Docket #0014 Date Filed: 7/19/2023

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)

DEFENDANTS' BRIEF IN RESPONSE AND OPPOSITION TO DEBTORS' MOTION TO EXTEND THE AUTOMATIC STAY AND FOR INJUNCTIVE RELIEF PURSUANT TO 11 U.S.C. § 105

[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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The above-captioned Defendants Benjamin Hebert ("Hebert") and Atri Amin ("Amin" and together with Hebert, "Defendants" or the "Delaware Class Plaintiffs"), by and through their undersigned counsel, hereby file their brief in response and opposition (the "Opposition") to the Debtors' Motion to Extend the Automatic Stay and for Injunctive Relief Pursuant to 11 U.S.C. § 105 (the "Motion") [D.I. 2]. In support of this Opposition, Defendants respectfully represent as follows:

Defendants are co-lead plaintiffs in the class action styled *In re Lordstown Motors Corp. Stockholders Litigation*, C.A. No. 2021-1066-LWW (Del. Ch.) (the "Delaware Class Action"), currently pending in the Delaware Court of Chancery. The Delaware Class Action is brought on behalf of a class of investors (the "Class") who held shares of DiamondPeak Holdings Corp. ("DiamondPeak") on October 23, 2020—the date DiamondPeak consummated a merger (the "SPAC Merger") with Lordstown Motor Corp. ("LMC" or "Company")—and did not redeem their shares when they had the right to do so.[2] The Delaware Class Action asserts breach of fiduciary duty claims against the five former DiamondPeak directors (the "DiamondPeak Directors"), each of whom is a non-debtor. Of those five DiamondPeak Directors, only one—David Hamamoto ("Hamamoto")—served as an LMC director after the SPAC Merger.[3] Delaware Class Plaintiffs submit this Opposition to the Debtors' Motion, along with the Declaration of Ankita Sangwan in Support of the Opposition (the "Sangwan Declaration"), and respectfully state as follows:

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[2] Capitalized terms used in this Opposition but not defined herein shall have the meaning ascribed to such terms in the Motion.

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

PRELIMINARY STATEMENT

The Debtors seek the extraordinary remedy[4] of enjoining the Delaware Class Action, which has been pending for over a year and a half, from continuing against the DiamondPeak Directors. The Debtors advance three primary arguments to support the unusual relief they seek:

1. The Delaware Class Action may give rise to indemnification claims against the Debtors by the DiamondPeak Directors;
2. Continuing the Delaware Class Action against the DiamondPeak Directors will somehow adversely impact the Debtors' future defenses to purportedly similar claims filed against the Debtors; and
3. Continuing the Delaware Class Action will significantly distract the Debtors from their sale and restructuring efforts.

Each of these arguments fails, and the Motion must be denied on the merits. Extending the automatic stay under section 362 or granting injunctive relief under section 105 of the Bankruptcy Code in favor of non-debtors, who are independently liable for the claims asserted in the Delaware Class Action, is available only in extraordinary and unusual circumstances. The mere status of a non-debtor as a current or former director or officer and conclusory allegations of distraction or burden do not approach the showing required to stay third-party litigation against non-debtors. Were that the case, such an injunction would issue automatically in virtually every corporate chapter 11 case. Indeed, some of the largest and most complex chapter 11 cases in history have proceeded without interference from significant pending class actions.

[4] To be clear, the Delaware Class Plaintiffs do not concede that this Court has subject matter jurisdiction to enjoin the Delaware Class Action, *See Gillman v. Continental Airlines* (*In re Continental Airlines*), 203 F.3d 203, 214 n. 12 (3d Cir. 2000) (noting that jurisdiction to enjoin third-party actions against non-debtors cannot be presumed), and do not waive any right to argue same with respect to the underlying Adversary Proceeding or otherwise.

The Debtors cannot carry their heavy burden to demonstrate, through clear and convincing evidence, that the failure to enjoin the Delaware Class Action would imminently and seriously adversely affect the Debtors' bankruptcy estates or their property. There is no evidence that continuation of the Delaware Class Action will cause the Debtors any harm, let alone imminent, irreparable harm. The Debtors do not identify any current or near-term activity in the Delaware Class Action warranting the extraordinary injunctive relief requested. Nor do Debtors explain how claims against four ***former*** directors of the Debtor's ***predecessor*** entity could possibly rise to this level, particularly where an adjudication of the action will not (as discussed below), have any collateral estoppel effect on other pending litigation and any losses may be covered by insurance.

Additionally, the Debtors cannot seriously contend that the Company will be subject to burdensome discovery demands in the Delaware Class Action. Although discovery is underway in the Delaware Class Action, the Company's sole obligation to date is responding to a third-party subpoena. Sangwan Decl. ¶ 9. Although the Company has refused to cooperate in discovery or comply with a Court order in the Delaware Class Action, the Delaware Class Plaintiffs understand that the majority of documents responsive to their subpoena have ***already*** been collected, reviewed, bates-stamped, and produced to governmental authorities. Sangwan Decl. ¶ 9. And had the Company timely complied with the document demands of the subpoena and not forced the Delaware Class Plaintiffs to move to compel, the Company likely would have already met its document production obligations. As a result, any current so-called burden is not only minimal, it a problem of the Debtors' own making.

The Company instead focuses much of its brief arguing that it would be compelled to assist in the defense of the DiamondPeak Directors or risk an adverse ruling that could harm it in other pending class and derivative stockholder litigation. This too is a red herring. First, the

DiamondPeak Directors are already ably represented by sophisticated counsel and do not require additional resources from the Company to aid in their defense. Second, the breach of fiduciary duty claims asserted in the Delaware Class Action on behalf of a class for a one-day class period are distinct from the claims in the Ohio Securities Class Action, which asserts claims arising under the Federal Securities law arising from a much broader class period. Finally, these additional Actions are currently stayed and Debtors have already admitted that their intention is to "resolve[] the claims of all stakeholders, ***including shareholder-plaintiffs in the Actions***" in the bankruptcy proceeding. Debtors Br. at 7. If the other Actions are indeed to be resolved in the bankruptcy proceeding, then Debtors cannot claim any risk of prejudice in those Actions from the Delaware Class Action moving forward.

Debtors' arguments regarding indemnification and insurance obligations also miss the mark. To begin, indemnification obligations of the Debtors are not "automatic" in the Delaware Class Action. Rather, only those obligations that come within the "good faith" threshold of 8 *Del. C.* § 145 may be indemnified. Second, Debtors ignore the existence of insurance coverage that may directly cover the DiamondPeak Directors' potential liability in the Delaware Class Action, mitigating any potential impact to the Debtors' estate. Moreover, in an apparent effort to escape the fact that the claims against the DiamondPeak Directors may be subject to insurance coverage, the Class Action Plaintiffs believe that the Debtors have failed to provide the Delaware Class Plaintiffs with copies of all relevant policies for the Debtors and their DiamondPeak predecessors. At this juncture, all the Debtors can do is to speculate that "[t]he Debtors' D&O Policies may not provide full coverage to the DiamondPeak Directors in connection with the Actions." Debtors Br. at 17. This is insufficient to warrant the extraordinary remedy of extending the stay.

