Docket #0037 Date Filed: 8/13/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: LORDSTOWN MOTORS CORP., *et al.*,[1] Debtors.	Chapter 11 Case No. 23-10381-MFW (Jointly Administered)
NU RIDE INC. (f/k/a LORDSTOWN MOTORS CORP.) and LORDSTOWN EV CORPORATION, Plaintiffs, vs. HON HAI PRECISION INDUSTRY CO., LTD. (a/k/a HON HAI TECHNOLOGY GROUP), FOXCONN EV TECHNOLOGY, INC., FOXCONN VENTURES PTE LTD., FOXCONN (FAR EAST) LIMITED, and FOXCONN EV SYSTEM LLC, Defendants.	Adv. Pro. No. 23-50414-MFW

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL RECONSIDERATION OF INTERLOCUTORY ORDER

[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) (collectively, the "**Debtors**"). The Debtors' service address is 27000 Hills Tech Ct., Farmington Hills, MI 48331.

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STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

Lordstown Motors Corp. ("**Lordstown**") and Lordstown EV Corporation ("**LEVC**") (collectively, "**Plaintiffs**"), pursuant to Federal Rule of Bankruptcy Procedure 7054 and Federal Rule of Civil Procedure 54(b), respectfully submit this opening brief in support of their Motion for Partial Reconsideration of a discrete aspect of this Court's Memorandum Opinion (D.I. 31) and Order (D.I. 32), entered August 1, 2024.

SUMMARY OF ARGUMENT[2]

1. Plaintiffs move for partial reconsideration of the Court's ruling on LEVC's claim for breach of the Joint Venture Agreement ("**JVA**") in Count Six. The Court's decision reflected a narrow, but clear, error on an issue that (a) it should not have reached due to the Court's finding that the JVA was arbitrable as between those parties; (b) it was not raised in the parties' briefs; and (c) had it been briefed, it likely would have come out the other way in light of applicable law—namely, whether the subsequent Investment Agreement between other parties or JVA Amendment extinguished LEVC's right to sue for past breach of the JVA. Once this Court found that the arbitration provision applied, the proper course under the caselaw was not to touch on the merits. Accordingly, the Court should strike the substantive parts of its ruling dismissing Count Six for breach of the JVA and not dismiss on the merits. If the Court finds it proper to pass upon the merits of Count Six, it should reconsider its ruling and find that Count Six states a valid claim in light of the proper caselaw discussed below. This is because, while the parties briefed the effect of the subsequent Investment Agreement and JVA Amendment with respect to the JVA's arbitrability clause, Defendants did not raise (and LEVC, therefore, did not address) whether the subsequent agreements terminated LEVC's right to sue for breach under the JVA.

[2] Capitalized terms not defined in this Summary of Argument have the meanings ascribed to them in the body of the brief.

2. To be clear, LEVC does *not* move to reconsider the parts of this Court's ruling that concluded the arbitration clause in the JVA survived the Investment Agreement and JVA Amendment. But because the Court found that the clause does apply, the proper remedy was to send the breach of the JVA contract claim to arbitration as it did the CMA contract claim, while allowing all the remaining claims to proceed in this Court.[3]

BACKGROUND

On September 29, 2023, Hon Hai Precision Industry Co., Ltd. (a/k/a Hon Hai Technology Group), Foxconn EV Technology, Inc. ("**Foxconn EV Tech**"), Foxconn Ventures Pte. Ltd. ("**Foxconn Ventures**"), Foxconn (Far East) Limited, and Foxconn EV System LLC (collectively, "**Foxconn**" or "**Defendants**") moved to dismiss Plaintiffs' Complaint, arguing all claims are arbitrable, or in the alternative, fail to state a claim. D.I. 8–9, 19. On November 6, 2023, Plaintiffs filed a response opposing dismissal. D.I. 15.

