Docket #0018 Date Filed: 7/26/2023

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) Re: D.I. 2

DEBTORS' REPLY IN SUPPORT OF THE 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 Debtors submit this reply in support of their *Motion to Extend the Automatic Stay and for Preliminary Injunctive Relief Pursuant to 11 U.S.C. § 105* [Adv. D.I. 2] (the "**Motion**").[2]

PRELIMINARY STATEMENT

Less than a month into these Chapter 11 Cases, the Debtors have just begun their efforts to restructure by selling their business, centralizing the resolution of a variety of different litigation claims, and negotiating and confirming a plan that will maximize distributions to the Debtors' creditors and, if there is sufficient value, shareholders. One of the most profound risks to the Debtors' ability to successfully restructure is if prepetition litigation continues to erode the value of the Debtors' estates, diverts vital (and shrinking) resources, and distracts management.

In an effort to continue prosecuting the Delaware Class Action, Defendants argue that the Debtors' indemnification obligations and available insurance coverage may be sufficient to cover all liability associated with the Delaware Class Action. Defendants miss the point. The limited insurance coverage available to *all* D&O Defendants will be depleted by ongoing defense costs and any adverse judgment in the Delaware Class Action, depriving the Debtors of needed flexibility to potentially resolve the claims of other prepetition litigation claimants. Defendants also largely ignore the alternative, independent bases to extend the automatic stay established in the Opening Brief. Any of these bases, standing alone, is sufficient to grant the Motion.

First, the Debtors share an identity of interest with the Delaware D&O Defendants because Defendants' claims are inextricably intertwined with the claims asserted in the other Actions against both the Company and the other D&O Defendants. Defendants' argument that the Actions involve different causes of action and different class periods is irrelevant. The fiduciary duty claims brought in the Delaware Class Action are based on the same alleged

[2] Capitalized terms not defined have the meanings set forth in the *Brief in Support of the Debtors' Motion to Extend the Automatic Stay and for Injunctive Relief Pursuant to 11 U.S.C. § 105* [Adv. D.I. 6] ("**Opening Brief**").

misstatements made by the same individuals during the same period of time as the causes of action asserted in each of the other Actions, including the alleged violations of federal securities law. Moreover, the class period in the Ohio Securities Class Action is broader than, and includes, the class period and *all* putative class members in the Delaware Class Action. It is therefore impossible to litigate the Delaware Class Action without implicating the Debtors' interests or alleged liability in the other Actions.

Second, Defendants fail to meaningfully address the substantial threat that continuing to litigate the Delaware Class Action poses to the Debtors' restructuring efforts. It is true that the Debtors are not named defendants in the Delaware Class Action, but any factual or legal findings against the Delaware D&O Defendants will prejudice the Company in the remaining Actions in which the same defendants are also named, including with respect to claims filed in the Chapter 11 Cases. Even while the stay is imposed in the other Actions, any adverse ruling threatens to impact the value of the claims in the Derivative Actions, which are property of the Debtors' estate. The Debtors will be required to expend significant resources to participate in the Delaware Class Action in order to avoid these results, in addition to the Debtors' direct (and expensive) discovery obligations. Unlike the other chapter 11 cases identified by Defendants where "companion" litigation did not interfere with the restructuring process, the Debtors have only the limited cash and resources available as of the Petition Date—any delay or drain on those resources will permanently hinder their chance of a successful restructuring.

Third, the Debtors have satisfied each of the requirements for a preliminary injunction under section 105(a) of the Bankruptcy Code. The Debtors are likely to successfully restructure despite the fact that it is early in these Chapter 11 Cases, the Debtors will face irreparable injury from the continuation of the Delaware Class Action, and the harm to the Debtors far outweighs

any potential delay or "risk of harm" to Defendants' ability to litigate their claims. The public interest also weighs in favor of an injunction, providing the Debtors with the breathing spell needed to effectuate a fair and final resolution of the Actions for the benefit of the Debtors, their estates, and all stakeholders. Defendants raise no countervailing public interest in their favor.

