

4 The five D&O Defendants named in the Delaware Class Action are former DiamondPeak directors: David Hamamoto, Mark Walsh, Andrew Richardson, Steven Hash and Judith Hannaway. Of these five D&O Defendants, David Hamamoto is currently an LMC board member. Mr. Hamamoto is also a named defendant in each of the Actions.

equate to proceeding against the debtor. Alternatively, bankruptcy courts have the power under Bankruptcy Code § 105 to issue injunctive relief expanding the stay, where the debtor would suffer irreparable harm absent that relief, including by losing the benefit of the stay. Under either standard, the Court should expand the stay to the non-debtor directors in the Chancery Action for four primary reasons.

First, the Debtors owe advancement and contractual indemnification obligations to their current and former directors and officers. Any expenses incurred by the Delaware D&O Defendants in defense costs are an expense to the Debtors' estates, and any judgment against them would in effect be a judgment against the Debtors. Moreover, any insurance proceeds sought by the Delaware D&O Defendants under shared D&O insurance policies with the Debtors, which are property of the estate, threaten to deplete estate assets and undermine the Debtors' ability to consummate a restructuring plan to the benefit of all creditors.

Second, allowing the Delaware Class Action to proceed puts the Debtors at risk of collateral estoppel and evidentiary prejudice. The Debtors are co-defendants with the D&O Defendants in four of the Actions, which involve substantially similar facts and causes of action to those at issue in the Delaware Class Action. Any judicial decision on the Delaware Class Action will necessarily impact the Debtors' ability to defend the other actions. Moreover, allowing prosecution of the direct claims, which involve the same allegations as those in the securities class action stayed pending resolution of a motion to dismiss under federal securities law and the derivative claims that are automatically stayed, will impact the Debtors' interest in the derivative actions, which are property of the estate and would function as an improper evasion of the automatic stay.

Third, if the Delaware Class Action is allowed to proceed, the Debtors and their key management will be required to participate in the action by engaging in discovery and analyzing and developing legal defenses and strategies, so as to protect the Debtors' interests. This necessary involvement would divert attention from the Sale Process and the restructuring process and burden the Debtors' resources during this critical preliminary stage of the chapter 11 proceedings, ultimately draining the pool of assets from which creditors may recover.

Fourth, the equities weigh in favor of staying the action under the preliminary injunction standard of 11 U.S.C. § 105. The Debtors' sale and restructuring efforts would be irreparably harmed should litigation be allowed to proceed against the Delaware D&O Defendants. In contrast, the Defendants face no imminent harm from the stay. The balance of the harms thus favors the Debtors.

STATEMENT OF FACTS

A. The Actions

Between March 2021 and February 2022, the Company's shareholders filed 15 separate lawsuits in federal and state courts in Ohio and Delaware based on alleged wrongdoing by Debtors and the D&O Defendants in connection with the Company's SPAC merger that closed on October 23, 2020 (the "**SPAC Merger**").[5] The Actions generally allege common theories of wrongdoing and injury. Each asserts that the Debtors and/or certain of the D&O Defendants made materially false and misleading statements relating to the production capabilities, timeline, and the extent of customer pre-orders for Debtors' flagship electric vehicle, the

[5] The Company—then known as DiamondPeak Holdings Corp. ("**DiamondPeak**")—was incorporated in Delaware as a special purpose acquisition company (SPAC) on November 13, 2018, completed its initial public offering in March 2019, and closed the SPAC Merger on October 23, 2020 with the entity then known as Lordstown EV Corporation, and became Lordstown Motors Corp. ("**LMC**" or "**Company**"). LMC and its subsidiary entities are the Debtors in these chapter 11 cases.

Endurance. Those misrepresentations, they allege, artificially inflated the Company's stock price and induced existing shareholders to hold their stock through the SPAC Merger.

These lawsuits were consolidated into five litigation proceedings, including three shareholder derivative suits (the "**Derivative Actions**"), a putative securities fraud class action pending in the U.S. District Court for the Northern District of Ohio, *In re Lordstown Motors Corp. Sec. Litig.*, No. 4:21-cv-616-DAR (N. D. Ohio Mar. 18, 2021) (the "**Ohio Securities Class Action**"), and a putative class action pending in the Delaware Court of Chancery, *In re Lordstown Motors Corp. Stockholders Litig.*, C.A. No. 2021-1066-LWW (Del. Ch. Dec. 8, 2021) (the "**Delaware Class Action**" and, together with the Ohio Securities Class Action, the "**Putative Class Actions**").

1. The Derivative Actions

Following the SPAC Merger, various substantially similar shareholder derivative suits were brought on behalf of LMC, as nominal defendant, for alleged harm done to the Company by the D&O Defendants. These lawsuits have proceeded in three Derivative Actions:

- ***Ohio Derivative Action***[6] – Shareholder derivative lawsuit against 19 D&O Defendants filed on June 30, 2021, asserting claims for breach of fiduciary duty, conspiracy, and aiding and abetting breach of fiduciary duty. The complaint alleges the D&O Defendants made materially false and misleading statements relating to the production capabilities, timeline, and demand for the Endurance, including the extent of customer pre-orders. The complaint also alleges that the D&O Defendants failed to maintain adequate internal controls and engaged in insider sales for proceeds in excess of $28 million. *See* Turetsky Decl., Ex. A.

- ***District of Delaware Derivative Action***[7] – Four consolidated shareholder derivative suits filed between April 28, 2021 and July 9, 2021 against 17 of the D&O Defendants, asserting violations of Section 10(b), Section 14(a), Section 20(a) and Section 21D of the Exchange Act and Rule 10b-5, breach of fiduciary duty, insider selling, and unjust enrichment. The operative complaint alleges that the D&O

6 *Thai v. Burns, et al.*, 4:21-cv-01267-DAR (N.D. Ohio Jun. 30, 2021).