On August 1, 2024, the Court issued an order denying Defendants' motion to dismiss or compel arbitration as to all but two claims, Counts Six and Seven. D.I. 31. Only a small part of that Order is at issue here. Specifically, the Court ruled that Count Six—alleging Foxconn EV

[3] Shortly after 7 p.m. this evening—while Plaintiffs were preparing to file this Motion for Partial Reconsideration—Defendants filed a purported notice of appeal without seeking leave. D.I. 33. Contemporaneous with this purported notice, Defendants also suggested that their notice of appeal should automatically stay the entire adversary proceeding per the Supreme Court's decision in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023). Not so. While Plaintiffs will fulsomely respond to Defendants' argument in opposing an application for a stay, Defendants' position is meritless on its face. *Coinbase* did not address adversary proceedings and, on the contrary, noted at least one specific exemption for bankruptcy proceedings, *id.* at 744 n.6. Regardless, nothing in Coinbase would limit this Court's ability to reconsider its dismissal of LEVC's claim for breach of the JVA. Even if Defendants' purported notice of appeal is valid, Courts regularly resolve timely motions for reconsideration prior to appeals. See Fed. R. Bankr. P. 8002(b)(2); *Hammersley v. Paragon Offshore PLC*, 2020 WL 6544697, at *4 (D. Del. Nov. 6, 2020) ("[W]hen a party files a timely motion to reconsider, the district court may retain jurisdiction to decide that motion notwithstanding the filing of the notice of appeal."); *In re Schonfeld, Inc.*, 2017 WL 11834412, at *1–2 (M.D. Fla. Mar. 9, 2017) ("A notice of appeal filed before entry of final judgment denying a motion for reconsideration is ineffectual." (quoting *Wright v. Preferred Rsch., Inc.*, 891 F.2d 886, 889 (11th Cir. 1990) (per curiam))).

Tech's breach of the JVA—was subject to a valid arbitration clause: "[T]he Court concludes that the arbitration provision of the JVA survived the execution of the Investment Agreement," and "Count Six . . . alleges breaches of specific provisions of the JVA.")) *Id.* at 16–17, 19. The Court, however, went on to dismiss Count Six on the merits for failure to state a claim, explaining: "While the Court has concluded that the arbitration provisions of the JVA survived . . . termination, . . . the substantive terms of the JVA have been superseded by the Investment Agreement." *Id.* at 31. This small part of the Court's ruling both overlooked binding precedent and was a clear error of law. Plaintiffs are not moving to reconsider any other aspect of the Court's Order.

LEGAL STANDARD

This Court "should reconsider a prior decision if it overlooked facts or precedent that reasonably would have altered the result." *N.A.I.F., Inc. v. Snyder*, 2005 WL 735554, at *1 (D. Del. Mar. 30, 2005); *accord Calyon N.Y. Branch v. Am. Mortg. Corp.*, 383 B.R. 585, 589 (Bankr. D. Del. 2008). Revising an interlocutory order is also appropriate "to correct a clear error of fact or law." *In re Energy Future Holdings Corp.*, 575 B.R. 616, 628 (Bankr. D. Del. 2017). In deciding whether to amend an interlocutory order, courts often apply the standard applicable to a motion for reconsideration of a final judgment, "but plac[ing] a slightly lesser burden of persuasion on the movant." *In re NewStarcom Holdings, Inc.*, 547 B.R. 106, 133 (Bankr. D. Del. 2016).

ARGUMENT

This Motion asks the Court to revisit a single, discrete issue: the disposition *on the merits* of LEVC's claim for breach of the JVA. The Opinion ran afoul of a bedrock principle of the Federal Arbitration Act—namely, that after determining that a claim is arbitrable, a court may not resolve the merits of that claim. And even if the Court could have reached the merits, the Opinion committed a "clear error of fact or law" on the substance of the JVA claim by dismissing it.

I. BECAUSE THE COURT CONCLUDED THAT THE JVA CLAIM WAS ARBITRABLE, THE JVA CLAIM SHOULD HAVE BEEN SENT TO ARBITRATION

Recall that LEVC was a party to the JVA but not to the Investment Agreement. In its Response to the Motion to Dismiss, LEVC argued in relevant part that the JVA Amendment terminated any arbitration obligation under the JVA's arbitration clause and thus "relieved Lordstown EV Corporation of any obligation to arbitrate its claims." D.I. 15, at 20.[4] The Opinion rejected this argument. *See* D.I. 31, at 16–17 ("[T]he Court concludes that the arbitration provision of the JVA survived the execution of the Investment Agreement."); *id.* at 21–24; *see also id.* at 27 ("The Plaintiffs did not agree to arbitrate any claims against the Defendants except those extant under the CMA and JVA.").[5] Plaintiffs did not argue—nor could they—that the JVA claim fell outside the textual scope of the JVA arbitration clause.

