

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

Lordstown Motors Corp., *et al.*,<sup>1</sup>

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)

**SUPPLEMENTAL DECLARATION OF ANKITA SANGWAN IN SUPPORT OF  
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**

I, Ankita Sangwan, declare:

1. I am an associate at the law firm Pomerantz LLP, 600 Third Avenue, New York, New York 10016, co-counsel for Defendants (*i.e.* the Delaware Class Plaintiffs<sup>2</sup>) in the above-captioned

<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used in this Declaration but not defined herein shall have the meaning ascribed to such term in the Opposition.



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cases. I respectfully submit this supplemental declaration in support of the Defendants' Opposition to the Debtors' Motion.

2. Unless indicated otherwise, the matters set forth herein are based upon my personal knowledge, my review of relevant documents and my discussions with the Delaware Class Plaintiffs and their counsel.

3. I am authorized to submit this Declaration on behalf of the Delaware Class Plaintiffs. If requested, I am able to testify competently to the facts set forth in this Declaration.

4. Attached hereto as Exhibit L is a true and correct copy of the letter opinion denying the defendants' motion to stay in the Delaware Class Action issued on March 7, 2022.

5. Attached hereto as Exhibit M is a true and correct copy of DiamondPeak's excess insurance policy, as produced to the Delaware Class Plaintiffs during discovery in the Delaware Class Action, bates numbered DP-DIR 0000043. **[CONFIDENTIAL FILING]**

I declare under penalty of perjury that the foregoing is true and correct.

Executed: August 1, 2023  
New York, New York

s/ Ankita Sangwan  
Ankita Sangwan

**Exhibit L**

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

LORI W. WILL  
VICE CHANCELLOR

LEONARD L. WILLIAMS JUSTICE CENTER  
500 N. KING STREET, SUITE 11400  
WILMINGTON, DELAWARE 19801-3734

Date Submitted: February 28, 2022

Date Decided: March 7, 2022

Raymond J. DiCamillo, Esquire  
Kevin M. Gallagher, Esquire  
Alexander M. Krischik, Esquire  
Alena V. Smith, Esquire  
Richards, Layton & Finger P.A.  
920 North King Street  
Wilmington, Delaware 19801

Gregory V. Varallo, Esquire  
Daniel E. Meyer, Esquire  
Bernstein Litowitz Berger  
& Grossmann LLP  
500 Delaware Avenue, Suite 901  
Wilmington, Delaware 19801

RE: *In re Lordstown Motors Corp. Stockholders Litigation*,  
CA. No. 2021-1066-LWW

Dear Counsel:

The defendants have moved to stay this putative class action pending the resolution of a federal securities class action. I decline to grant a stay. The *McWane* doctrine applies with less force in the context of representative litigation and is particularly inapt here. Although the federal action is first-filed and concerns and the same business combination, the parties, claims, and remedy sought are different.

Perhaps more importantly, this case raises emerging issues of Delaware law. Established doctrines of fiduciary duty law are, of course, far from novel. But this court has had occasion to apply these principles in the context of special purpose

C.A. No. 2021-1066-LWW

March 7, 2022

Page 2 of 13

acquisition companies and stockholder redemption rights just once—in a decision rendered two months ago. This court’s essential role of providing guidance in developing areas of our law would be impaired if the court were to denude its jurisdiction because a federal securities action resting on similar facts was filed first.

## **I. RELEVANT BACKGROUND**

On October 23, 2020, Lordstown Motors Corp. (“Legacy LMC”) completed a business combination with special purpose acquisition company DiamondPeak Holding Corp. (“DiamondPeak,” and, after the combination, “Lordstown”).<sup>1</sup> Disclosures issued in connection with the transaction indicated that Lordstown would have a first-mover advantage in the burgeoning electric truck market and that Lordstown had a large and growing backlog of truck orders.<sup>2</sup> On March 12, 2021, an analyst report was published that purported to identify problems faced by Lordstown.<sup>3</sup> A drop in Lordstown’s stock price followed.<sup>4</sup>

Litigation followed, to say the least.

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<sup>1</sup> Verified Class Action Compl. (“Compl.”) ¶¶ 6, 13 (Dkt. 1).

<sup>2</sup> *See id.* ¶¶ 5-6.

<sup>3</sup> *Id.* ¶¶ 102-03.

<sup>4</sup> *See* Defs.’ Mot. to Stay Ex. A (“Securities Compl.”) ¶¶ 20-29 (Dkt. 15).