7 *In re Lordstown Motors Corp. Shareholder Derivative Litig.*, No. 1:21-cv-604-SB (D. Del. Apr. 28, 2021).

Defendants made materially false and misleading statements relating to the production capabilities, timeline, and the extent of customer pre-orders for the Endurance in connection with the SPAC Merger. *See* Turetsky Decl., Ex. B.

- ***Delaware Chancery Derivative Action***[8] – Two shareholder derivative suits filed on December 2, 2021 and February 18, 2022, alleging that all 20 of the D&O Defendants breached their fiduciary duties by making materially false and misleading statements relating to the production capabilities, timeline, and the extent of customer pre-orders for the Endurance and engaging in insider selling. *See* Turetsky Decl., Ex. C.

Prior to the Petition Date, the Derivative Actions were stayed pending resolution of the motion to dismiss in the Ohio Securities Class Action, which has been fully briefed and awaiting a ruling since March 3, 2022. The Derivative Actions are now subject to the existing automatic stay in these chapter 11 cases.

2. The Ohio Securities Class Action

Between March 18 and May 18, 2021, six consolidated putative securities class action lawsuits were filed against the Company and seven of the D&O Defendants. The consolidated complaint asserts violations of Section 10(b), Section 14(a), Section 20(a), and Section 20A of the Exchange Act and Rule 10b-5 on behalf of the named plaintiffs an extensive shareholder class. *See* Turetsky Decl., Ex. D. The putative class spans both pre- and post-SPAC Merger time periods and includes all persons or entities that (a) acquired the Company's stock or publicly traded warrant, unit, or option from August 2020 through July 2021 and/or (b) held their stock through the SPAC Merger instead of exercising their right to redeem those shares on September 21, 2020. *Id.* ¶¶ 442–43.

Like the Derivative Actions, the Ohio Securities Class Action alleges that certain of the D&O Defendants made materially false and misleading statements relating to the production

[8] *In re Lordstown Motors Corp. Stockholder Derivative Litig.*, C.A. No. 2021-1049-LWW (Del. Ch. Dec. 2, 2021).

capabilities, timeline, and the extent of customer pre-orders for the Endurance in order to raise funding for the SPAC and persuade existing shareholders to approve the SPAC Merger. *See* Compl. ¶¶ 21–22 & Exs. A & B. The complaint does not allege separate facts to support claims against the Company; rather, claims against both the Company and the seven named D&O Defendants are based on the same alleged misconduct. For example, the complaint asserts that the Company acted "in concert" with the named D&O Defendants in violation of Sections 10(b) and 14(a) of the Exchange Act and Rule 10b-5, such that the Company's liability would likely be commensurate with that of the individual D&O Defendants. *See, e.g.*, Turetsky Decl., Ex. D ¶ 453 (alleging the Company and D&O Defendants acted "individually and in concert" to violate Section 10(b) and Rule 10b-5), ¶ 457 (alleging the Company and D&O Defendants are "individually and collectively responsible for making the false and misleading statements"), ¶ 474 (alleging that the Company violated Section 14(a) by "issuing and disseminating the proxy materials" that "contained the false and misleading statements," but clarifying that it "acted through [D&O] Defendant Hamamoto, and therefore is negligent to the same extent as [D&O] Defendant Hamamoto"). According to the complaint, this joint misconduct by the Company and D&O Defendants caused shareholders to purchase or hold the Company's stock at an inflated price, ultimately resulting in their alleged damages following the deflation of that price. *See id.* ¶¶ 451–68.

On November 9, 2021, the Defendants filed a motion to dismiss the Ohio Securities Class Action. That motion has been fully briefed and is awaiting ruling from the District Court. Under federal securities law, all discovery is stayed unless and until the District Court denies the motion

to dismiss. 15 U.S.C.S. § 78u-4(b)(3)(B). In addition, the filing of these Chapter 11 Cases automatically stayed all claims asserted against the Company in this action.[9]

3. The Delaware Class Action

The remaining two putative class actions were filed in the Delaware Court of Chancery in December 2021 against the Delaware D&O Defendants. The consolidated complaint asserts a direct breach of fiduciary duty claim on behalf of the plaintiffs and a putative class consisting of "all record and beneficial holders" of the Company's stock who held their shares through close of the SPAC Merger on October 23, 2020, which are "believed to be in the thousands." Turetsky Decl., Ex. E ¶¶ 152–55; *see also id.* ¶ 18 (defining the "Class" as "DiamondPeak SPAC investors who did not redeem when they had the right to do so.").

In keeping with the other Actions, the Delaware Class Action alleges that the Delaware D&O Defendants breached their fiduciary duties by, among other things, making or failing to prevent materially false or misleading statements relating to the production capabilities, timeline, and the extent of customer pre-orders for the Endurance. They did so, according to the complaint, to induce existing shareholders to hold their stock through the SPAC Merger rather than exercise their redemption rights. *See id.* ¶ 18. By virtue of the Delaware D&O Defendants' "power to control, influence, and cause" the Company to consummate the SPAC Merger, the plaintiffs allege that shareholders approved the transaction on an "unfair price and an unfair process." *Id.* ¶¶ 172–73.

The Delaware D&O Defendants filed a motion to dismiss the Delaware Class Action, which they subsequently withdrew in light of an intervening decision and order by the Delaware

[9] If the stay under federal securities law were to be lifted in the Ohio Securities Class Action during the pendency of these Chapter 11 Cases, the Debtors reserve the right to seek a similar extension of the stay to the D&O Defendants in that action, if necessary.

Court of Chancery allowing an unrelated class action to proceed on direct claims arising from a SPAC merger. *See Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 709 (Del. Ch. 2023). The Delaware D&O Defendants also moved to stay the Delaware Class Action, in favor of the Ohio Securities Litigation. The Delaware Chancery court denied the motion to stay on March 7, 2022. Discovery and litigation are ongoing and, on June 9, 2023, the Chancery Court granted the plaintiffs' motion to compel concerning a subpoena for the production of documents directed at LMC. The Delaware Class Action is set for trial in March 2024. *See* Compl. ¶¶ 25–28 & Ex. A.