[4] The Court also stated: "Plaintiffs argue that the method of dispute resolution in the Investment Agreement controls over the arbitration clause in the JVA." D.I. 31, at 14. As described in more depth below, this argument was made only in response to an argument that the JVA's arbitration clause compelled arbitration of claims under the Investment Agreement brought by nonparties to the JVA.

[5] LEVC also argued that that arbitration of any claims would jeopardize the objectives of the Bankruptcy Code. D.I. 15 at 20–22. The Opinion did not expressly reject the argument that prosecuting the JVA claim would jeopardize the objectives of the Bankruptcy Code, because the Opinion found that argument mooted by the Court's merits finding that "no valid substantive claims remain to be arbitrated under the JVA." D.I. 31, at 25–26. As a doctrinal matter, this put the cart before the horse: the Court *had* to resolve arguments concerning arbitrability before reaching the merits. *See, e.g.*, *Silfee v. Automatic Data Processing, Inc.*, 696 F. App'x 576, 577 (3d Cir. 2017) (explaining that "courts may not alter this sequencing" and citing cases). In any event, Plaintiffs understand from the rest of the Opinion's discussion on pages 21–24 that the Court has generally rejected Plaintiffs' arguments about arbitration jeopardizing the Bankruptcy Code's objectives—especially because this Court ordered the CMA claim (Count 7) to arbitration. *See* D.I. 15, at 20–22. To the extent that the Court's holding was a ruling on the merits of the "objectives" argument, Plaintiffs do not seek reconsideration of that ruling. A ruling ordering the breach of JVA claim to arbitration and replacing or striking the substantive discussion would confirm what appears implicit in this Court's Order. To the extent that the Court agrees with LEVC's original argument that sending a (live) JVA claim to arbitration would jeopardize the objectives of the Bankruptcy Code, the proper course would be to reverse the breach of JVA contract ruling on the merits and keep all but the CMA claim (Count 7) in front of this Court.

Those findings—which this Motion does not challenge—mean that the JVA breach claim must be arbitrated. Indeed, those findings track the only two steps in the Third Circuit's test for arbitrability. *See Sapp v. Indus. Action Servs., LLC*, 75 F.4th 205, 212 (3d Cir. 2023) ("Deciding whether a party may be compelled to arbitrate is a two-step inquiry in which we consider (1) 'whether there is a valid agreement to arbitrate between the parties,' and if so, (2) 'whether the merits-based dispute in question falls within the scope of that valid agreement.'").

And because the Court found the JVA breach claim arbitrable, the ultimate merits of that claim need to be decided by the arbitrator, not the Court. As the Supreme Court recently re-emphasized, "a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649–50 (1986)); *Townsend v. Pinnacle Ent., Inc.,* 457 F. App'x 205, 207 (3d Cir. 2012) ("In addressing a motion to compel arbitration, a court may not resolve the merits of the underlying dispute."); *accord MZM Constr. Co. v. N.J. Build. Laborers Statewide Benefit Funds*, 974 F.3d 386, 405 n.12 (3d Cir. 2020) ("In deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the merits of the underlying claims." (quoting *AT&T*, 475 U.S. at 649)); *Medtronic AVE Inc. v. Cordis Corp.*, 100 F. App'x 865, 867–68 (3d Cir. 2004) ("[W]e note the longstanding rule that courts 'have no business weighing the merits' of the issue proposed to be arbitrated." (quoting *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960))). Under these precedents, the Opinion's rejection of Plaintiffs' arguments against arbitrability should have ended the matter—with LEVC's breach of the JVA claim sent to arbitration.[6]

[6] Notably, the Court made clear that its discussion of the substantive terms of the JVA was unnecessary to its conclusion on arbitrability, since "the parties expressly agreed to the continuing viability of the arbitration provision in the JVA." *See id.* at 18 ("[E]ven if the JVA had been completely terminated

Accordingly, this Court should not have reached a decision on the merits on the breach of the JVA claim (Count 6). *See* D.I. 31, at 31. The Opinion overlooks the clear precedent—cited above—holding that courts may not reach the merits of arbitrable claims. Although some of that precedent was cited in the parties' briefing—Foxconn, for instance, cites *Townsend* at page 3 of its reply brief—this issue was not front-and-center because neither side requested a merits ruling on an otherwise arbitrable claim. Instead, Foxconn sought either (1) an order compelling arbitration of Count Six, "or, *in the alternative*," (2) dismissal of that claim on the merits—but not both. D.I. 9, at 12 (emphasis added). As a result, the parties did not expressly brief, and the Court did not expressly consider, whether the Court could reach the merits of an arbitrable claim. The Supreme Court has held no. *Henry Schein*, 586 U.S. at 68. Thus, the decision to reach the merits of an arbitrable claim warrants reconsideration "to correct a clear error of fact or law." *See In re Energy Future*, 575 B.R. at 628.