Additionally, the Debtors have not satisfied—and cannot satisfy—the requirements for an injunction under section 105 of the Bankruptcy Code enjoining the continuation of the Delaware Class Action against the DiamondPeak Directors. The potential of the Debtors' reorganization is, at this early point in the Debtors' bankruptcy cases, highly speculative. While the Debtors face no imminent, irreparable harm if the Delaware Class Action proceeds against the DiamondPeak Directors, the injunction the Debtors seek would cause substantial harm to the Delaware Class Plaintiffs and the Class by delaying the prosecution of the Delaware Class Action. Finally, the requested injunction is antithetical to the public interest. As set forth above and detailed herein, there is no legal or factual basis for the extraordinary relief sought by the Debtors. Accordingly, the Motion must be denied.

STATEMENT OF FACTS

The Delaware Class Action

On December 8, 2021, and December 13, 2021, the Delaware Class Plaintiffs, respectively, filed their Verified Class Action Complaints in the Delaware Chancery Court. These actions were consolidated, and the Delaware Class Plaintiffs filed their Verified Amended Class Action Complaint (the "Complaint") on July 22, 2022. Turetsky Decl., Ex. E. The DiamondPeak Directors initially filed motions to dismiss the Complaint, which they withdrew on January 5, 2023. Sangwan Decl., Ex. A. The DiamondPeak Directors answered the Complaint on March 2, 2023. Sangwan Decl., Ex. B.

The Complaint alleges that the DiamondPeak Directors breached their fiduciary duties by inducing Delaware Class Plaintiffs and the Class to approve the SPAC Merger and to forego exercising their redemption rights. Delaware Class Plaintiffs are scheduled to file their motion for class certification on July 21, 2023. Sangwan Decl., Ex. C ¶1(g). Delaware Class Plaintiffs will

seek certification of a class of stockholder who held shares in the Company's predecessor entity on the day of the SPAC Merger and did not exercise their redemption rights, thus becoming LMC stockholders. Sangwan Decl. ¶ 7. Over 99% of DiamondPeak's investors voted for the deal while rejecting the redemption payment that was available to any dissenting investors. *Id.*

Fact discovery is continuing apace and is well on its way toward completion. Sangwan Decl. ¶ 8. The deadline for substantial completion of document production was June 16, 2023. Sangwan Decl. ¶ 8; *id.*, Ex. C ¶1(d). All fact discovery, including depositions, shall be completed by September 29, 2023. Sangwan Decl. ¶ 8; *id.*, Ex. C ¶1(j). A five-day trial is scheduled for March 11 through March 15, 2024. Sangwan Decl. ¶ 8; *id.*, Ex. C ¶1(y).

Delaware Class Plaintiffs served a third-party subpoena on LMC on February 9, 2023. Sangwan Decl. ¶ 9; *id.*, Ex. D. On June 9, 2023, the Delaware Court granted in substantial part Delaware Class Plaintiffs' Motion to Compel Directed at Non-Party LMC. Sangwan Decl. ¶ 9; *id.*, Exs. E-F. To comply with the Court's order in response to the motion to compel and the majority of its document production obligations under the subpoena, LMC primarily needs to reproduce to of documents that they have already provided to the SEC and the DOJ. Sangwan Decl. ¶ 9. To date, LMC has still not produced any of the required documents. Sangwan Decl. ¶ 9; *id.*, Ex. G.

On June 27, 2023, LMC filed a Suggestion of Bankruptcy and Notice of the Automatic Stay which incorrectly stated that the Delaware Class Action was subject to the automatic stay. Sangwan Decl., Ex. H. On June 28, 2023, the Bankruptcy Court clarified that the automatic stay does not automatically apply to actions against non-debtors, stating that "the automatic stay does not protect any non-debtor or the property of any non-debtor" and "only applies to the debtor and to property of the debtor," and ordered LMC to file a Corrected Suggestion of Bankruptcy and

Notice of the Automatic Stay making that point clear. First Day Hrg. Tr. (June 28, 2023) at 32-33 [D.I. 80]. On June 29, 2023, LMC filed a Corrected Suggestion of Bankruptcy and Notice of the Automatic Stay in the Delaware Class Action, which clarified that the Delaware Class Action was not subject to the automatic stay, but that "Debtors . . . intend to promptly file an action in the Bankruptcy Court seeking to extend the automatic stay to the claims asserted in this action." Sangwan Decl., Ex. I.

The Other Actions

While other LMC stockholders have filed other stockholder class and derivative litigation, all such actions have been stayed by virtue of the automatic bankruptcy stay. This includes the Ohio Securities Class Action, which asserts claims under the Federal Securities laws on behalf of a class of individuals who acquired the Company's stock between August 2020 through July 2021. In addition, a number of stockholder derivative suits were filed parroting the allegations of the Ohio Securities Class Action and alleging that certain current and former officers and directors of LMC breached their fiduciary duties for the reasons described in the Ohio Securities Class Action. All of the derivative actions were stayed voluntarily in deference to the Ohio Securities Class Action from the outset, and as a result the defendants have not yet filed motions to dismiss any of the derivative actions. The derivative actions are now also stayed due to the automatic stay. If a bankruptcy plan is confirmed and goes effective, the derivative plaintiffs may lose standing to continue pursuing their claims. Moreover, Debtors have indicated that they intend to resolve all stockholder litigation by virtue of the bankruptcy proceeding. Debtors Br. at 7. Hamamoto is the only one of the DiamondPeak Directors named as a defendant in every pending Action. The individuals named as defendants in each of the Actions are listed in the following table:

Defendant Name	Status	Delaware Class Action	Ohio Securities Class Action	Ohio Derivative Action	D. Del. Derivative Action	Del. Ch. Derivative Action
Mark Walsh	Former DiamondPeak Director	X		X	X	X
Andrew Richardson	Former DiamondPeak Director	X		X	X	X
Steven Hash	Former DiamondPeak Director	X		X	X	X
Judith Hannaway	Former DiamondPeak Director	X		X	X	X
David Hamamoto	Former DiamondPeak Director / Current LMC Officer	X	X	X	X	X
Stephen S. Burns	LMC Officer and Director		X	X	X	X
Julio Rodriguez	LMC Officer		X	X	X	X
Caimin Flannery	LMC Officer		X			X
Shane Brown	LMC Officer		X	X		X
Darren Post	LMC Officer		X	X		X
Rich Schmidt	LMC Officer		X	X		X
Angela Strand Boydston	LMC Director			X	X	X
Michael Fabian	LMC Officer			X	X	
Keith Feldman	LMC Director			X	X	X
Michael Gates	LMC Director			X	X	X
Mickey Kowitz	LMC Director			X	X	X
Jane Reiss	LMC Director			X	X	X
Martin Rucidlo	LMC Director			X	X	X
Dale G. Spencer	LMC Director			X	X	X
Chuan "John" Vo	LMC Officer			X		X