B. The Debtors' Indemnification and Insurance Obligations to the D&O Defendants

1. Indemnification Obligations

The Debtors are contractually required to indemnify all D&O Defendants, including the Delaware D&O Defendants, by the applicable bylaws and indemnity and employment agreements. The Debtors are also contractually required to advance the expenses of all D&O Defendants.

As to the Company's current directors and officers, LMC's certificate of incorporation and bylaws, which were in effect after the SPAC Merger, provide a contractual right to indemnification to all D&O Defendants to the fullest extent permitted by Delaware law.[10] Although certain of the D&O Defendants are former directors and officers, the bylaws explicitly extend all indemnification rights to former D&O Defendants. Turetsky Decl., Ex. F § 8.9 ("The

[10] LMC's bylaws provide that LMC "shall indemnify and hold harmless each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any threatened, pending or completed action, suit or proceeding . . . by reason of the fact that he or she is or was a director or officer of the Corporation . . . against all liability and loss suffered and expenses (including, without limitation, attorneys' fees, judgments, fines, ERISA excise taxes and penalties and amounts paid in settlement) reasonably incurred" in connection with such proceeding." *See* Turetsky Decl., Ex. F § 8.1. Similar language is included in Lordstown EV Corp.'s bylaws. Turetsky Decl., Ex G § 6.4.

rights provided . . . shall continue as to an Indemnitee who has ceased to be a director, officer, agent or employee and shall inure to the benefit of the Indemnitee's heirs, executors and administrators.").

Moreover, the majority of D&O Defendants are party to indemnification agreements with the Company which establishes a separate indemnification obligation.[11] The agreements also require the Company to reimburse and pay incurred expenses, including those incurred in connection with such proceeding or determination in advance of its final disposition, and prohibit the Company from imposing other conditions to advancement or seeking any order that would prohibit the D&O Defendants from enforcing such advancement. Turetsky Decl., Ex. I § 3. The indemnification obligations under these agreements "continue for so long as Indemnitee may be subject to any possible Proceeding by reason of the fact of Indemnitee's Position or Positions, whether or not Indemnitee ceases to hold such Position or Positions." Turetsky Decl., Ex. I § 9.

Former directors and officers of DiamondPeak that did not remain with the Company after the SPAC Merger are also indemnified under the DiamondPeak certificate of incorporation and bylaws,[12] and indemnification agreements with DiamondPeak, which remained in effect against LMC after it took control of DiamondPeak through the SPAC Merger.[13] The DiamondPeak indemnification agreements provide that "the Company shall indemnify, hold

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[11] For example, the Company's indemnification agreement with D&O Defendant Hamamoto provides that LMC "shall indemnify . . . Indemnitee against all judgments, awards, fines, ERISA excise taxes, penalties, amounts paid in settlement, liabilities and losses and shall pay or reimburse all Expenses incurred by Indemnitee . . . to the fullest extent permitted by Delaware law" in any proceeding by reason of his or her position. Turetsky Decl., Ex. I § 3.

[12] *See* Turetsky Decl., Ex. H § 8.1.

[13] The indemnification obligations under the DiamondPeak indemnification agreements remain in effect even upon a change in control. The agreements provide that such obligations continue as to former directors and officers "so long as Indemnitee shall be subject to any possible Proceeding . . . by reason of Indemnitee's Corporate Status, whether or not Indemnitee is acting in any such capacity at the time any liability or expense is incurred for which indemnification or advancement can be provided under this Agreement." *See* Turetsky Decl., Ex. I § 17.

harmless and exonerate Indemnitee . . . if Indemnitee was, is, or is threatened to be made, a party to or a participant (as a witness, deponent or otherwise) in any Proceeding . . . ." *See* Turetsky Decl., Ex. I § 3. The DiamondPeak indemnification agreements further provide that DiamondPeak "shall be indemnified, held harmless and exonerated against all Expenses, judgments, liabilities, fines, penalties and amounts paid in settlement . . . incurred by Indemnitee or on Indemnitee's behalf in connection with such Proceeding or any claim . . . if Indemnitee acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Company." *Id*.

2. D&O Insurance Policies

All D&O Defendants—including the Delaware D&O Defendants—are subject to Debtors' directors' and officers' insurance policies or equivalent (each, a "**D&O Policy**"). Prior to the SPAC Merger, DiamondPeak had a D&O Policy in place from February 27, 2019 to February 27, 2021, which insured DiamondPeak and its current and former directors and officers, and included a primary policy of $10 million and an excess policy for an additional $5 million. *See* Turetsky Decl., Ex. J. DiamondPeak extended the policy through February 27, 2027. *Id.*

LMC had D&O Policies in effect starting on October 23, 2020 and has policies in effect today. The policies insure both the Company and current and past directors and officers. *See* Turetsky Decl., Ex. K; Ex. J. LMC's D&O Policies include primary and excess Side-A Coverage (coverage for claims made against directors and officers, whose costs are not non-indemnified or advanced by the Debtors), Side-B Coverage (for the Debtors in indemnifying directors, officers, and employees against claims), and Side-C Coverage (for the Debtors for claims made directly against them). *See* Turestky Decl., Ex. K. These policies have an

aggregate limit of liability, claim retentions, and shared limits applicable to its various coverages. *See id*. LMC also has several Side-A Excess difference in conditions ("**DIC**") policies for additional $5 million increments, which provide additional coverage to claims made directly against one of its directors and officers that are not otherwise indemnified by the Debtors. Turestky Decl., Ex. J. While the Debtors' Side-A excess DIC insurance policies may be required to "drop down" under certain circumstances to cover the D&O Defendants, those Side-A excess DIC insurance carriers are thereafter subrogated to the D&O Defendants' rights, including the D&O Defendants' indemnification rights against the Debtors and any rights the D&O Defendants would have against the underlying insurance carriers. *See, e.g.,* Turetsky Decl., Ex. L § IV(F)(2) as amended by Endorsement No. 6.