C.A. No. 2021-1066-LWW

March 7, 2022

Page 3 of 13

Starting in March 2021, multiple federal securities class actions were filed in the United States District Court for the Northern District of Ohio.<sup>5</sup> The cases were consolidated in June 2021 (the “Securities Action”).<sup>6</sup> The defendants named in the Securities Action complaint are Lordstown, the Lordstown subsidiary that is the continuation of Legacy LMC, certain of Lordstown and Legacy LMC’s current and former officers, and Lordstown director David Hamamoto.<sup>7</sup> The complaint asserts various violations of the Securities Act of 1933 and Securities Exchange Act of 1934.<sup>8</sup> The claims are brought on behalf of a putative class of persons and entities who “(a) purchased or otherwise acquired [Lordstown’s] Class A Common Stock . . . publicly traded warrants . . . or any publicly traded option to purchase or sell [Lordstown’s] Class A Common Stock, from August 3, 2020, through July 2, 2021. . . and/or (b) held [Lordstown’s] Class A Common Stock as of September 21, 2020.”<sup>9</sup>

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<sup>5</sup> Defs.’ Mot. to Stay ¶ 10.

<sup>6</sup> See *In re Lordstown Motors Corp. Sec. Litig.*, No. 4:21-cv-00616 (PAG) (N.D. Ohio).

<sup>7</sup> Securities Compl. ¶¶ 51-57. Specifically, that complaint names as defendants former Legacy LMC (and later Lordstown) officers Caimin Flannery, Darren Post, and Rich Schmidt, and Lordstown officer Shane Brown. *Id.*; see Compl. ¶ 22.

<sup>8</sup> Securities Compl. ¶¶ 451-90.

<sup>9</sup> *Id.* ¶ 442.

C.A. No. 2021-1066-LWW

March 7, 2022

Page 4 of 13

Related derivative actions were also filed in the United States District Court for the District of Delaware,<sup>10</sup> the Northern District of Ohio,<sup>11</sup> and in this court.<sup>12</sup>

The present action (the “Action”) was brought after two Lordstown (previously DiamondPeak) stockholders obtained documents pursuant to 8 *Del. C.* § 220.<sup>13</sup> Their class action complaints were filed in this court on December 8 and December 13, 2021 and have been consolidated.<sup>14</sup> The plaintiffs’ claims are brought on behalf of a putative class of “all record and beneficial holders of [DiamondPeak] common stock who continuously held such stock between the [transaction’s] Record Date of September 21, 2020 and the closing of the de-SPAC Acquisition on October 23, 2020.”<sup>15</sup>

The plaintiffs’ Verified Class Action Complaint (the “Complaint”) advances one claim against Hamamoto and four other former members of the DiamondPeak Board<sup>16</sup> and another claim against the “Controller Defendants”—defined as

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<sup>10</sup> *In re Lordstown Motors Corp. S’holder Deriv. Litig.*, No. 21-cv-00604 (D. Del.).

<sup>11</sup> *Thai v. Burns*, No. 4:21-cv-01267 (N.D. Ohio). That action has been stayed pending the resolution of the Securities Action. *See* Defs.’ Mot. to Stay ¶ 16.

<sup>12</sup> *Cormier v. Burns*, C.A. No. 2021-1049-LWW (Del. Ch.).

<sup>13</sup> Compl. ¶¶ 15-16.

<sup>14</sup> *See* Dkt. 1; *Amin v. Hamamoto*, C.A. No. 2021-1085-LWW (Dkts. 1, 44).

<sup>15</sup> Compl. ¶ 148.

<sup>16</sup> *Id.* ¶¶ 21-26, 158-63. Those individuals are Mark Walsh, Andrew Richardson, Steven Hash, and Judith Hannaway.

C.A. No. 2021-1066-LWW

March 7, 2022

Page 5 of 13

Diamond Peak Sponsor LLC and two of the former directors.<sup>17</sup> I previously described those claims as follows:

The plaintiff[s] assert[] that the directors of DiamondPeak breached their fiduciary duties by failing to disclose certain information about [Legacy LMC's] purchase orders and production timeline. The plaintiff[s] further allege[] that DiamondPeak's controlling stockholders acted to advance their own interests by pursuing the transaction with Legacy LMC to the detriment of minority stockholders. The putative class of then-DiamondPeak stockholders were purportedly harmed by not exercising their redemption rights.<sup>18</sup>

On January 10 and 18, 2022, the defendants filed one-page motions to dismiss pursuant to Court of Chancery Rules 12(b)(6) and 23.1.<sup>19</sup> On January 19, 2022, the defendants filed a Motion to Stay this Action pending the resolution of the Securities Action.<sup>20</sup> I heard argument on the Motion to Stay on February 28, 2022.<sup>21</sup>

## II. LEGAL ANALYSIS

The defendants seek to stay this Action pending the resolution of the Securities Action, relying on *McWane Cast Iron Pipe Corp. v. McDowell Wellman*

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<sup>17</sup> *Id.* ¶¶ 28, 164-71.