The Debtors respectfully request that the Court grant the Motion, extend the automatic stay, and enjoin the Delaware Class Action for the duration of the Chapter 11 Cases.

ARGUMENT

I. THE COURT SHOULD EXTEND THE AUTOMATIC STAY UNDER § 362

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

The first basis for extending the automatic stay is that the Debtors and the Delaware D&O Defendants share an identity of interest. *See In re Mallinckrodt plc*, No. 20-50850-JTD, 2021 WL 5275781, at *2 (D. Del. Nov. 10, 2021). This is true for at least two reasons.

1. Defendants' Claims Are Inextricably Intertwined With Claims Asserted Against the Company

Defendants recognize that the claims asserted in the Ohio Securities Class Action and the Derivative Actions—and the nearly identical allegations underlying those claims—are inextricably intertwined. *See* Resp. 7 ("[S]tockholder 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.").[3] Yet Defendants maintain that their breach of fiduciary duty claims should be treated differently, arguing that there is no "compelling basis" to extend the automatic stay *because* their claims against the Delaware D&O Defendants are direct, not derivative. *See id.* at 10–13. This cannot be correct. Derivative claims are property of the

[3] References to the "**Response**" or, as cited, "**Resp.**" refer to *Defendants' Brief in Response and Opposition to the Debtors' Motion to Extend the Automatic Stay and for Injunctive Relief Pursuant to 11 U.S.C. § 105* [Adv. D.I. 14].

bankruptcy estate and subject to the automatic stay. *In re RNI Wind Down Corp.*, 348 B.R. 286, 293 (Bankr. D. Del. 2006). This means that the question of whether "unusual circumstances" exist to warrant extending the stay can only apply to direct claims against non-debtors.

The Delaware Class Action and each of the other Actions are based on the same alleged false or misleading statements made by the same individuals while in positions of control and influence over the Company's affairs, including the content of public statements related to the SPAC Merger. *See* Op. Br. 5–9. The Debtors' operations and conduct are thus "at the core of the issues raised" in all of the claims asserted. *In re W.R. Grace & Co.*, 386 B.R. 17, 30 (Bankr. D. Del. 2008). It is not possible to adjudicate claims against the Delaware D&O Defendants without impacting the Debtors' interests or alleged liability in the other Actions. *See In re Reliance Acceptance Grp., Inc.*, Nos. 98-288 (PJW), A-98-310, 2000 WL 33712305, at *15–16 (Bankr. D. Del. Dec. 6, 2000) (staying action because claims were based on non-debtor's "alleged improper conduct engaged in with [debtor]"); *In re Cont'l Airlines*, 177 B.R. 475, 479–80 (D. Del. 1993) (finding identity of interest where "the substantive allegations raised in the pleadings . . . demonstrate that [debtor] is the alleged wrongdoer in those actions").

Defendants attempt to distinguish their claims from the Ohio Securities Class Action on the ground that they assert a different cause of action and a narrower class period. Resp. 15, 22. But the allegations of wrongdoing in both Putative Class Actions are based on the exact same misstatements made by the same individuals during the same period of time. As a result, the wrongdoing at issue in the Delaware Class Action is indistinguishable from alleged wrongdoing by the Company in the Ohio Securities Class Action. Op. Br. 15. And, while the Ohio Securities Complaint includes *additional* allegations, Defendants do not allege any unique facts or circumstances not also alleged in the Ohio Securities Class Action. *See, e.g.*, Turetsky

Decl. Ex. D (Ohio Sec. Compl.) ¶ 479 (alleging that, as a result of the Company's and the D&O Defendants' joint conduct, including "dissemination of the false and/or misleading Proxy Statements," plaintiffs and members of the class "were deprived of their right to be presented with accurate proxy materials . . . [and] were caused to not exercise their redemption rights"). The alleged injury suffered by individual shareholders in both Putative Class Actions—loss in the value of their stock—is identical. *See id.* ¶¶ 436–37; Turetsky Decl. Ex. E (Del. Class Action Compl.) ¶¶ 115–25. That these same allegations can give rise to different causes of action with independent elements or pleading requirements is both undisputed and irrelevant, as are Defendants' cited cases. *See* Resp. 15 (citing out-of-circuit decisions for the proposition that breach of fiduciary duty does not, on its own, prove a violation of the federal securities laws).