The Debtors' D&O Policies may not provide full coverage to the D&O Defendants in connection with the Actions. As of the date hereof, certain of LMC's insurers have refused to provide coverage with respect to any of the Actions, including for defense costs. *See* Kroll Decl. ¶ 6. The Debtors are in ongoing discussions with the LMC insurers regarding coverage under the applicable D&O policies. *Id*.

ARGUMENT

I. UNUSUAL CIRCUMSTANCES EXIST TO EXTEND THE AUTOMATIC STAY UNDER SECTION 362

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3); *see also* 11 U.S.C. § 541(a)(1) (defining property of the estate to include "all legal and equitable interests of the debtor in property"). The automatic stay "is one of the fundamental debtor protections supplied by the Bankruptcy Code" and provides debtors

with a much-needed "breathing spell" to formulate a restructuring plan. *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1074 (3d Cir. 1992); *see also In re ABC Learning Centres Ltd.*, 445 B.R. 318, 336 (Bankr. D. Del. 2010), *aff'd*, 728 F.3d 301 (3d Cir. 2013) ("The purpose of the automatic stay is to prevent certain creditors from gaining a preference for their claims against the debtor, to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general to avoid interference with the orderly liquidation or rehabilitation of the debtor." (citation omitted)).

Courts have regularly extended the stay to non-debtors to provide the debtor with the full protections of the automatic stay. *See SN Liquidation, Inc. v. Icon Int'l (In re SN Liquidation, Inc.)*, 388 B.R. 579, 585 (Bankr. D. Del. 2008) ("courts have often extended protection to non-debtor defendants who were officers or directors of the debtors"). Courts in this circuit have two independent means of granting this relief. The first basis for extending the stay exists in the "unusual circumstances" test under Bankruptcy Code § 362. *See, e.g.*, *McCartney v. Integra Nat. Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997) (applying unusual circumstances test to extend stay).

The "unusual circumstances" test asks "(1) whether the nondebtor and debtor share an identity of interest such that a suit against the nondebtor is essentially a suit against the debtor, or (2) whether the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization." *McCartney*, 106 F.3d at 510 (holding unusual circumstances caused stay to apply of its own force to non-debtors). The test is disjunctive: the debtor need only establish one element or the other. *See In re Mallinckrodt plc*, 2021 WL 5275781, at *2 (D. Del. Nov. 10, 2021) ("the Third Circuit's holding in *McCartney* clearly states a disjunctive test"). Although not required, in this case both elements are satisfied.

A. The Debtors Share An Identity of Interest With The Delaware D&O Defendants

Courts have found an "identity of interest" between a debtor and non-debtor in two primary situations. *First,* courts find an "identity of interest" where the nature of the claims against the non-debtor are such that the debtor would need to participate in spite of the automatic stay to protect its interest (such as to protect from collateral estoppel or other type of preclusion). *See In re W.R. Grace & Co.*, 386 B.R. 17, 31 (D. Del. 2008) ("*W.R. Grace II*") (identity of interest existed because "it is the Debtors' operations and conduct … that are at the core of the issues raised in the [underlying actions]"); *In re SN Liquidation, Inc.*, 388 B.R. 579, 585 (Bankr. D. Del. 2008) ("[C]ourts have often extended protection to non-debtor defendants who were officers or directors of the debtors. The rationale for such decisions is that a finding of liability against management defendants could have a preclusive effect, as collateral estoppel, against the debtors.").

Second, courts find an "identity of interest" where proceeding against the non-debtor could create liability on the part of the debtor, such as through indemnification or contribution claims. *See, e.g.*, *In re Mallinckrodt, LLC*, 2021 WL 5275781, at *1 (noting bankruptcy court's ruling that "the existence of contractual indemnification claims is sufficient to meet the unusual circumstances test"). This case meets both criteria.

1. The Claims Against the Delaware D&O Defendants Are Inextricably Intertwined With The Stayed Derivative Claims And The Claims In the Ohio Securities Litigation

Here, the question of the Delaware D&O Defendants' liability cannot be separated from the matters raised in the Derivative Actions and the Ohio Securities Litigation. It is therefore impossible to adjudicate the Delaware Class Action without impacting the Debtors' interests in

the other actions. The majority of allegations of wrongdoing by the D&O Defendants in both Putative Class Actions (including the allegations against Mr. Hamamoto, a defendant in both) are indistinguishable from alleged wrongdoing by the Company itself, including with regard to the misrepresentations on which the plaintiffs' theories are based. *See* Turetsky Decl., Ex. E ¶¶ 12, 57. Even the plaintiffs in the Derivative Actions expressly acknowledge the interdependence of the Actions. *See, e.g.*, Turetsky Decl., Ex. B ¶ 208 ("If the Company is found liable [in the Putative Class Actions], the Company's liability will arise, in whole or in part, from the intentional, knowing, or reckless acts or omissions of [the D&O Defendants]"); Turetsky Decl., Ex. C ¶ 126 ("The Company's alleged liability in the [N.D. Ohio] Securities Class Action is a result of the conduct described herein and arises from the knowing, disloyal, and/or bad faith acts and omissions of the [D&O] Defendants."). Thus, the D&O Defendants' "defenses in each of these cases will certainly revolve around the acts and omissions of the debtors." *In re TK Holdings* Hr'g Tr. at 15:13-16. The Debtors therefore would need to participate in the action despite the automatic stay, frustrating its purpose. *See In re SN Liquidation, Inc.*, 388 B.R. 579, 585 (Bankr. D. Del. 2008) ("The preclusive effect means the Debtors might be imperilled [sic] by findings in the [underlying action] and would be compelled to participate in the … litigation").