The D&O Policies

The Debtors attached as exhibits to their Motion two insurance policies (the "Motion D&O Policies" and, together with any other insurance policies that may cover the claims asserted by the Delaware Class Plaintiffs against the DiamondPeak Directors, the "D&O Policies") that cover certain insured persons and entities. Specifically, the Motion D&O Policies may be implicated by the Delaware Class Action and provide coverage: (a) directly to the DiamondPeak Directors for losses (including all defense costs) that the Debtors cannot or do not indemnify ("Side A

Coverage"), and (b) to the Debtors for their own liability and for certain losses for which the Debtors indemnify certain directors. Debtors Br. at 11-12. Certain of the D&O Policies provide Side A Coverage exclusively to the DiamondPeak Directors above and beyond the Side A Coverage provided by the D&O Policies under which the Debtors are also named insureds. Debtors Br. at 12.

It is noteworthy that, of the Motion D&O Policies, the policy issued by Hudson Insurance Company (the "Hudson Policy") does not include the Debtors as potential insurance beneficiaries and, therefore, the Debtors are not entitled to make claims against or receive any proceeds of this policy. In addition, while the policy issued by the Berkley Insurance Company (the "Berkley Policy") would include the Debtors as potential claimants/beneficiaries, along with other claimants/beneficiaries, the Berkley Policy has a $10 million self-insured retention.

The DiamondPeak Directors also have the benefit of policies issued by the DiamondPeak insurers (the "DiamondPeak D&O Policies"), which have been providing coverage to the DiamondPeak Directors to date. Debtors Br. at 19, n.14. For example, the claims asserted against the DiamondPeak Directors in the Delaware Class Action would be covered by the tail run-off coverage period of the insurance policy issued by the Greenwich Insurance Company and XL Specialty Insurance Company (the "Greenwich Policy"), which has a policy period of February 27, 2019 to February 27, 2027. Sangwan Decl., Ex. J; *see also* Turetsky Decl., Ex. J. Indeed, in its March 9, 2022 coverage position letter, the Greenwich Policy's Claims Manager "acknowledges that the [Delaware Class Action] appear[s] to trigger coverage under the Policy," generally accepts coverage of the defense expenses of the DiamondPeak Directors relating to the Delaware Class Action, and LMC does not appear to be competing for proceeds under the Greenwich Policy. Sangwan Decl., Ex. K at -485, -488-92.

ARGUMENT

I. THERE IS NO BASIS FOR EXTENDING THE AUTOMATIC STAY FOR THE BENEFIT OF THE DIAMONDPEAK DIRECTORS

Upon the commencement of a debtor's bankruptcy case, the automatic stay immediately and automatically stays all "action[s] or proceeding[s] against the debtor" and all actions "to obtain possession . . . or to exercise control over property of the estate." 11 U.S.C. §§ 362(a)(1), (3). However, "[t]he automatic stay only protects debtors," and does not protect "non-debtor parties." *In re Forever 21, Inc.*, 623 B.R. 53, 63 (Bankr. D. Del. 2020). "It is true that some courts have extended section 362(a)'s protections to non-debtors in 'unusual circumstances,' such as where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* (citations omitted).

Despite the Debtors' doomsday speculation in the Motion, the simple reality is that continued prosecution of the Delaware Class Action against the DiamondPeak Directors neither creates an identity of interest between the Debtors and the DiamondPeak Directors nor will it adversely affect the Debtors' restructuring for several reasons:

- First, the Debtors' potential indemnity obligations do not—and likely will not—create any financial burden on the Debtors, and thus there is no identity of interest between the Debtors and the DiamondPeak Directors in the Delaware Class Action. The liability of the DiamondPeak Directors is direct, not derivative of any liability of the Debtors. In addition, it is not clear whether these claims will be subject to permissive indemnification under Delaware Law.

- Second, Debtors' concerns that applicable insurance "may result in insufficient coverage" is speculative and insufficient to warrant extension of the automatic stay to the Delaware Class Action.

- Third, the Debtors are not subject to collateral estoppel or res judicata as a result of any findings or ruling in the Delaware Class Action because they will not be

participating in or affected by the Delaware Class Action by virtue of the automatic stay.

- Finally, the Delaware Class Action will not distract them from tasks essential to the Debtors' business operations or reorganization efforts during the pendency of the 'Debtors' bankruptcy cases because four of the five DiamondPeak Directors are no longer either officers or directors of the Debtors, the DiamondPeak Directors are ably represented by counsel, and the Debtors' remaining discovery obligations in the Delaware Class Action are not significant.

A. There Is No Identity Of Interest Between The Debtors And The DiamondPeak Directors

Courts may extend the automatic stay for the benefit of the DiamondPeak Directors where "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986). No such identity of interest exists here.

In the first instance, the existence of a right of indemnity does not, as the Debtors suggest, automatically create an identity of interest warranting extension of the automatic stay. *See In re Reliance Acceptance Grp., Inc*., 235 B.R. 548, 557 (D. Del. 1999) (finding that the existence of indemnification claims was not a basis for enjoining shareholder litigation); *cf. In re Codfish Corp.*, 97 B.R. 132, 135 (Bankr. D.P.R. 1988) ("The practice of indemnifying corporate officers and directors is common . . . and is not by itself sufficient to warrant [the automatic stay] be extended . . . to officers who act as guarantors to a debtor corporation.").

In *In re Uni-Marts, LLC*, this Court refused to extend the automatic stay to a non-debtor, noting that the debtor was required to indemnify the non-debtor for any losses related to actions taken in his official capacity, and that a D&O insurance policy existed to cover losses of this type, but that the proceeds of said policy may not actually be part of the estate. 399 B.R. 400, 416 (Bankr. D. Del. 2009). The Court held that "the purpose served by extending the stay to directors

and officers indemnified by the debtor must be consistent with the purpose of the stay itself, to suspend actions that pose a serious threat to a corporate debtor's reorganization efforts." *Id; see also Stanford v. Foamex L.P.*, 2009 U.S. Dist. LEXIS 32405, *10 (Bankr. E.D. Pa. 2009) (refusing to extend automatic stay where the "action alleges that each of the non-bankrupt defendants is independently liable for breaches of fiduciary duties they owed to plaintiff"). "[T]he mere existence of an indemnification obligation on the part of the Debtors is not alone enough to extend the protections of the automatic stay to a non-debtor." *In re FPSDA I, LLC*, No. 10-75439, 2012 WL 6681794, at *11 (Bankr. E.D.N.Y. Dec. 21, 2012), as corrected (Dec. 26, 2012).