Moreover, the class period in the Ohio Securities Class Action is broader than, and includes, the class period and *all* putative class members in the Delaware Class Action. *See* Turetsky Decl. Ex. D ¶¶ 442–43 (defining the class as anyone that acquired stock between August 3, 2020 through July 2, 2021, inclusive, and/or anyone that held their stock on September 21, 2020). The putative class in the Delaware Class Action consists of anyone that held stock from September 21, 2020 through October 23, 2020—i.e., stockholders that acquired shares before October 23, 2020 and did not redeem those shares by that date—all of which are included in the Ohio Securities Class Action. *See* Turetsky Decl. Ex. E ¶ 148; *see also* Op. Br. 6–8.

2. The Debtors' Contractual Obligation to Indemnify All D&O Defendants Provides Additional Evidence of Identity of Interest

The Debtors are contractually obligated to indemnify all five Delaware D&O Defendants under the LMC or DiamondPeak bylaws and indemnification agreements. *See* Op. Br. 17–22. Defendants argue these obligations do not warrant extending the automatic stay because their claims "might not trigger a right of indemnification under Delaware law," in which

case the Delaware D&O Defendants' right to indemnification may not be "absolute." *See* Resp. 11–13. This misconstrues the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), which does not hold that a non-debtor must be "entitled to *absolute* indemnity by the debtor on account of *any* judgment" for the stay to be extended. Resp. 13.

In *A.H. Robins*, the court held that "unusual circumstances" warranting a stay exist when 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]n illustration of such a situation* would be a suit against a third-party who is entitled to absolute indemnity by the debtor." 788 F.2d at 999 (emphasis added). Absolute indemnity is an example, not the rule. *See In re LTL Mgmt., LLC*, 638 B.R. 291, 312 (Bankr. D.N.J. 2022) ("[T]his Court remains unpersuaded that 'absolute' indemnity is a prerequisite for extension of the automatic stay."). As noted in *LTL*, the Fourth Circuit clarified its decision in *A.H. Robins*, stating that it "found that a stay was authorized under 11 U.S.C. § 362(a)(3) because Aetna *might* seek indemnification from Robins for any damages it had to pay, thus implicating the debtor's property." *Id.* (quoting *A.H. Robins Co. v. Aetna*, 828 F.2d 1023, 1025 (4th Cir. 1987)).

The question of whether the Debtors will ultimately be required to indemnify the Delaware D&O Defendants for "bad faith" is academic absent a ruling on the merits of Defendants' claims and, even if true, neither negates the Debtors' *present* indemnification risks nor precludes extending the stay. *See LTL*, 638 B.R. at 312 ("mere possibility of indemnification obligations warrants extension of the automatic stay"); *In re SN Liquidation, Inc.*, 388 B.R. 579, 548 n.5 (Bankr. D. Del. 2008) ("[T]he Court cannot assume [plaintiff] will establish fraud and therefore cannot assume that Debtors do not have indemnification obligations.").

B. The Delaware Class Action Will Adversely Affect the Debtors' Sale and Restructuring Efforts

The Delaware Class Action would interfere with the Debtors' restructuring efforts, which is an independent basis to extend the stay. *McCartney v. Integra Nat. Bank North*, 106 F.3d 506, 510 (3d Cir. 1997).