2. A Judgment Against the Delaware D&O Defendants Is Effectively A Judgment Against the Debtor

The Debtors' contractual indemnification obligations to the Delaware D&O Defendants further evidence the identity of interest here. *See In re W.R. Grace & Co.*, 386 B.R. at 31 ("[T]he contractual indemnification agreements discussed above indicate an identity of interest between [non-debtor] and Debtors."); *In re Am. Film Techs.,* 175 B.R. 847, 851–55 (Bankr. D. Del. 1994) (concluding that "indemnification" between the debtor and its officers and directors

was one of the "overriding considerations" that warranted issuing a preliminary injunction). Of the Delaware D&O Defendants, one (David Hamamoto) is currently a board member of LMC. The other four are DiamondPeak directors that did not remain at LMC after the SPAC Merger. Nevertheless, the Debtors shoulder the burden of indemnifying all five. The Debtors are obligated to indemnify Mr. Hamamoto by LMC's certificate of incorporation and bylaws, as well as a separate indemnification agreement with Mr. Hamamoto. *See* Turetsky Decl., Exs. F, I. The Debtors are also required to indemnify the other four Delaware D&O Defendants who are former directors under the terms of the DiamondPeak certificate of incorporation and bylaws and individual indemnification agreements, which obligations survived the SPAC Merger. *See supra* Section I.B.

The Debtors have a direct interest in the Delaware Class Action because a judgment against the Delaware D&O Defendants would, in effect, be a judgment against the Debtors. *See W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.)*, 2004 WL 954772, at *3 (Bankr. D. Del. Apr. 29, 2004) ("In essence, a judgment against [the non-debtor] will in effect be a judgment or finding against the Debtors that will implicate the Debtors' indemnification obligation and, therefore, the automatic stay should be extended to the [action]."). And, regardless of whether the plaintiffs are successful in obtaining a judgment, the Debtors are required to pay or reimburse the Delaware D&O Defendants' expenses related to litigating the action, including attorneys' fees and other defense costs. *See* Turetsky Decl., Ex. I. Proceeding on those claims against the Delaware D&O Defendants is essentially a proceeding against the Debtors that should be stayed under section 362(a)(1) of the Bankruptcy Code. *See In re LTL Mgmt., LLC*, 640 B.R. 322, 334 (Bankr. D.N.J. 2022) (finding "that § 362(a)(3)'s protection is

applicable to the nondebtor defendants" in securities action and concluding that extension of the stay was warranted).

B. If Allowed to Continue Against the D&O Defendants, the Delaware Class Action Will Adversely Affect the Debtors' Sale and Restructuring Efforts

As an alternative to the "identity of interest" analysis, "[c]ourts have also extended the stay to nondebtor third parties where stay protection is essential to the debtor's efforts of reorganization." *McCartney v. Integra Nat. Bank North,* 106 F.3d at 510; *see also In re W.R. Grace & Co.*, 115 F. App'x 565, 570 (3d Cir. 2004) ("The standard for the grant of a stay is generally whether the litigation could interfere with the reorganization of the debtor, or would interfere with, deplete, or adversely affect property of the estate."); *In re Midway Games, Inc.*, 428 B.R. at 334 (noting that actions against non-debtors are properly stayed where they directly affect the debtor's "ability to pursue a successful plan of reorganization or liquidation"); *see also Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec.*, 443 B.R. 295, 318–19 (S.D.N.Y. 2011) (noting that actions against non-debtors may "threaten to substantially undermine this Court's jurisdiction, as further prosecution could ultimately result in another court's determining how potential estate funds are distributed").

Stay protection is needed here to avoid adversely impacting the Debtors' restructuring. Allowing the Delaware Class Action to proceed would adversely impact the Debtors' restructuring effort because, absent a stay, losses incurred by the Delaware D&O Defendants would deplete the assets available to the Debtors' bankruptcy estates, including through contractual indemnification obligations and the exhaustion of potential insurance proceeds. The Debtors would also face substantial risk of collateral estoppel and evidentiary prejudice with respect the other Actions, including with respect to any claims filed in these chapter 11 proceedings. Permitting the Delaware Class Action to continue will also compel the Debtors to

participate in the Delaware Class Action, divert the Debtors' attention, put the Debtors' estate assets at risk, and have an adverse impact on the Debtors' sale and restructuring efforts.

1. Assets of the Bankruptcy Estate Will Be Depleted if the Delaware Class Action Is Not Stayed

Courts in this Circuit have recognized that an adverse impact on a debtor's ability to restructure or reorganize is "obvious" where, as here, contractual indemnity and shared insurance policies would require the debtor to expend estate resources. *See In re W.R. Grace & Co.*, 386 B.R. at 31–32. Without a stay of the Delaware Class Action, the Debtors' estates may be depleted through (1) contractual indemnification claims brought by the Delaware D&O Defendants, (2) reimbursement or advancement of defense costs and attorneys' fees, (3) the depletion of shared policy limits with the D&O Defendants that could be implicated in the Derivative Cases, and (4) reimbursement claims by insurance carriers against the Debtors.

As noted above, due to the Debtors' contractual indemnification obligations, the Debtors would incur a significant financial burden in the form of attorneys' fees and costs, discovery, trial preparation, and trial. *See supra* Section I.A. Thus, any indemnity claims or expenses incurred by the Delaware D&O Defendants through continuation of the Delaware Class Action will deplete the assets of the Debtors' estates. *See, e.g.*, *In re Midway Games, Inc.*, 428 B.R. at 334 (extending stay to officers of debtors because debtors would be directly responsible for indemnifying target officer, thereby "impacting Debtors' remaining assets"); *In re Cont'l Airlines*, 177 B.R. at 481 (affirming the extension of a stay over director and officer defendants because the debtor was "legally obligated to indemnify, to the fullest extent permitted by Delaware law, its directors and officers for any judgments against them in connection with these [class action lawsuits] challenging actions taken by them in their official capacity and to advance litigation expenses to its officers and directors for their defense of these actions.").