Furthermore, where a party holds an independent direct claim against a non-debtor, "there is no compelling basis by which a court must extend the automatic stay provisions of § 362 to the non-debtor co-defendants." *In re First Cent. Fin'l Corp.*, 238 B.R. 9, 18 (Bankr. E.D.N.Y. 1999) (quoting *Duval v. Gleason*, 1990 WL 261364, *4 (N.D. Cal. 1990)); *see also Holland v. High Power Energy*, 248 B.R. 53, 58 (S.D. W.Va. 2000) (automatic stay is inapplicable when a third party has "obligations that are 'independent' and primary, not derivative of those of the debtor."); *In re Phar-Mor Securities Litig.*, 166 B.R. 57, 62 (W.D. Pa. 1994) ("the Code was not intended to stay action . . . where the non-debtor's liability rests upon his own breach of duty"); *Chesapeake Crossing Associates v. TJX Companies, Inc.*, 1992 WL 469801, *4 (E.D. Va. 1992) ("a third party defendant will not be covered under the stay . . . where the non-debtor's liability rests upon his own breach of duty"). In other words, where a claim is independent of a debtor, the 'unusual circumstances' are generally not implicated to extend the automatic stay to a non-debtor. "Thus, [a] non-debtor can claim the protection of a debtor's stay only in 'unusual circumstances' — specifically, one when there is such identity between the debtor and [non-debtor] that the debtor may be said to be the real party defendant and that a judgment against the [non-debtor] will in

effect be a judgment ... against the debtor.'" *JSO Assocs., Inc. v. Awrey Bakeries, LLC*, No. 13-CV-6035 JFB ARL, 2014 WL 2882896, at *2 (E.D.N.Y. June 25, 2014); *Gray v. Hirsch*, 230 B.R. 239, 242 (S.D.N.Y.1999) (citations omitted).

The Debtors argue that their indemnification obligations to the Delaware DiamondPeak Directors support an extension of the stay. However, it is not the case that *any* right of indemnity constitutes grounds to extend the automatic stay, but rather, where a non-debtor party "is entitled to *absolute* indemnity by the debtor on account of *any* judgment that might result against them in the case." *A.H. Robins*, 788 F.2d at 999 (emphasis added). Unlike Debtors' citations, the Delaware Class Action involves direct claims that the DiamondPeak Directors themselves violated their fiduciary duties—claims for which the DiamondPeak Directors appear to have ample insurance coverage.

In addition, the Delaware Class Plaintiffs' claims might not trigger a right of indemnification under Delaware law so nothing about this case demands that the right of indemnification will be automatic. Specifically, "[s]ection 145(a) [of the Delaware General Corporate Law] addresses indemnification for direct claims and authorizes a corporation to indemnify a director or officer for "expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding," as long as "the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation." *New Enter. Assocs. 14, L.P. v. Rich*, No. 2022-0406-JTL, 2023 WL 3195927, at *28 (Del. Ch. May 2, 2023) (citing 8 *Del. C.* § 145); *see also Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1094 (Del. Ch. Feb. 7, 2012) (holding that the DGCL "*prohibits* a corporation from indemnifying a corporate official

who was not successful in the underlying proceeding and has acted, essentially, in bad faith.") (emphasis in original).

Unlike the circumstances in *In re W.R. Grace & Co*., 2004 WL 954772 (Bankr. D. Del. Apr. 29, 2004), cited by the Debtors in support of their argument that the Debtors' alleged indemnity obligations create an identity of interest between the Debtors and the DiamondPeak Directors, the existence and nature of the D&O Policies mitigates any perceived harm to the estate from the Indemnity Obligations. In *W.R. Grace*, the court's holding that the debtors were the real parties in interest in an action filed by ExxonMobil against Samson Hydrocarbons Co. relating to claims regarding groundwater contamination and surface damage turned in large part on the fact that the debtors had no insurance coverage whatsoever to fund their indemnity obligations and had already assumed responsibility for the defense and indemnification of the litigation in question. *Id*. at *1. Here, on the other hand, the D&O Policies provide substantial priority coverage, including advancement of defense costs, both for the Debtors' potential indemnity obligations (including defense costs) and for any non-indemnifiable liability the DiamondPeak Directors may incur. Debtors' claims that they are "in ongoing discussions with the LMC insurers regarding coverage under the applicable D&O policies" does not alter the Court's analysis. *See*, e.g., *Reliance Acceptance*, 235 B.R. at 557 ("The nature and amount of coverage may be relevant to other issues related to the Shareholders' Litigation, including payment of defense costs and possible settlements. But those are matters that can be resolved between the insurers and insured, without enjoining the Shareholders from proceeding with their claims."). Moreover, Debtors' speculative statement that "Debtors' D&O Policies may not provide full coverage to the DiamondPeak Directors in connection with the Actions" (*Id.*), even if true, does not equate to an

"*immediate* adverse economic consequence for the debtor's estate." *In re Queenie, Ltd*., 321 F.3d 282, 287 (2d Cir. 2003) (emphasis in original).

Moreover, the Debtors are incorrect that the "questions of Delaware DiamondPeak Directors' liability cannot be separated from the matters raised in the Derivative Actions and the Ohio Delaware Class Action." Debtors Br. at 14. As referenced above, the Debtors have never been a party to the Delaware Class Action. Moreover, the Delaware Class Action and the Ohio Delaware Class Action share only one common defendant, further negating any potential interconnectedness.

The Delaware Class Action asserts only claims for breach of fiduciary duty. Delaware Class Plaintiffs' claims for breach of fiduciary duty claims have no overlap with the elements of a claim under the federal securities laws. Indeed, the Delaware Class Action alleges that the DiamondPeak Directors all acted in bad faith respecting (i) the approval of the SPAC Merger; and (ii) the issuance of a false and misleading Proxy. As to the former, Delaware Class Plaintiffs alleged that the DiamondPeak Directors' Founder Share ownership caused them to favor ***any*** deal—even a value-decreasing deal—at the expense of public Class A stockholders. That is quintessential bad faith. As to the latter, Delaware Class Plaintiffs alleged that the DiamondPeak Directors allowed the issuance of the false and misleading Proxy despite knowing that (i) the production date for LMC's electric vehicles was not feasible; (ii) the projections were unrealistic and likely unachievable; and (iii) letters of intent were suspicious, if not outright fraudulent, and converting all such pre-orders to actual orders was unsupportable. The DiamondPeak Directors were "under a fiduciary duty to disclose material information when seeking shareholder action" and, by failing to disclose.