Plaintiffs therefore respectfully request that, consistent with the Court's finding that the JVA arbitration clause is enforceable, the Court order arbitration of LEVC's claim for beach of the JVA, rather than dismiss the claim on the merits. Plaintiffs further request that the Court amend the Order to remove any consideration or discussion of the merits of Count Six, allowing the arbitrator to resolve the merits of that claim in the first instance.

II. THE SUBSTANTIVE DISMISSAL OF THE JVA CLAIM ON THE MERITS SHOULD BE REVISED.

The Opinion and Order's merits dismissal of the breach of JVA claim was also in error. Defendants moved to dismiss *all* of Plaintiffs' breach-of-contract claims on one ground: a purported failure to plead damages resulting from the breaches. D.I. 9, at 17–20. The Court

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by the execution of the Investment Agreement, the Court concludes that the arbitration provision of the JVA still survived.").

rejected that argument. D.I. 31, at 32–35. Defendants nowhere argued that LEVC's JVA claim failed on the merits because the JVA had been superseded by the Investment Agreement (to which LEVC is not a party). D.I. 9, at 17–20; D.I. 19, at 10. The Court therefore rejected LEVC's claim for breach of the JVA on a theory Defendants never advanced, concluding: "Plaintiffs have not stated a claim for breach of the JVA because its substantive terms (and the obligations of the parties thereunder) have been superseded by the terms of the Investment Agreement." D.I. 31, at 31 & n.99. Given that Defendants may argue (wrongly) that this part of the Court's Opinion has persuasive or preclusive effect in a later proceeding, this Court should—if it does not delete the merits discussion of Count Six entirely because those merits are arbitrable—at a minimum correct the substantive part of the Opinion to reflect the correct legal standard, make clear that LEVC raises arguments that were not considered in the initial briefing, and clarify that the merits discussion of Count Six should not be relied on for preclusive or persuasive effect.

Respectfully, reconsideration is warranted because this Court's holding on an unbriefed theory conflated two distinct issues: (1) whether the parties to the JVA had ongoing *obligations* under the JVA after the Investment Agreement and JVA Amendment, with (2) whether terminating obligations under the JVA extinguished LEVC's already-existing *claims* under the JVA. The parties briefed the first question solely with respect to LEVC's going-forward obligation to arbitrate disputes. They did not brief the second question, because they had no occasion to—Foxconn did not argue that the Investment Agreement or JVA Amendment released those already-existing claims. Plaintiffs submit that this resulted in an erroneous holding dismissing LEVC's JVA breach claim.

A. No subsequent contract extinguished LEVC's pre-existing claim for breach of the JVA.

First and foremost, neither the Investment Agreement (not signed by LEVC) nor the subsequent November 22, 2022 Amendment to the JVA (signed by LEVC) purported to release LEVC's already-existing claims for Foxconn EV Tech's past breaches of the JVA. By the time that the respective parties signed the Investment Agreement and the JVA Amendment, Foxconn EV Tech had already breached the JVA in multiple ways, including by failure to deliver intellectual property licenses "within sixty (60) days of the date hereof." D.I. 1-4, at 14 § 2.10(a). Those are the breaches—those that accrued prior to the termination by the JVA Amendment—that LEVC is suing for.

Because Foxconn EV Tech did not raise or brief this issue in its Opening Motion (and accordingly LEVC did not respond), this Court did not have the benefit of briefing on this issue, and that resulted in legal error. As a threshold matter, the contract between Foxconn EV Tech and LEVC is governed by Delaware law. D.I. 1-4, at 49 § 13.7. Under Delaware law, "the termination of a contract 'results in an agreement becoming void, but *that fact alone does not eliminate liability for a prior breach*.'" *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 139 (Del. Ch. 2023) (emphasis added) (quoting *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *103 (Del. Ch. Nov. 30, 2020)). Instead, "[i]n order to depart from the common law rule and eliminate liability for a pre-termination breach*, the contract must contain language to that effect*." *Id.* at 139 & n.14 (emphasis added) (collecting authority).