1. If Not Stayed, the Delaware Class Action Will Expose the Debtors to Increased Indemnification and Liability Risks

Despite Defendants' argument that the Delaware D&O Defendants "appear to have ample insurance coverage" (Resp. 13), the Debtors' D&O Policies will likely be insufficient to provide full coverage for the Delaware Class Action. Op. Br. 19.[4] Given that the $15 million coverage limit under the DiamondPeak D&O Policies has been applied to fund multiple Actions as a single "Claim" since at least April 2021 (*see* Sangwan Decl. Ex. K at 5), ongoing reimbursement or advancement of defense costs and attorneys' fees and any judgment will almost certainly exceed the remaining coverage limit. Defendants do not identify the damages they are seeking. If successful on their claims, damages awarded to Defendants could independently exhaust the remaining coverage available to any of the D&O Defendants, exposing the Debtors to indemnification claims and liability for additional attorneys' fees, costs, and potential damages in this and the other Actions. *See In re Midway Games, Inc.*, 428 B.R. 327, 334 (Bankr. D. Del. 2010) (extending stay where debtors would be directly responsible for indemnifying target officer, thereby "impacting Debtors' remaining assets"); *In re Circle K Corp.*, 121 B.R. 257, 262 (Bankr. D. Ariz. 1990) (enjoining litigation because, to the extent

[4] Defendants attack the Debtors' attempt to streamline its Motion papers by including examples of D&O Policies (rather than filing hundreds of pages under seal) as "an apparent effort to escape the fact that the claims against the DiamondPeak Directors may be subject to insurance coverage." Resp. 4. Defendants have not sought production of the D&O Policies—either informally or through discovery in this adversary—and have made no attempt to meet and confer with the Debtors' counsel, so any attempt to characterize the Debtors as withholding information is baseless.

expenditures exhausted insurance policy limits, assets of the estate would be diminished).[5]

The Company's current D&O Policies do not mitigate this risk, as those insurers have already denied coverage for the Actions, including the Delaware Class Action. *See* Op. Br. 19 & n.14; Kroll Decl. ¶ 6–8. Defendants fail to acknowledge this. *See* Resp. 8–9; 13. If the Delaware Class Action proceeds to an adverse judgment, depleting the entire coverage limit under the DiamondPeak D&O Policies, the Debtors will be responsible for costs in excess of those limits, notwithstanding the Debtors' other D&O Policies. Even though the Debtors are not named insureds under DiamondPeak D&O Policies, the remaining proceeds are "an important asset of the estate" and "any action which may diminish the value of that asset is subject to a stay under section 362(a)(3)." *In re NanoMech, Inc.*, No. 19-10851 (JTD), 2019 BL 387501, at *2 (Bankr. D. Del. Oct. 9, 2019) (enjoining litigation "intimately intertwined" with debtor where use of D&O insurance "would risk substantially diminishing an important asset of the estate").

These concerns are hardly "premature," and waiting until a judgment has been issued in the Delaware Class Action, as Defendants suggest (Resp. 19), would seriously undermine the Debtors' ability to negotiate and confirm a plan that provides equitable recoveries to all similarly situated litigation claimants. Absent a stay, the Debtors may lose all flexibility to use those proceeds toward an efficient, equitable resolution of all the Actions in this Court. This threat to the Debtors' restructuring is sufficient to warrant a stay; absolute certainty is not required. *See 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'" (emphasis added) (internal citation omitted)); *In re Bernard L. Madoff Inv. Sec.*, 512 F. App'x 18, 20 (2d Cir. 2013) ("Section 105(a) is to be 'construed liberally to enjoin suits that *might*

[5] This situation is unlike *In re Uni-Marts, LLC*, 404 B.R. 767 (Bankr. D. Del. 2009), where any recovery against the non-debtor would have been "modest" in relation to the available insurance proceeds. *Id.* at 781.

impede the reorganization process'—or, as here, the process of liquidation." (emphasis added)).

2. The Risk of Collateral Estoppel and Evidentiary Prejudice Will Force the Debtors to Divert Resources, Including Key Management

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 other proceedings, including in bankruptcy. *See* Op. Br. 20–21. The fact that the Debtors are not named defendants in the Delaware Class Action does not lessen this risk. *See* Resp. 21–22 (arguing that collateral estoppel does not apply where a party did not have "a full and fair opportunity" to litigate the issue). Defendants' argument to the contrary has been rejected by courts in this Circuit. *See, e.g.*, *LTL*, 638 B.R. at 314 (rejecting argument and noting that "[t]he Third Circuit explicitly cautioned against this type of logic" (citing *W.R. Grace & Co.*, 115 F. App'x 565)). Here, continuation of the Delaware Class Action would subject the Debtors a direct risk of res judicata, collateral estoppel, and evidentiary prejudice in at least four ways.