Conversely, the Ohio Class Action asserts claims under the Section 10(b) and Section 14(a)

of the Securities and Exchange Act of 1934. To bring an action under Section 10(b) and Rule 10b-5 a plaintiff must plead: "(1) a material misrepresentation or omission by the defendant: (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Spar v. Celsion Corp*., 2023 U.S. Dist. LEXIS 19553, *14 (D. NJ. Jan. 3, 2022) (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37 (2011). Thus, whether the DiamondPeak Directors acted in bad faith respecting the approval of the SPAC Merger their will have no bearing on whether the Company is liable for violations of the Federal securities laws. *See, e.g., Fagin v. Gilmartin*, 2007 U.S. Dist. LEXIS 7256, *17 (D. NJ 2007) ("Whether federal securities laws were in fact violated is not a necessary element of determining whether Defendants' alleged mismanagement rose to the level of a breach of fiduciary duty."); *Koehler v. Bank of Berm. (N.Y.*), 1998 U.S. Dist. LEXIS 13574, *32 (S.D.N.Y. 1998) ("breach of a fiduciary duty is not sufficient by itself, to establish the basis for a federal securities claim."); *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 478-80, 51 L. Ed. 2d 480, 97 S. Ct. 1292 (1977) (emphasizing principles of federalism and holding claims challenging "internal corporate mismanagement" are not actionable under § 10(b)). Moreover, the Debtors have stated that the bankruptcy process will "resolve[] the claims of all stakeholders, ***including shareholder-plaintiffs in the Actions***." Debtors Br. at 7 (emphasis added). If this is true, there can be no risk of prejudice in the other Actions.

Even if the other Actions do survive, the Debtors face no risk of collateral estoppel. Collateral estoppel may not be applied against a party in a subsequent proceeding where the party did not have a full and fair opportunity to litigate the claim or issue in the prior proceeding. *See Allen v. McCurry*, 449 U.S. 90, 96–97 (1980). And even if that were not the case, the alleged risk of collateral estoppel or evidentiary prejudice, in and of itself, is insufficient to justify extension

of the automatic stay. As the Second Circuit held in *Queenie, Ltd. v. Nygard, Int'l*, if the possibility of "later use against the debtor . . . of an adverse decision" "could support application of the stay, there would be vast and unwarranted interference with creditors' enforcement of their rights against non-debtor co-defendants." 321 F.3d at 288; *Forcine Concrete & Constr. Co., Inc. v. Manning Equip. Sales & Serv.*, 426 B.R. 520, 525-26 (E.D. Pa. 2010) ("Nor does the possibility that a finding of liability against [the employees] might facilitate a later suit against [the debtor] suffice to constitute such 'unusual circumstances,' even assuming *arguendo* that [debtor] would be collaterally estopped from relitigating any issues decided in prior proceedings concerning the individual defendants."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 564 B.R. 192, 195 (S.D.N.Y. 2016) ("The Court is not persuaded that collateral estoppel . . . is even arguably implicated here, given that Debtor Defendants' bankruptcy has deprived them of a full and fair opportunity to litigate the claims against them in this forum at this time.").

B. The Delaware Class Action Will Not Adversely Affect The Debtors' Sale And Restructuring Efforts

An alternative to the "identity of interest" analysis is the extension of the stay to a non-debtor "where stay protection is *essential* to the debtor's efforts of reorganization." *McCartney v. Integra Nat. Bank North*, 106 F.3d 506, 510 (3d Cir. 1997) (emphasis added); *see also In re LTL MANAGEMENT, LLC*, 638 B.R. 291, 306 (Bankr. D.N.J. 2022) ("[A] critical factor in deciding whether to extend the stay is the potential adverse impact on a debtor's estate and prospect of reorganization."). In this analysis, courts "have stayed actions against non-debtor co-defendants where they have found that the bankrupt estate would be adversely affected because the creditor's action would prevent the non-debtor from contributing funds to the reorganization, or would consume time and energy of the non-debtor that would otherwise be devoted to a reorganization effort." *In re MCSi, Inc.*, 371 B.R. 270, 271 (S.D. Ohio 2004) (quoting *Gray v. Hirsch*, 230 B.R.

239, 243 (S.D.N.Y.1999)).

Here, the Debtors argue that continuation of the Delaware Class Action against the DiamondPeak Directors will (1) distract their attention away from the Debtors' restructuring efforts and deplete the bankruptcy estate and (2) implicate collateral estoppel concerns with respect to other actions that are currently stayed. These arguments are unsupported by evidence and are seriously flawed. The Debtors cannot show, and, indeed, have not shown, irreparable harm to their efforts to restructure if the Delaware Class Action is allowed to proceed against the DiamondPeak Directors.

i. The Potential For Indemnification Claims Does Not Deplete The Estates

The Debtors argue that the Delaware Class Action will deplete estate assets because the Delaware Class Action will give rise to indemnification claims of the DiamondPeak Directors against the Debtors' estates. In addition, the Debtors argue that there is a possibility that the D&O Policies will be insufficient to cover the claims if judgment was to be awarded to the Delaware Class Action. To highlight how indemnification can deplete estate assets and adversely impact the Debtors' restructuring efforts, the Debtors cite *W.R. Grace II*. However, in *W.R. Grace II*, it was anticipated that the non-debtor may assert in excess of 1,000 indemnification claims against the debtors through contractual indemnification agreements and under insurance policies on which the non-debtor was named or additionally insured. *See In re W.R. Grace & Co.*, 386 B.R. 17, 31–32 (D. Del. 2008). Needless to say, the Debtors are not liable for anywhere near that number of indemnification claims in relation to the DiamondPeak Directors, and, under the Delaware Code, it is not at all clear the Debtors will be liable for these potential indemnification claims.

Instead of acknowledging that the D&O Policies will protect the Debtors from depletion of estate assets regarding the indemnification of the DiamondPeak Directors, the Debtors revert to

a concern that the D&O Policies will be insufficient or that insurance proceeds would have to be shared with the Debtors. These conclusions are speculative at this juncture for a number of reasons. First, the Debtors' conveniently ignore that the Hudson Policy does not cover any losses sustained by the Debtors at all, that this policy may be sufficient to cover available losses of the Delaware Class Plaintiffs, and that the Debtors have no right to these policy proceeds. Second, among the DiamondPeak D&O Policies the Debtors did not include with their Motion is the Greenwich Policy, which is in place from February 27, 2019 to February 27, 2021, that included a primary policy of $10 million and an excess policy for an additional $5 million. *See* Sangwan Decl., Ex. J; *see also* Turetsky Decl., Ex. J. DiamondPeak extended the policy through February 27, 2027. *Id.* In fact, the Greenwich Policy's Claims Manager acknowledged that the Delaware Class Action triggered coverage under the Policy, generally accepted coverage of the DiamondPeak Directors' defense expenses relating to the Delaware Class Action, and Debtors do not appear to be competing for proceeds under the Greenwich Policy. *See* Sangwan Decl., Ex. K at -485, -488-92. The Greenwich Policy, of course, is in addition to any other D&O Policies. Third, while the Berkley Policy may also cover losses sustained by the Debtors, that policy has a $10 million self-insured retention and, at this juncture, it is entirely unclear whether those policy proceeds would be needed to satisfy the Delaware Class Plaintiffs' claims and, if so, whether the policy proceeds would be insufficient to satisfy any insured claims of the Debtors and the Delaware Class Plaintiffs.