The D&O Policies reinforce this fact. The Debtors' policies have shared limits between the Debtors and the D&O Defendants applicable to its various coverages—shared limits which could result in insufficient coverage to the Debtor if depleted by actions against any of the D&O Defendants (*see supra* Statement of Facts, Section B.2), and, therefore, are property of the bankruptcy estate. *See In re SN Liquidation, Inc.*, 388 B.R. at 584 (finding that debtor's primary insurance, which covered both the directors and officers and the debtor, were property of the bankruptcy estate, and depletion of those proceeds would "adversely affect the Debtors' estate"). *See also In re marchFIRST, Inc.*, 288 B.R. 526, 531 (Bankr. N.D. Ill. 2002) (enjoining shareholders' prosecution of securities fraud claims against debtor's officers and directors because any attempt to recover from limited proceeds available under shared policies, which ensured both the debtors and its officers and directors, threatened to impact the bankruptcy estate); *In re Circle K Corp.*, 121 B.R. 257, 262 (Bankr. D. Ariz. 1990) (enjoining continued litigation against debtor's former chief executive officers where debtor's policies provided indemnification and liability coverage policies because, to the extent that expenditures exhausted policy limits, assets of the estate would be diminished).

To the extent the Debtors' D&O Policies provide coverage for the Delaware Class Action, the payment of insurance proceeds to the Delaware D&O Defendants may result in insufficient coverage of the Debtors both in this action and the other Actions.[14] Because those insurance proceeds are property of the Debtors' estates, any attempt to obtain the proceeds

[14] While the DiamondPeak insurers have been providing coverage to the Delaware D&O Defendants to date, the applicable LCM insurance carriers have denied coverage to the Company and the D&O Defendants relating to the Actions, including the Delaware Class Actions. Kroll Decl. ¶ 6. The Debtors are in discussions with the insurers about potential coverage despite the denial. *Id.* Therefore, the lack of sufficient insurance coverage may require the Debtors to satisfy indemnification claims from estate assets and expend the Debtors' time and resources defending the Actions due to the potential liability under its indemnification obligations. Kroll Decl. ¶ 6-8; *see, e.g.*, *In re Midway Games*, 428 B.R. at 334 (extending automatic stay to action against non-debtor officers because "the absence of insurance means Debtors will be forced to shoulder indemnity obligations to the Officers thereby directly impacting Debtors' remaining assets from the Court-approved sales").

should be prohibited under the automatic stay. *See In re World Health Alternatives, Inc.*, 369 B.R. 805, 810 (Bankr. D. Del. 2007) ("When a policy covers the debtor and its directors and officers, and there is risk that payment of proceeds to the directors and officers will result in insufficient coverage of the debtor, then the proceeds are property of the estate and any attempts to obtain the proceeds are prohibited under the automatic stay" (citing *In re Allied Digital Techs., Corp.,* 306 B.R. 505, 511 (Bankr. D. Del. 2004))); *Aetna Casualty & Surety Co. v. Jasmine, Ltd. (In re Jasmine, Ltd.),* 258 B.R. 119, 128 (D.N.J. 2000) (finding the debtor's interest in indemnification proceeds of its insurance policy was enough to make the entire policy part of the bankruptcy estate); *In re Sacred Heart Hosp. of Norristown,* 182 B.R. 413, 420 (Bankr. E.D. Pa. 1995) ("Proceeds available for the Debtor's liability exposure are not segregated from the proceeds available to the directors and officers. Thus, the Debtor is indeed an insured and has a sufficient interest in the Proceeds as a whole to bring them into the estate.").

2. An Adverse Ruling Would Likely Result in Collateral Estoppel and Evidentiary Prejudice

As discussed above, the claims asserted against the Delaware D&O Defendants are inseparable from the claims at issue in the Derivative Actions and the Ohio Securities Litigation. For example, the Delaware Class Action alleges breach of fiduciary duty claims against the Delaware D&O Defendants, purportedly on behalf of investors who held stock for roughly one month (September 21, 2020 through the de-SPAC transactions close on October 23, 2020) of the eleven-month class period alleged in the Ohio Securities Class Action (August 2020 through July 2021). *Compare* Turetsky Decl., Ex. E ¶ 148 and Turetsky Decl., Ex. D. ¶¶ 442–43. Class Plaintiffs in the Delaware Class Action further allege that the Delaware D&O Defendants made or failed to prevent misrepresentations in a subset of the pre-merger disclosures, as do all the Derivative Actions and the Ohio Securities Class Action. *See supra* Statement of Facts, Section

A. As a result, it is impossible to litigate the Delaware Class Action without collateral estoppel and evidentiary concerns to the Debtors. Actions against non-debtor defendants are properly and routinely enjoined where there is a risk that the debtor will be bound by key factual and legal determinations in subsequent proceedings, including in bankruptcy. *See In re SN Liquidation*, 388 B.R. at 585 (finding that there are "collateral estoppel concerns" in litigation against officers and directors because "facts developed in [such proceedings] could be used in the resolution of the" proof of claim against the Debtors).

Courts have recognized this as a threat to a bankrupt debtor's ability to restructure. *In re SN Liquidation*, 388 B.R. at 585; *see also Am. Film Techs.*, 175 B.R. at 850–55 (concluding that a potential finding of liability against debtor's directors would be based on acts undertaken by directors as agents of the debtor and therefore would expose the debtor to the risk of being collaterally estopped from denying liability for the directors' actions); *Sudbury, Inc. v. Escott,* 140 B.R. 461, 463 (Bankr. N.D. Ohio 1992) (granting injunctive relief after finding that debtor's liability "may be determined on collateral estoppel principles [by fact determinations reached on the same fact issues] in Plaintiffs' actions" against non-debtors).