First, an adverse ruling against the Delaware D&O Defendants—at least one of which is also a named defendant in each of the other Actions—will subject those defendants to collateral estoppel or evidentiary prejudice in the other Actions, which directly impacts the Debtors. *See* Op. Br. 20–21. Because the Company's liability is coextensive with that of the D&O Defendants in the Ohio Securities Class Action, any preclusive effect with respect to Mr. Hamamoto (who is named in both Putative Class Actions) will apply equally against the Company. *See* Turetsky Decl. Ex. D ¶ 474 (alleging the Company is liable for "issuing and disseminating . . . false and misleading statements . . . to the same extent as Defendant Hamamoto"), ¶ 453 (alleging the Company and D&O Defendants acted "individually and in concert"), ¶ 457 (alleging the Company and D&O Defendants are "individually and collectively responsible for making the

false and misleading statements").[6] A finding that any of the alleged misstatements are false or misleading would also prejudice all D&O Defendants in the other Actions.

Second, contrary to Defendants' assertion that there is no risk of preclusive effect while the Actions are stayed (Resp. 7, 20–21), the facts developed in the Delaware Class Action and any adverse rulings could be used against the Debtors in their efforts to resolve other proofs of claim. *See, e.g.*, *SN Liquidation*, 388 B.R. at 585 (finding "collateral estoppel concerns" warranted extending the stay because "facts developed [in the underlying action] could be used in the resolution of the" proof of claim against the debtors).

Third, adverse factual or legal findings could also undercut the Debtors' ability to resolve the Actions through settlement, destabilize the balance of negotiations, and inhibit the Debtors' ability to resolve all Actions in a uniform, equitable manner. *See In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81, 95–96 (2d Cir. 2014) (affirming bankruptcy court's stay enjoining two putative class actions that threatened to prejudice the trustee's settlement of related claims, unravel months of negotiations, and undermine efforts to maximize recovery for the estate).

Fourth, continued litigation could prejudice the Debtors' interest in the Derivative Actions, which are property of the estate. Apart from potentially affecting the value of those claims, a judgment in the Delaware Class Action could result in inconsistent judgments. *See e.g.*, *In re CD Liquidation*, 462 B.R. 124, 134 (Bankr. D. Del. 2011) (enjoining shareholder's claim that threatened to "usurp" liquidation trustee's control over estate claims and create the possibility of inconsistent judgments); *In re The 1031 Tax Grp., LLC*, 397 B.R. 670, 685 (Bankr. S.D.N.Y. 2008) (enjoining claims "closely related" to trustee's because permitting litigation

[6] The automatic stay does not apply to the D&O Defendants in the Ohio Securities Class Action, including Mr. Hamamoto, so any adverse finding will prejudice the Company to the same extent as Mr. Hamamoto whether in the Chapter 11 Cases or once the automatic stay is lifted as to the Debtors. Thus, Defendants' reliance on *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), is misplaced.

"before the Trustee has had the opportunity to resolve the issues" jeopardized the restructuring).

The risk that any adverse finding could have preclusive or precedential effect will force the Debtors and key management—including individuals not named as defendants—to participate in the Delaware Class Action to protect the Debtors' interests. *See SN Liquidation*, 388 B.R. at 585 ("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"); *In re Am. Film Techs., Inc.*, 175 B.R. 847, 855 (Bankr. D. Del. 1994) ("[B]ecause of the identity of subject matter, issues and parties involved, the [action] squarely implicates [debtor's] indemnification obligations and exposes it to collateral estoppel prejudice if it does not participate in that case.").[7] This belies Defendants' incorrect assertion that continued litigation will not distract from the Debtors' restructuring efforts because only Mr. Hamamoto is a current director of the Company. *See* Resp. 20, 23. The harm to the Debtors' ability to successfully restructure will only become more acute the longer the Delaware Class Action is allowed to proceed while the full attention of Debtors' current leadership team is needed to complete the critical tasks at hand, including the Debtors' sale process. *See* Op. Br. 21–22; Kroll Decl. ¶¶ 3, 6.