Here, no contract between the parties purported to release LEVC's existing claims for Foxconn EV Tech's breach of the JVA. The Investment Agreement nowhere contains an express release of LEVC's existing claims. Nor could it have, as LEVC is not a party to the Investment Agreement:

Contract	Plaintiff Party	Defendant Party	Cite
May 11, 2022 LLC Agreement of MIH EV Design LLC (the JVA)	LEVC	Foxconn EV Tech	D.I. 1-4, at 6.
Nov. 7, 2022 Investment Agreement	Lordstown Motors Corp.	Foxconn Ventures	D.I. 1-5, at 6.
Nov. 22, 2022 Amendment to the LLC Agreement of MIH EV Design LLC	LEVC	Foxconn EV Tech	D.I. 15-1, at 2.

The Investment Agreement therefore could not supersede any rights or obligations of LEVC. "As a matter of black letter contract law, parties cannot modify a contract without the assent of all parties to the contract." *Wildfire Productions, L.P. v. Team Lemieux LLC*, 2022 WL 2342335, at *7 (Del. Ch. June 29, 2022) (cleaned up). From that principle, it follows that a contract cannot supersede a separate agreement between nonparties. *Id.* ("The 2007 Partnership Agreement does not supersede the NHL Constitution . . . because the NHL is not a party to the 2007 Partnership Agreement . . . ."). Federal courts in this Circuit routinely follow this rule. *See, e.g.*, *Blackhawk Network, Inc. v. IdX Corp.*, 2023 WL 3848337, at *2 (D. Del. June 6, 2023) ("The promise that idX made to Blackhawk in the FMSA to arbitrate disputes ***cannot have been superseded*** by a contract to which idX was not a party." (emphasis added)); *Oldcastle Precast, Inc. v. VPMC, Ltd.*, 2013 WL 1952090, at *20–21 (E.D. Pa. May 13, 2013) (holding that under Pennsylvania law, obligations in a prior contract cannot be "extinguishe[d]" or "super[s]eded by" a "subsequent contract" that is not "between the same parties").

Regardless, even if Foxconn EV Tech were a party to the Investment Agreement, nothing in the Investment Agreement specifically terminates LEVC's right to bring suit for pre-termination breach of the JVA nor eliminates Foxconn EV Tech's liability for those breaches. Accordingly, the substantive holding that the Investment Agreement superseded the JVA is erroneous, and this Court should modify its opinion to so reflect.

Similarly, the November 22 Amendment to the JVA Agreement did not release LEVC's claims. Rather than agreeing to directly modify the JVA, the new parties to the Investment Agreement (Lordstown and Foxconn Ventures) instead agreed that any obligations under the JVA required termination by a separate agreement. *See* Investment Agreement § 5.03(f) (parties to the Investment Agreement shall "have … caused to be amended [the JVA] to terminate all obligations" of the parties to that agreement). That separate agreement was formalized two weeks later as the JVA Amendment, executed by LEVC and Foxconn EV Tech.

And that Amendment is clear. Section 1.1 amended the JVA to terminate certain going-forward *obligations* of its members—namely, LEVC and Foxconn EV Tech (neither of whom had signed the earlier Investment Agreement. D.I. 15-1, at 2 § 1.1. It did not release any liabilities or claims. Indeed, section 1.2 made clear that the parties did not waive any *rights* under the Agreement, such as the right to sue for past breaches. It provided:

> Section 1.2 No Other Amendment or Waiver. Except as expressly set forth herein, (a) all of the terms and provisions of the Agreement remain in full force and effect unmodified and (b) ***the parties hereto make no other amendment to the Agreement nor does any of them, by executing this Amendment, waive any provision of the Agreement or any right thereunder***."

Id. at 2 § 1.2 (emphasis added). Far from altering the common law background that the termination of contracts does not extinguish pre-existing claims, the Amendment expressly reaffirmed that principle, stating that the only thing that the parties were changing was going-forward obligations. "[B]y executive this Agreement," LEVC was not "waiv[ing] any provision of the Agreement or any right thereunder." *Id.*