In addition to this risk of preclusive effect and evidentiary concerns, denial of a stay will force the Debtors to participate in the Delaware Class Action at least through discovery. Indeed, the Chancery Court has recently ordered LMC to participate in discovery directly by compelling it to produce certain documents, subject to a subpoena which also seeks a deposition of LMC, though no date has been set for that. Order Granting in Part Plaintiff's Motion to Compel, Delaware Class Action [ECF No. 215]. While the Court noted that LMC and the plaintiffs would negotiate criteria for LMC's continued direct involvement in discovery beyond the subpoena, *id.*, the Debtors anticipate that they will be primarily responsible for ESI and

document production going forward and that the plaintiffs may seek to depose a number of current and former officers and directors who are not named defendants, but to whom LMC may have additional advancement and indemnification obligations. This will force the Debtors to incur substantial costs in connection with discovery and trial preparation and to divert attention from the sale and their restructuring efforts. Kroll Decl. ¶¶ 3, 6. Such extensive fact and expert discovery would further deplete the Debtors' estates and significantly impair their ability to successfully complete their sale process and confirm a plan. *See In re W.R. Grace & Co.*, 115 Fed. App'x 565, 569 (3d Cir. 2004) (affirming bankruptcy court's stay of actions against non-debtors where "discovery from [the debtor] would be needed if the case proceeded against [the non-debtor defendant], and . . . [the debtor]'s absence would disadvantage both [parties] as a practical and legal matter"); *see also In re Residential Cap., LLC*, 480 B.R. 529, 539 (Bankr. S.D.N.Y. 2012) ("The uncontrolled burden and expense of discovery in third-party actions has the potential to destroy a debtor's ability to reorganize, to the substantial detriment of all creditors and other parties in interest in a bankruptcy case."); *In re Loewen Group, Inc., Sec. Litig.*, 2001 WL 530544, at *3 (E.D. Pa. May 16, 2001) (applying the stay to debtor's officers and directors to avoid engaging in "detailed and burdensome discovery").

II. ALTERNATIVELY, THE COURT SHOULD ENJOIN THE DELAWARE CLASS ACTION UNDER SECTION 105 OF THE BANKRUPTCY CODE

Section 105(a) of the Bankruptcy Code authorizes this 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); *In re Vistacare Grp., LLC*, 678 F.3d 218, 231 n.11 (3d Cir. 2012) (Bankruptcy courts are "courts of equity" and, under section 105(a), may "issue injunctive relief where parties are pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." (citation omitted)); *In re Bernard L. Madoff Inv. Sec., LLC*, 512 F. App'x 18, 20 (2d Cir. 2013)

("Section 105 grants bankruptcy courts ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process, whether in a liquidation or in a reorganization case." (citation omitted)); *cf. Wedgewood Inv. Fund, Ltd. v. Wedgewod Realty Grp., Ltd. (In re Wedgewood Realty Grp., Ltd.)*, 878 F.2d 693, 700–01 (3d Cir. 1989) (bankruptcy court may re-impose stay under its § 105 injunctive powers).

To obtain injunctive relief under section 105, the debtor must establish the traditional injunction factors, modified to fit the bankruptcy context. *See W.R. Grace*, 412 B.R. at 665. Those factors are "(1) a likelihood of success on the merits; (2) that [the Debtor] would suffer irreparable harm if the injunction is not granted; (3) the extent to which the enjoined party would suffer irreparable injury if the injunction is issued, and (4) public interest." *Id.*; *see also Kos Pharm., Inc. v. Andrz Corp*., 369 F.3d 700, 708 (3d Cir. 2004). All factors favor an injunction.

A. The Debtors Are Likely to Successfully Restructure

Courts have recognized that "Section 105(a) is to be 'construed liberally to enjoin suits that might impede the reorganization process'—or, as here, the process of liquidation." *In re Bernard L. Madoff Inv. Sec.*, 512 F. App'x at 20 (citation omitted). In the bankruptcy context, "reasonable likelihood of success" means a reasonable likelihood of successful resolution of the chapter 11 case, which includes successful consummation of a chapter 11 reorganization or liquidating plan. *See In re W.R. Grace & Co.*, 386 B.R. at 33 ("[T]he court must apply the usual preliminary injunction standard . . . and consider whether the debtor has a reasonable likelihood of a successful reorganization." (citations and internal quotation marks omitted)); *In re Soundview Elite Ltd.*, 543 B.R. 78, 119 (Bankr. S.D.N.Y. 2016) ("Although any reorganization plan the Trustee might propose would almost certainly be a liquidating plan, that does not foreclose this Court from finding the requisite likelihood of success." (citing cases)).

This factor generally favors the debtor where, as here, the bankruptcy case is in its early stages. *See In re Saxby's Coffee Worldwide, LLC*, 440 B.R. 369, 381 (Bankr. E.D. Pa. 2009) ("[A]t this early stage of the case, there are sufficient indicia that the Debtor has a reasonable prospect of reorganizing."); *In re Union Tr. Phila., LLC*, 465 B.R. 765, 773 (Bankr. E.D. Pa. 2011) (affirming bankruptcy court's finding that debtor had a reasonable likelihood of success where prospects for a successful restructuring remained viable "at this early stage," and the debtor was entitled to additional time to formulate a plan). All a debtor must show to satisfy the "likelihood of success" factor is that "it is proceeding on track," meeting the challenges faced so far, and that "there is no reason to believe or suspect" at that point that the restructuring will fail. *In re Lyondell Chem. Co.*, 402 B.R. 571, 590 (Bankr. S.D.N.Y. 2009) (finding the necessary likelihood and granting an injunction where "the Debtors have so far been successful in doing everything they've needed to do to date"); *see also In re Phila. Newspapers*, 407 B.R. 606, 617 (E.D.N.Y. 2009) (recognizing the speculative nature of this inquiry at early stages, but concluding "nothing has transpired in this case that would lead [the court] to conclude that the debtor does not have [a] reasonable likelihood of reorganization"). Indeed, "case law establishes that certainty is not required; a debtor need only show the possibility that it will succeed—a hurdle that [the Debtors have] cleared given the early stages of this litigation." *In re LTL Mgmt.*, LLC, No. 23-12825 (MBK), 2023 WL 3136666, at *7 (Bankr. D.N.J. Apr. 27, 2023).