Even absent this risk, the Debtors will be forced to participate in the Delaware Class Action. Defendants address only the Company's discovery obligations pursuant to a third-party subpoena to argue the Debtors' remaining obligations are "minimal." Resp. 23. The Company cannot simply reproduce all documents it has produced to federal regulators; those 54 production volumes include documents that are not responsive to Defendants' subpoena, thus requiring the Company to apply search terms (which it is attempting to negotiate with Defendants) to narrow

[7] In *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282 (2d Cir. 2003), the court declined to extend the automatic stay where the sole basis for seeking the stay was the fear that offensive collateral estoppel could be used against the debtor in a later proceeding. *Id.*; *see also Forcine Concrete & Constr. Co., Inc. v. Manning Equip. Sales & Serv.*, 426 B.R. 520, 525–26 (E.D. Pa. 2010). Here, the risk of collateral estoppel is neither the sole basis to extend the stay nor is it "speculative" in light of the four other Actions pending against the Debtors and the D&O Defendants.

the production set as ordered by the Delaware court on June 9, 2023. *See* Sangwan Decl. Ex. G at 2–3, 9. Reviewing even a narrower set of the nearly 200,000 documents and almost a million pages produced to regulators for responsiveness to Defendants' subpoena will be substantial and expensive. *See id.* at 6.

Moreover, because the vast majority of documents Defendants' seek are in the Company's possession, the Debtors will be responsible for any further ESI and document production on behalf of the Delaware D&O Defendants. Op. Br. 21–22. Defendants do not contest that they are *also* seeking to depose, and will seek trial testimony from, the Company and its current directors and officers. *Id.* Participation in extensive discovery, let alone trial preparation and trial, will significantly impair the Debtors' ability to complete a timely sale and confirm a chapter 11 plan that benefits all stakeholders. *See In re W.R. Grace & Co.*, 115 F. App'x 565, 569 (3d Cir. 2004) (affirming stay where "discovery from [the debtor] would be needed" and "[debtor]'s absence would disadvantage both [parties] as a practical and legal matter"); *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.").

II. THE COURT SHOULD ISSUE AN INJUNCTION UNDER § 105

A. The Debtors Are Likely to Successfully Restructure

Defendants argue (without support) that the Debtors' likelihood of a successful restructuring is "uncertain" at this juncture and, therefore, does not warrant injunctive relief. Resp. 25. This conflicts with the weight of authority in the Third Circuit, which holds that this factor generally favors the debtor where, as here, the bankruptcy case is in its early stages. *See In re LTL Mgmt.*, LLC, No. 23-12825 (MBK), 2023 WL 3136666, at *7 (Bankr. D.N.J. Apr. 27,

2023) ("[C]ertainty is not required; a debtor need only show the possibility that it will succeed—a hurdle that [debtors have] cleared given the early stages of this litigation."); *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 injunction where prospects for a successful restructuring remained viable "at this early stage").

There is no dispute that the Debtors are proceeding on track in the early days of these Chapter 11 Cases. Therefore, this factor favors an injunction. *See, e.g.*, *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" where debtor was "evaluating strategic alternatives for its remaining businesses and assets, including various . . . sale options); *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 finding "nothing has transpired in this case that would lead [the court] to conclude that the debtor does not have [a] reasonable likelihood of reorganization").