In light of this specific language in the JVA Amendment—and the background law that contracts cannot supersede obligations and rights of nonparties under a separate contract—the Investment Agreement's generic integration clause did not effect a sweeping (and enormously

consequential) release of already-existing claims under a different contract between nonparties. Indeed, a generic integration clause without more cannot serve as the requisite specific language that would waive liability for pre-termination breaches. *See New Enter.*, 292 A.3d at 139–40; *see also Morgart v. Union Mut. Life Ins. Co.*, 644 F. Supp. 934, 937–40 (D.N.J. 1986) (applying "black-letter contract law principles" to hold that a later agreement's integration and release clauses did not extinguish pre-existing rights based on past breaches of an earlier agreement—observing further that "the doctrine of substitution of contracts should not be applied to the detriment of a plaintiff whose ability to bargain freely was crippled by defendant's intentional breach" of the original agreement); *Genasys Inc. v. Vector Acoustics, LLC*, 2023 WL 4414222, at *14 (S.D. Cal. July 7, 2023) ("Courts have found that general integration clauses do not supersede the rights and obligations found in prior agreements—instead, an integration clause must be specific and clearly show such intent." (collecting cases)).

Consider, in stark contrast to the JVA Amendment's preservation of rights, the Investment Agreement's effect-of-termination clause, which expressly contained liability-limiting language:

> Section 7.02 Effect of Termination. In the event of the termination of this Agreement . . . this Agreement shall forthwith become null and void (other than [specified provisions], all of which survive termination of this Agreement), and ***there shall be no liability*** on the part of the Investor or Company or their respective directors, officers and Affiliates, ***except that no such termination shall relieve any party from liability for damages to another party resulting from a knowing or intentional breach of this Agreement or from Fraud***.

D.I. 1-5, at 51 § 7.02 (emphasis added). This language in the Investment Agreement, which would apply upon termination of that later agreement, shows that the parties knew how to extinguish liability for pre-existing breaches—and even then, intended to preserve the right to sue for intentional breach. And the parties' decision *not* to use any such liability-limiting language in

either the JVA or the JVA Amendment with respect to the right to sue for past breaches of the JVA indicates the parties' clear intent to preserve that right. *See New Enter.*, 292 A.3d at 139–40.

To the extent the Court finds any tension between the Investment Agreement and the JVA Amendment, the *specific* JVA Amendment between the relevant *parties* agreeing not to waive "rights" with respect to the JVA must control over any *general* implications of the Investment Agreement executed by *nonparties*. *See In re Weinstein Co.*, 2021 WL 3573843, at *3 (Bankr. D. Del. Aug. 12, 2021) ("[S]pecific provisions of a contract control more general ones." (collecting cases)), *aff'd*, 2022 WL 3226317 (D. Del. Aug. 10, 2022); *Donnelly v. Propharma Grp. Topco LLC*, 2023 WL 5037786, at *10 (D. Del. Aug. 8, 2023) ("[G]eneral terms of the contract must yield to more specific terms." (quoting *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019))); *see also DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." (collecting cases)).

B. The Court's cited authorities do not support a finding that the Investment Agreement extinguished LEVC's JVA claim.

In reaching the conclusion that the Investment Agreement extinguished LEVC's JVA breach claim, the Court cited Plaintiffs' arguments about why the claim for breach of the Investment Agreement is not arbitrable. One paragraph in Plaintiffs' opposition argued that "the resolution dispute provisions in the Investment Agreement supersede any arbitration provision in the JV Agreement." D.I. 15, at 18. This paragraph needs to be read in context: it responded to a specific Foxconn argument that the JVA's arbitration provision somehow compelled Lordstown—not a party to the JVA—to arbitrate claims for breach of the *Investment Agreement*. *See* D.I. 1-5,

at 57 § 8.06(b); D.I. 15, at 17 n.3 (quoting same).[7] In that counterfactual context, the Investment Agreement's own dispute resolution provision would trump the JVA's arbitration clause and govern Lordstown's going-forward obligations on how to resolve claims under the Investment Agreement. But that argument says nothing about the Investment Agreement's effect on the rights and obligations of the parties to the JVA, who were not parties to the Investment Agreement. Nor does it say anything about other provisions of the JVA, which were subject to the JVA Amendment.

In fact, Plaintiffs specifically did *not* argue that the Investment Agreement (rather than the JVA Amendment) somehow eliminated LEVC and Foxconn EV Tech's obligations under the JVA, let alone pre-existing claims under the JVA. Exactly the opposite: Plaintiffs expressly argued that the subsequent agreements "did not contain a release of any claims, however, and Lordstown EV Corporation remains free to pursue those claims in this adversary proceeding." D.I. 15, at 27. ***Foxconn's reply did not even contest this assertion***. It did not argue, for instance, that those claims were superseded or otherwise extinguished by the Investment Agreement or JVA Amendment—likely because of the contrary law described above.