Not only are arguments regarding the possibility that the Debtors and the Delaware Class Plaintiffs will, at some later date, be fighting over the proceeds of an insurance policy highly speculative, concerns over insufficient coverage are entirely premature and insufficient to stay the Delaware Class Action. The trial in this action is scheduled for March 2024. Issues of insurance

coverage should be dealt with, if at all, following a judgment in the Delaware Class Action in favor of the Delaware Class Plaintiffs and there is no reason whatsoever to deal with that issue now, after a year and a half of litigation and with discovery heading toward a conclusion.

Further, when extending the automatic stay to officers and/or directors of a debtor, courts in this district have previously employed a four-factor analysis in determining whether to apply the automatic stay to a debtor's directors and officers: (1) the involvement of the directors and officer in the reorganization process; (2) the burden imposed on the directors and officers if the litigation is not stayed; (3) the likelihood that the litigation would detract from the officers and directors' efforts to reorganize; and (4) whether the debtor's assets would likely be depleted as a result of the litigation." *See In re Cont'l Airlines*, 177 B.R. 475, 481 (D. Del. 1993); *In re Midway Games, Inc.*, 428 B.R. 327, 334 (Bankr. D. Del. 2010). Here, four of the five DiamondPeak Directors are not on the board of the Debtors and so the first three factors are minimally implicated since they will not be involved in the restructuring efforts and, it is important to recall that the fifth defendant is a director only, with limited oversight duties, and not an officer who would be involved in the day-to-day operations of the Debtors. As to the fourth factor, the Delaware Class Plaintiffs dispute that the Debtors' assets would be depleted as a result of the litigation.

ii. Debtors Face No Risk Of Collateral Estoppel And Their Involvement In The Delaware Class Action Would Not Interfere With Their Efforts To Reorganize

The Debtors argue that any continuation of the Delaware Class Action against the DiamondPeak Directors will preclude the Debtors from asserting certain defenses, proving exculpatory facts, or will subject them to the risk of adverse precedent. The Debtors' argument is premised on misplaced authority and has no merit.

The Debtors also assert that they may be collaterally estopped from litigating any issue decided in the Delaware Class Action. That argument is wholly without merit. Collateral estoppel may not be applied against a party in a subsequent proceeding where the party did not have a full and fair opportunity to litigate the claim or issue in the prior proceeding. *Allen v. McCurry*, 449 U.S. at 96-97, 66 L.Ed 2d at 314-15; *Haring v. Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 76 L.Ed 2d 595, 603 (1983). As the United States Supreme Court held in *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed 2d 210, 217 (1979):

> [u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action *involving any party to the prior litigation*.

Id. (emphasis added). Here, as discussed above, the automatic stay precludes any action against the Debtors while the Chapter 11 Cases are pending unless this Court lifts the automatic stay in its discretion, negating any risk of collateral estoppel in the other Actions, which are all currently stayed.

The Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), is instructive. There, the lead plaintiffs commenced a lawsuit against Pacor in state court seeking damages relating to exposure to asbestos supplied by Pacor. Pacor filed a third party complaint impleading the Johns-Manville Corporation. Subsequently, Johns-Manville filed for bankruptcy protection. The state court case was severed and Pacor moved for removal of the state case to the bankruptcy court. Following remand by the bankruptcy court and affirmance by the district court, the Third Circuit held "[s]ince Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel . . . . Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor."

Pacor, 743 F.2d at 995. Likewise, here, the Debtors will not be bound by collateral estoppel, as the Delaware Class Action will be dismissed without prejudice as to the Debtors, and the automatic stay prevents the Delaware Class Action from proceeding as to them.

While the Delaware Class Action and the Ohio Securities Class Action involve some of the same factual underpinnings, the claims are entirely distinct, and the defendants are entirely different (save Hamamoto). As described above, even a finding that Hamamoto breached his fiduciary duties in the Delaware Class Action would not necessarily mean that Hamamoto also violated the Federal Securities laws, much less that LMC itself is liable in that action. Accordingly, Debtors vastly overstate the need for LMC to remain involved in the Delaware Class Action going forward. And, as described above, LMC is on the cusp of having complied with the Motion to Compel, and will likely have satisfied its documentary discovery obligations by the time this Motion is argued before the Court.

And even if the Debtors were subject to a claim of collateral estoppel (which they are not), the alleged risk of collateral estoppel or evidentiary prejudice, in and of itself, is insufficient to justify extension of the automatic stay. As the Second Circuit held in *Queenie, Ltd. v. Nygard, Int'l*, if the possibility of "later use against the debtor . . . of an adverse decision" "could support application of the stay, there would be vast and unwarranted interference with creditors' enforcement of their rights against non-debtor co-defendants." 321 F.3d at 288; *Forcine Concrete & Constr. Co., Inc. v. Manning Equip. Sales & Serv.*, 426 B.R. 520, 525-26 (E.D. Pa. 2010) ("Nor does the possibility that a finding of liability against [the employees] might facilitate a later suit against [the debtor] suffice to constitute such 'unusual circumstances,' even assuming *arguendo* that [debtor] would be collaterally estopped from relitigating any issues decided in prior proceedings concerning the individual defendants."); *New Jersey Carpenters Health Fund v. Royal*

Bank of Scotland Grp., PLC, 564 B.R. 192, 195 (S.D.N.Y. 2016) ("The Court is not persuaded that collateral estoppel . . . is even arguably implicated here, given that Debtor Defendants' bankruptcy has deprived them of a full and fair opportunity to litigate the claims against them in this forum at this time.").

Additionally, the Debtors allege that involvement in litigation would negatively impact their efforts of a successful reorganization. Given non-involvement of all but one defendant in the Debtors' affairs, the Debtors' minimal discovery burdens moving forward, and the non-preclusive effect of any judgment(s) against the DiamondPeak Directors, the Debtors' concerns ring hollow. As previously stated, four out of five of the DiamondPeak Directors are no longer affiliated with LMC and so the implications of litigation would be minimal. And, while the Delaware Class Action is in the midst of discovery, the Company's sole obligation to date is responding a third party subpoena. These minimal obligations and disruptions, in case where the Debtors may be getting reimbursed or entitled to reimbursement from certain of the insurers with respect to any monies advanced to the DiamondPeak Directors, are, at best minor and routine obligations and, clearly, do not constitute the type of unusual circumstances sufficient to stay the Delaware Class Actions. In sum, unusual circumstances do not apply in this case to support the extension of the automatic stay to non-debtor third parties because neither the identity of interests nor the impact of restructuring efforts are implicated in the Delaware Class Actions.