The Debtors only just commenced their bankruptcy cases on June 27, 2023, with unencumbered cash sufficient to fund operations at least through the initial stage of these Chapter 11 Cases. First Day Decl. ¶ 49. Moreover, while the Debtors' current plan is to pursue a strategic sale of their assets, courts have routinely found consummation of a successful sale or liquidation qualifies as success on the merits for purposes of satisfying this requirement. *See,*

e.g., *In re Soundview Elite*, 543 B.R. at 119 (finding trustee had shown "likelihood of a successful reorganization" even though it was likely to put forth a liquidating plan); *In re SVB Fin. Grp.*, No. 23-10367 (MG), 2023 WL 2962212, at *8 (Bankr. S.D.N.Y. Apr. 14, 2023) (finding "likelihood of a successful reorganization" established where debtor was "presently evaluating strategic alternatives for its remaining businesses and assets, including various . . . sale options).

B. Absent an Injunction, the Debtors Will Be Irreparably Harmed

The Debtors will be irreparably harmed if the Delaware Class Action is allowed to proceed by depriving them of the key benefits of the automatic stay: relief from financial pressures and a breathing spell to execute a restructuring plan. *See McCartney*, 106 F.3d at 509; *Gerard v. W.R. Grace & Co. (In re W.R. Grace & Co.)*, 115 Fed. App'x at 570 ("The standard for the grant of a stay is generally whether the litigation 'could interfere with the reorganization of the debtor,' or 'would interfere with, deplete or adversely affect property of [the] estates or which would frustrate the statutory scheme of chapter 11 or diminish [the debtor's] ability to formulate a plan of reorganization.'" (citations omitted)).

For all the reasons detailed above, allowing the Delaware Class Action to go forward will irreparably harm the Debtors' sale and restructuring efforts and deplete the Debtors' estate. *See supra* Section I.B (discussing the Debtors' contractual indemnification obligations to the Delaware D&O Defendants; that, absent a stay, the Debtors would immediately and continually incur significant costs related to defending the litigation and would face a risk of collateral estoppel and evidentiary prejudice; and that continued litigation would derail an efficient path to plan confirmation).

C. The Irreparable Harm to the Debtors Outweighs Any Potential Harm to the Delaware Class Action Plaintiffs

The balance of harms strongly favors the issuance of a preliminary injunction. The most profound risk to the Debtors' successful restructuring is if litigation of the Delaware Class Action continues to erode the value of the Debtors' estates, distracts the Debtors and key management, and leads to a judgment that will undermine the Sale Process and negotiation of a plan. As noted above, the Debtors face imminent and irreparable harm that would significantly affect their efforts to consummate a restructuring plan should the Delaware Class Action be allowed to proceed.

On the other hand, if this Court grants the Motion, claimants will be incentivized to maximize the benefits to all similarly situated creditors. Even if a delay is possible, the Debtors are hopeful that these chapter 11 cases and the Bankruptcy Code will provide an avenue and mechanism for facilitating resolution of the underlying claims asserted in all Actions. Regardless, a delay in litigating a claim does not outweigh the potential harm to the Debtors. *See In re Am. Film Techs.*, 175 B.R. at 849 ("[Plaintiff] is not being asked to forego his prosecution against the individual defendants, only to delay it. Given the stipulated delay of 10 months, a further delay of limited duration will not cause [Plaintiff] irreparable harm."); *In re Union Tr. Phila., LLC*, 465 B.R. at 773-74 ("[T]he fact that efforts to collect on the judgments may be delayed for short period in and of itself is not sufficient to outweigh the potential harm to [Debtor]."). The damages sought in the Delaware Class Action relate to events that have occurred in the past, and not to harms that may conceivably injure future plaintiffs. Further, the requested relief would merely stay the Delaware Class Action temporarily. Thus, the balance of harms weighs in favor of the Debtors.

D. Injunctive Relief Is In the Public Interest

The Debtors will likely put forth a plan of liquidation, not reorganization, as part of its strategic restructuring process. Nonetheless, given "the Bankruptcy Code's overriding policy of promoting an orderly distribution and preventing a 'race to the courthouse' among creditors," *In re CD Liquidation Co.*, 462 B.R. at 135, the public interest favors enjoining the Delaware Class Action while the Debtors' work to consummate that plan. For all the reasons noted above, allowing the Delaware Class Action to proceed would undermine the Debtors' ability to pursue an efficient resolution to these chapter 11 cases and diminish the size of the bankruptcy estate from which the plaintiffs—and all creditors—hope to recover. *See In re SN Liquidation*, 388 B.R. at 585 (finding public interest weighed in favor of injunction where "Debtors' right to fashion an orderly liquidation may be jeopardized" by continuing litigation).

The public interest is best served by resolving all of the Actions through a centralized process, thereby avoiding inconsistent rulings and potentially preferential or double recoveries. *See In re W.R. Grace & Co.*, 386 B.R. at 36 (public interest favored injunction where multitude of claims could be resolved through bankruptcy "in a uniform and equitable manner"). Therefore, the balance of equities favors enjoining the Delaware Class Action.

CONCLUSION

For the reasons stated herein, the Debtors respectfully request that this Court grant the Motion and preliminarily enjoin the continued litigation of the Delaware Class Action.

Dated: July 5, 2023

Respectfully submitted,

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