<sup>18</sup> *In re Lordstown Motors Corp. S'holders Litig.*, 2022 WL 601120, at \*2 (Del. Ch. Feb. 28, 2022).

<sup>19</sup> Dkts. 11, 14.

<sup>20</sup> Dkt. 20.

<sup>21</sup> Dkt. 43.



C.A. No. 2021-1066-LWW

March 7, 2022

Page 6 of 13

*Engineering Corp.* and its progeny.<sup>22</sup> Under the *McWane* doctrine, the court’s discretion to grant a stay should be freely exercised where “there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues.”<sup>23</sup> “[T]hese concepts are impelled by considerations of comity and the necessities of an orderly and efficient administration of justice.”<sup>24</sup>

The defendants contend that allowing the Action to proceed in parallel with the Securities Action would tax the resources of the court and the parties. They further assert that the plaintiffs here seek to represent a subset of the stockholder class represented in the Securities Action and that the breach of fiduciary duty claims in this Action are premised upon the same statements alleged to be misleading in the Securities Action.<sup>25</sup>

In response, the plaintiffs note that the claims in this Action involve novel issues of Delaware law that are not implicated in the Securities Action. They further argue that, regardless, none of the *McWane* factors support staying the Action.<sup>26</sup>

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<sup>22</sup> 263 A.2d 281 (Del. 1970).

<sup>23</sup> *Id.* at 283.

<sup>24</sup> *Id.*

<sup>25</sup> See Defs.’ Mot. to Stay ¶¶ 1, 21-22.

<sup>26</sup> See Pls.’ Opp’n to Defs.’ Mot. to Stay (“Pls.’ Opp’n”) ¶¶ 7-10 (Dkt. 34).

C.A. No. 2021-1066-LWW

March 7, 2022

Page 7 of 13

A *McWane* analysis is an imperfect method to guide my assessment of the defendants' motion.<sup>27</sup> "[T]his court has proceeded cautiously when facing the question of whether to defer to a first-filed representative action and has given much less weight to first-filed status than is required in the non-representative action context."<sup>28</sup> In the representative litigation setting, the court's "paramount interest" is to ensure that "stockholders receive 'fair and consistent enforcement of their rights under the law governing the corporation.'"<sup>29</sup>

Here, the fundamental question is whether this court's interest in resolving corporate governance issues under Delaware law prevails over considerations of comity and practicality. This Action concerns allegations that the defendants breached their fiduciary duties of loyalty and impaired the exercise of stockholders' redemption rights in the context of a de-SPAC transaction. Those claims raise "novel issues" akin to those that this court was presented with in a matter of first

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<sup>27</sup> *Biondi v. Scrushy*, 820 A.2d 1148, 1150 (Del. Ch. 2003) (explaining that "the *McWane* doctrine does not apply with full force" in representative actions).

<sup>28</sup> *Id.* at 1159; Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5.01 (2021) (observing that "the Court of Chancery tends to afford decidedly less deference" to the *McWane* factors when considering competing stockholder representative suits).

<sup>29</sup> *Brandin v. Deason*, 941 A.2d 1020, 1024 (Del. Ch. 2007) (quoting *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 953 (Del. Ch. 2007)).

C.A. No. 2021-1066-LWW

March 7, 2022

Page 8 of 13

impression earlier this year.<sup>30</sup> The Court of Chancery has “long been chary” about deferring to a first-filed action pending elsewhere “when a case involves important questions of our law in an emerging area.”<sup>31</sup>

None of the remaining factors appropriately considered under *McWane* outweigh that vital interest. The parties in this Action and the Securities Action differ significantly. Although these actions have facts in common, the issues presented are distinct. And the claims brought here are not a simple repackaging of securities claims with a Delaware law label.

To start, the Securities Action names only one of the Action’s defendants. The defendants point to the overlap in defendants here and in the related derivative actions (though they do not seek a stay in deference to those cases) to support their position that this Action should not move forward.<sup>32</sup> But—insofar as the derivative actions are even relevant to whether a stay in deference to the Securities Action is appropriate—those cases seek to recover on behalf of Lordstown while this action

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<sup>30</sup> See *In re MultiPlan Corp. S’holders Litig.*, --- A.3d ---, 2022 WL 24060, at \*1 (Del. Ch. Jan. 3, 2022) (stating that, until that decision, “Delaware courts ha[d] not previously had an opportunity to consider the application of our law in the SPAC context”).