The Court cited some authorities at page 31 n.99 on the "superseding contract" issue. But none of those authorities found that a superseding contract—let alone a contract between a new, different set of parties—extinguished already-existing breach claims. For instance, in *Dewitt Stern Grp., Inc. v. Eisenberg*, the court determined on summary judgment under New York law that a 2012 employment agreement superseded a 2007 employment agreement—which had "expired in 2012"—so the 2012 agreement governed the parties' obligations in 2013 and forward, when the

[7] The Court rejected Foxconn's argument on other grounds. D.I. 31, at 19 ("[T]he Court concludes that the arbitration provisions of the JVA and the CMA are not broad enough to cover the breach of contract claims related to the APA or the Investment Agreement which do not have arbitration provisions.").

alleged breaches of the 2007 agreement occurred. 257 F. Supp. 3d 542, 577–78, 581–82 (S.D.N.Y. 2017) ("DeWitt's principal position is that it possessed Eisenberg's book of business in May 2013 when Eisenberg resigned from DeWitt to begin work at AJG, a competitor. If so, Eisenberg misappropriated confidential information from DeWitt in violation of the 2012 Employment Agreement."). The case says nothing about a subsequent contract between nonparties releasing preexisting claims.

Similarly, in *Cabela's LLC v. Wellman*, the court dealt with employment contracts that were superseded in part by certain conflicting provisions in 2016 agreements, and claims that first arose in 2018. 2018 WL 5309954, at *4–6 & n.63 (Del Ch. Oct. 25, 2018) (observing that a new contract only supplants an old contract "to the extent the new contract is *inconsistent* with the old contract or if the parties *expressly* agreed that the new contract would supersede the old one" (quoting *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 (Del. Ch. Jan. 31, 2007))) (emphasis added)). Notably, the court found that two subsequent 2018 separation agreements did *not* supersede any of the earlier agreements because those later agreements did not refer to the specific noncompete obligations at issue. *Id.* at *6–7. Thus, *Wellman* does not find that a subsequent contract between nonparties implicitly released *already accrued* claims between parties to a separate contract. Just the opposite.

Nor does the Restatement (Second) of Contracts support the Court's conclusion: Section 279 deals specifically with enforcement of obligations under an original contract following a post-substitution "breach of the *substituted* contract"—not post-amendment enforcement of a pre-amendment breach. Restatement (Second) of Contract § 279 (1981) (emphasis added). Of course, there cannot be a substituted contract unless the original contract's "parties intend the new contract to replace *all* of the provisions of the earlier contract," which did not happen here. *Id.* cmt. a &

illustrations (describing post-substitution breaches); *see China Res. Prods. (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 747 F. Supp. 1101, 1106 (D. Del. 1990) (finding no substituted contract where a later agreement modified—but did not replace all terms of—an earlier contract, observing, the "black letter law that 'where one contract modifies another, the terms of the new contract are found partly in the original contract and partly in the modifying contract.'" (quoting Restatement (Second) of Contract § 149 cmt. a (1981), and discussing *id.* § 279)).

* * *

Respectfully, the Court's conclusion that the Investment Agreement extinguished LEVC's JVA claim stemmed from a clear error of law on an unbriefed issue that Foxconn never raised. The Court should revise its Opinion to conclude that LEVC has stated a claim for breach of the JVA, and amend the Order to remove the holdings which logically depend on the substantive merits dismissal of the JVA claim. And at minimum, this Court should make clear that no court or arbitration panel should rely on or treat as persuasive authority the substantive conclusion that the Investment Agreement (signed by different parties) terminated Foxconn EV Tech's liability to LEVC under the Joint Venture Agreement.

CONCLUSION

For the foregoing reasons, in light of the Court's conclusion that Count Six is subject to a valid arbitration clause, Plaintiffs respectfully request that the Court revise its Opinion and Order of August 1, 2024, to remove (1) any consideration or discussion of the merits of Count Six; (2) the holdings which logically depend on the substantive merits dismissal of Count Six; and (3) the part of the Order dismissing Count Six on the merits rather than for arbitration.

Dated: August 12, 2024
Wilmington, Delaware

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served via CM/ECF on the following counsel of record, this 12th day of August, 2024, as indicated below.

Dated: August 12, 2024
Wilmington, Delaware

/s/ Patrick A. Jackson
Patrick A. Jackson (No. 4976)

VIA CM/ECF

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