B. Absent an Injunction, the Debtors Will Face Irreparable Harm

The biggest risk to the Debtors' restructuring is if litigation of the Delaware Class Action erodes the value of the Debtors' estates, distracts key management, and leads to a judgment that will undermine the Debtors' ability to negotiate a restructuring plan—all of which will cause irreparable injury to the Debtors, their estates, and all stakeholders. Defendants place undue significance on whether litigation will distract the Delaware D&O Defendants, rather than the Debtors and their current leadership team, from the critical restructuring tasks at hand. *See* Resp. 27. Continuation of the Delaware Class Action would divert the Debtors' limited (and shrinking) resources, including management's time and attention, and significantly impair their

efforts to complete the timely and effective sale process and consummate a plan. Op. Br. 25.

Defendants' only remaining argument is that "an even more stringent standard should govern" the Debtors' showing of irreparable injury. *See* Resp. 26 (citing *Duval v. Gleason*, No. C-90-242-DLJ, 1990 WL 261364, *4 (N.D. Cal. Oct. 1990)). It is unclear whether this "stringent standard" is recognized in this Circuit but, even if it is, Defendants acknowledge that it applies only in the "securities class action context." *Id.* Although the Delaware Class Action involves the value of the Company's shares and relies on the same general allegations as the Ohio Securities Class Action, these allegations do not transform Defendants' breach of fiduciary duty claims into claims arising under the securities laws—a fact that Defendants readily point out in support of their other arguments. *See id.* at 15–16 (attempting to distinguish Defendants' claims from the "claims arising under the Federal Securities law" asserted in the Ohio Securities Class Action). Defendants cannot have it both ways. This factor favors an injunction.

C. The Harm to the Debtors Outweighs Any Potential Delay or "Risk of Harm" to Defendants' Ability to Litigate Their Claims

Compared to the harm the Debtors will likely face if the Delaware Class Action is allowed to proceed, the sole harm asserted by Defendants—a delay in adjudicating their claims—is both negligible and unremarkable in the context of a bankruptcy. *See* Resp. 28. Contrary to Defendants unsupported assertion that "[i]t is axiomatic that justice delayed is justice denied" (*see id.*), mere delay in litigating a claim does not outweigh the potential harm to the Debtors. *See 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," so "a further delay of limited duration will not cause [plaintiff] irreparable harm."); *Union Tr. Phila.*, 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]."). Speculation about "added

risk of harm" to Defendants' claims "by virtue of the bankruptcy proceedings" (Resp. 28) does not show that Defendants will suffer any actual harm if they are required to wait while the Debtors avail themselves of the full protections of the automatic stay. Thus, the balance of harms weighs in favor of the Debtors.

D. The Public Interest Is Best Served By Enjoining the Delaware Class Action

The public interest weights in favor of enjoining the Delaware Class Action to effectuate a uniform stay of the Actions while the Debtors' work to consummate a plan that provides for orderly distributions among creditors, including through centralized resolution of all the Actions in this Court. *See SN Liquidation*, 388 B.R. at 585 (public interest favored injunction where "Debtors' right to fashion an orderly liquidation may be jeopardized"). Defendants identify no countervailing public interest in their favor, but offer only the opinion that "resolution of stockholder litigation against directors and officers of a public corporation is in the public interest, more today than ever." Resp. 29. The Debtors do not disagree, but the public interest is best served here by allowing the Debtors to pursue an efficient and equitable resolution of the substantially similar Actions and fix their litigation liabilities while preserving maximum value for all stakeholders. *See In re United Health Care Org.*, 210 B.R. 228, 234 (S.D.N.Y. 1997) (public interest favored enjoining litigation that would interfere with potential settlement in bankruptcy and "generat[e] large legal fees that neither the defendants nor the bankrupt estate appears capable of paying"). Finally, Defendants' argument that there have been successful chapter 11 cases with "companion securities class actions" is irrelevant, both to the public interest analysis and to the Delaware Class Action, which is not a "securities class action." *See* Resp. 30. As with the other factors, the balance of equities favors issuing an injunction.

CONCLUSION

The Debtors respectfully request that this Court grant the Motion and preliminarily enjoin the continued litigation of the Delaware Class Action.

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Respectfully submitted,

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