II. THE EXTRAORDINARY INJUNCTIVE RELIEF REQUESTED BY THE DEBTORS IS NOT WARRANTED UNDER 11 U.S.C. § 105

The Debtors have failed to meet the exacting standards necessary to enjoin the Delaware Class Action pursuant to section 105 of the Bankruptcy Code. Pursuant to § 105(a) of the Bankruptcy Code, "[t]he court may 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). "The issuance of an

injunction under section 105(a) is governed by the standards generally applicable to the issuance of injunctive relief in non-bankruptcy contexts." *In re Phila. Newspapers, LLC*, 423 B.R. 98, 105 (E.D. Pa. 2010). In determining whether a preliminary injunction is appropriate, the Court considers the following factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

McTernan v. City of York, Pa., 577 F.3d 521, 527 (3d Cir. 2009) (quoting *United States v. Bell*, 414 F.3d 474, 478 n.4 (3d Cir. 2005)). "A preliminary injunction is an 'extraordinary remedy, which should be granted only in limited circumstances.'" *Kos Pharmaceuticals Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989)). "In considering a request for an injunction, these four factors are not weighed simultaneously against one another. Rather, the Court determines whether the first two threshold prongs are established, and if so, only then does it proceed to consider the third and fourth factors." *In re Phila. Newspapers, LLC*, 423 B.R. at 106 n.11 (citing *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002)).

Courts have recognized three (3) circumstances in which the entry of a § 105 injunction restraining creditors from proceeding against non-debtors may be appropriate:

> 1. when the non-debtor owns assets which will either be a source of funds for the debtor or when the preservation of the non-debtor's credit standing will play a significant role in the debtor's attempt to reorganize;
>
> 2. upon a showing that the non-debtor's time, energy and commitment to the debtor are necessary for the formulation of a reorganization plan;
>
> 3. where the relationship between the non-debtor and debtor is such that a finding of liability against the non-debtor would effectively be imputed to the debtor, to the detriment of the estate.

In re Saxby's Coffee Worldwide, LLC, 440 B.R. 369, 379 (Bankr. E.D. Pa. 2009). The three circumstances clearly do not apply to the Debtors and the DiamondPeak Directors.

A. Debtors Have Not Demonstrated A Reasonable Likelihood Of A Successful Reorganization

"[T]he court must apply the usual preliminary injunction standard . . . and consider whether the debtor has a reasonable likelihood of a successful reorganization." *In re W.R. Grace & Co.*, 386 B.R. at 33 (citations and internal quotation marks omitted)).

As noted in the Complaint, the Debtors only just commenced their bankruptcy cases on June 27, 2023. Debtors Br. at 24. However, in that short time, there has already been two (2) complaints and one (1) motion for relief from stay filed in the case. *See* D.I. 3, 82, 85. Further, in support of their position that they are likely to successfully restructure, Debtors point only to their "first day" declaration that they have "unencumbered cash sufficient to fund operations at least through the initial stage of these Chapter 11 Cases." Debtors Br. at 24.

While courts have been willing to engage in a speculative evaluation in considering the likelihood of a successful reorganization, the connection between the early stage of the case and the reason a debtor is seeking an injunction must be evaluated. *See e.g., In re Union Tr. Phila., LLC*, 465 B.R. 765, 773 (Bankr. E.D. Pa. 2011) (finding the debtor was entitled to additional time to formulate a plan at this early stage). Here, the Delaware Class Plaintiffs believe that, at this early stage of the case, the uncertain prospects for a reorganization (and even confirmable liquidating plan) are such that this factor does not weigh in favor of the court granting injunctive relief.

B. The Debtors Cannot Establish A Substantial Threat Of Imminent And Irreparable Injury If The Injunction Is Not Granted

The Debtors must establish that they will suffer irreparable injury unless the injunction is granted. "A plaintiff seeking a preliminary injunction must establish that . . . he is likely to suffer irreparable harm in the absence of preliminary relief." *In re Roman Cath. Diocese of Rockville Ctr., New York*, No. 20-12345 (MG), 2023 WL 3750442, at *24 (Bankr. S.D.N.Y. June 1, 2023) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)); *see also In re Sabratek Corp.*, 257 B.R. 732 (Bankr. D. Del. 2000) (declining to enjoin a state court matter between non-debtor parties, which did not involve property of the estate, because there was no showing of irreparable harm).

Some courts have determined that an even more stringent standard should govern when a debtor seeks to enjoin an action against executive officers in a securities class action context, as is the case here. Indeed, the current climate of rampant executive malfeasance and corporate fraud mandates such a stringent standard. In *Duval v. Gleason*, Case No. C-90-242-DLJ, 1990 WL 261364, *4 (N.D. Cal. Oct. 1990), the court reasoned:

> Unlike a products liability action in which a suit against an officer is effectively one against the corporation itself, the present securities action seeks to attach liability for the specific fraudulent acts of named individuals. Thus the securities laws allow for the independent liability of the officers or other parties involved, and proceedings like the present may go forward without the participation of the corporation. To hold otherwise would allow the Bankruptcy Act to create a sizable loophole through which malfeasant corporate officers and directors and their insurers could escape, at least temporarily, all civil prosecutions of their individual fraudulent acts by having the corporation file a bankruptcy petition. We cannot agree that the protections afforded by the Bankruptcy Act were intended to be so all encompassing as to shield such non-debtor third parties.

See also GATX Aircraft Corp. v. M/V Courtney Leigh, 768 F.2d 711, 716 (5th Cir. 1985); *Williford v. Armstrong World Indus., Inc*., 715 F.2d 124, 128 (4th Cir. 1983); *Morgan v. Kobrin Sec. Inc*., 649 F. Supp. 1023, 1032 (N.D. Ill. 1986).

Irreparable harm in the context of a reorganization is shown where the failure to enjoin the actions "would embarrass, burden, delay or otherwise impede the reorganization." *Alert Holdings, Inc. v. Interstate Protective Servs., Inc.*, 148 B.R. 194, 200 (Bankr. S.D.N.Y. 1992); *In re Cont'l Airlines*, 177 B.R. 475, 481 n.6 (D. Del. 1993) (the debtor must show that the securities litigation and responding to discovery "'would so consume the time, energy and resources of the debtor that it would substantially hinder the debtor's reorganization effort'" (citations omitted)). Strict proof, not conclusory allegations, is needed to sustain this burden. *Dore & Assocs. Contracting, Inc. v. American Druggists' Ins. Co.*, 54 B.R. 353, 358 (Bankr. W.D. Wis. 1985) ("Speculative and conclusory allegations are clearly insufficient."); *Phar-Mor, Inc. Sec. Litig.*, 166 B.R. at 62-63 (denying a request for an injunction under section 105 of the Bankruptcy Code, because the court found the allegation that pursuit of an action against the debtor's auditor would delay the reorganization was "mere speculation [that did] not constitute the type of proof required to entitle the [d]ebtors to an injunction").

As set forth above, the Delaware Class Action will have little or no impact on the Debtors' property, and the Debtors have not established that the DiamondPeak Directors (most of whom are no longer affiliated with LMC) will be so distracted and subject to burdensome discovery demands in the Delaware Class Action that enjoining the Delaware Class Action is justified. Indeed, LMC should be on the verge of completing its document production to Delaware Class Plaintiffs. Far from showing irreparable harm, the facts show, at most, a minor set of duties relating to its discovery obligations in the Delaware Class Action.

C. The Debtors Cannot Show That The Threatened Injury To Them Outweighs The Threatened Harm An Injunction Might Cause The Delaware Class Plaintiffs

The extraordinary injunctive relief sought by the Debtors can be granted only if, on balancing the interests of the respective parties, the Court finds that the Debtors have shown that any actual harm they will suffer outweighs the very clear and substantial harm to the Delaware Class Plaintiffs. *See Continental Air Lines*, 61 B.R. 758, 771 (S.D. Tex. 1986). The Debtors have not, and cannot, assert that the Delaware Class Plaintiffs will not be injured if the stay is extended.

It is axiomatic that justice delayed is justice denied. It is no surprise therefore, that "[t]he party seeking a stay bears the burden of justifying a delay tagged to another legal proceeding." *Wedgeworth v. Fibreboard Corporation, et al*., 706 F.2d 541, 545 (5th Cir. 1983).

If the prosecution of the Delaware Class Action is stayed for any significant length of time, critical information and knowledge may be lost. Human recollection inevitably fades as time passes. Similarly, pertinent documents might be lost or discarded. Thus, any injunction of the Delaware Class Action will deprive the Delaware Class Plaintiffs of their day in court. *See Continental Air Lines*, 61 B.R. at 782; *In re Lion Capital Group*, 44 B.R. 690, 703 (Bankr. S.D.N.Y. 1984).

Moreover, the Debtors have repeatedly stated that they are "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." Debtors Br. at 26. Delaware Class Plaintiffs and the Class therefore face the added risk of harm to the value of their claims by virtue of the bankruptcy proceedings, and potential impairment of their ability to litigate their claims moving forward.

Conversely, the Debtors cannot show that the unsupported speculation regarding any impact on their chapter 11 cases outweighs the very real harm to Delaware Class Plaintiffs. The alleged burden in responding to discovery or defending the Delaware Class Action has not been established, nor have the Debtors shown any burden or economic impact on their estates.

D. Issuance Of A Preliminary Injunction Is Adverse To The Public Interest

The Debtors must set forth facts showing that the issuance of an injunction is not adverse to the public interest. *Tenafly*, 309 F.3d at 157. This requires the balancing of the public interest of a successful bankruptcy reorganization with other competing societal interests. *In re Fowler Floor & Wall Covering Co*., 93 B.R. 55, 58 (Bankr. M.D. Pa. 1988). The "public interest" has been defined as "something in which the public, the *community at large*, has some *pecuniary* interest, or some interest by which *their legal rights or liabilities are affected*." *In re Costa and Head Land Co*, 68 B.R. 296, 303 (Bankr. N.D. Ala. 1986) (emphasis in original). Moreover:

> It has been a cardinal principle of bankruptcy law from the beginning that its effects do not normally benefit those who have not themselves 'come into' the bankruptcy court with their liabilities and all their assets. . . . To violate this principle on the appealing facts of a particular case, where no specific necessity for doing so is set forth, is simply to invite a wholesale restructuring of the expectations of those involved in commercial transactions without any indication from Congress that such a profound change was intended.

Robbins v. Chase Manhattan Bank, 1994 U.S. District LEXIS 5100 at *19-*20 (W.D.Va. 1994), quoting *In re Venture Properties, Inc.*, 37 B.R. 175, 177 (Bankr. N.H. 1984). The Bankruptcy Code was never intended to be used as a shield behind which officers and directors of a debtor corporation, not to mind former officers and directors, could hide from their violations of their fiduciary duties. *See In re Chateaugay Corp*., 76 B.R. 945, 948-49 (S.D.N.Y. 1987). The prompt resolution of stockholder litigation against directors and officers of a public corporation is in the public interest, more today than ever.

Moreover, several now successful corporate reorganizations and liquidations coexisted with companion securities class actions against the respective debtor's officers, directors, accountants, and underwriters without any stay or injunction of the ongoing private actions, and without undue inconvenience to, or burden on, the debtor. Securities litigation implicated by some of the largest and most complicated chapter 11 bankruptcy proceedings in history have continued despite pending securities litigation, some in this very court. *See, e.g.*, *In re WorldCom, Inc*., 298 B.R. 308 (S.D.N.Y. 2003) (permitting securities litigation to continue against non-debtor defendants); *see also In re Northwest Airlines Corp*., Adv. No. 06-01219 (ALG) (Bankr. S.D.N.Y. Apr. 27, 2006) (order denying request to extend automatic stay or enjoin securities and ERISA litigation against non-debtor defendants in complex airline bankruptcy). Those debtors filed and confirmed plans of reorganization or liquidation in the face of active securities litigation in which the debtors and their officers and directors participated and provided discovery. Indeed, to enjoin the ongoing prosecution of the Delaware Class Action would not only ignore these lessons of the past, but would set a very unfortunate and dangerous precedent for the future in which actions against third-parties that impose a minor burden and threaten no irreparable harm to estate are stayed without any real showing of immediate and irreparable harm. In addition to the procedural deficiencies and legal bases requiring denial of the Motion, public policy also requires that the Motion be denied.

CONCLUSION

Delaware Class Plaintiffs request that an Order be entered denying the Motion and granting such other and further relief as the Court deems just and proper.

Dated: July 19, 2023
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Joseph C. Barsalona II, hereby certify that on July 19, 2023, I caused a copy of the foregoing *DEFENDANTS' BRIEF IN RESPONSE AND OPPOSITION TO DEBTORS' MOTION TO EXTEND THE AUTOMATIC STAY AND FOR INJUNCTIVE RELIEF PURSUANT TO 11 U.S.C. § 105* to be served on all parties who are scheduled to receive notice through the Court's ECF system.

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