<sup>31</sup> *In re Topps*, 924 A.2d at 960; see *Brandin*, 941 A.2d at 1024-25 (finding that the presence of novel, complicated, and unsettled issues of Delaware law “strongly favor[ed]” denial of a motion to stay); *Ryan v. Gifford*, 918 A.2d 341, 349-50 (Del. Ch. 2007) (noting that Delaware courts have substantial interests in resolving cases “where the law is novel”).

<sup>32</sup> See Defs.’ Mot. to Stay ¶¶ 28-31.

C.A. No. 2021-1066-LWW

March 7, 2022

Page 9 of 13

is brought on behalf of a putative class of former DiamondPeak stockholders. It is not apparent to me why this court would stand down from hearing class action claims in deference to derivative actions that might themselves defer to prior-filed securities claims.

The putative class in the Securities Action is also not equivalent to the class the plaintiffs seek to represent in this Action. The class proposed in the Securities Action includes stockholders who “purchased” Lordstown publicly traded warrants, units, or options to purchase or sell Class A shares from August 3, 2020 through July 2, 2021 “and/or . . . held” Class A shares as of September 21, 2020.<sup>33</sup> This Action, by contrast, is brought on behalf of a putative class of stockholders who “continuously held” Lordstown common stock “between the Record Date of September 21, 2020 and the closing of the de-SPAC Acquisition on October 23, 2020.”<sup>34</sup> Members of the stockholder class in this Action also fall within the Securities Action class (which is not unusual in parallel actions). But, as the plaintiffs point out, any recovery for the earlier investors included in the Securities

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<sup>33</sup> Securities Compl. ¶ 442.

<sup>34</sup> Compl. ¶ 148.

C.A. No. 2021-1066-LWW

March 7, 2022

Page 10 of 13

Action class—who are the focus of this Action—could be affected by the breadth of that class period.<sup>35</sup>

The issues in the actions coincide insofar as the disclosures in DiamondPeak’s proxy statement require examination. They are otherwise fundamentally different. The crux of the Securities Action rests on whether Lordstown’s stock price was “artificially inflated” by false and misleading disclosures.<sup>36</sup> The plaintiffs’ Complaint, by contrast, alleges that the defendants harmed the putative class members by impairing the informed exercise of their redemption rights to the defendants’ benefit.<sup>37</sup> These are quintessential Delaware concerns—not, as the defendants argue, a rebranding of securities claims about material misstatements as fiduciary duty claims.

That reality renders the cases relied upon by the defendants inapposite. In *Derdiger v. Tallman*, a lead plaintiff in a consolidated federal securities action was appointed to “pursue *all* available causes of action against *all* possible defendants

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<sup>35</sup> The plaintiffs also contend that the proposed Securities Action class is under-inclusive of the class here because it would not include investors who purchased shares before August 3, 2020. The Securities Action class, however, also includes investors who “held” Class A shares as of the September 21, 2020 record date—which is the beginning of the plaintiffs’ proposed class. *Compare* Securities Compl. ¶ 442, *with* Compl. ¶ 148.

<sup>36</sup> *E.g.*, Securities Compl. ¶¶ 114, 246, 432.

<sup>37</sup> Compl. ¶¶ 161-63, 168-70.

C.A. No. 2021-1066-LWW

March 7, 2022

Page 11 of 13

under *all* available legal theories.”<sup>38</sup> A class action complaint was subsequently filed in the Court of Chancery, “seeking redress for . . . allegedly false statements made in connection with [a] merger.”<sup>39</sup> The court deferred to the federal action because the cases “share[d] the same core facts, legal claims, and alleged damages.”<sup>40</sup>

In *Schnell v. Porta Systems Corp.*, a federal securities complaint alleged “that the defendants engaged in a conspiracy to conceal adverse material information, to defraud purchasers, and to maintain an artificially high market price” for a company’s stock.<sup>41</sup> A class action complaint filed in Delaware three weeks later likewise alleged that the defendants “breached their fiduciary duties owed to the shareholders in that they made material misrepresentations and failed to correct those material misrepresentations with subsequent disclosures” and that those actions “amounted to fraud.”<sup>42</sup> In staying the Delaware action, the court explained that “while the claims in the two courts may be stated in different ways, they [were] actually the same claims.”<sup>43</sup>

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<sup>38</sup> 773 A.2d 1005, 1010 (Del. Ch. 2000) (emphasis in original).

<sup>39</sup> *Id.* at 1009.

<sup>40</sup> *Id.* at 1016.

<sup>41</sup> 1994 WL 148276, at \*4 (Del. Ch. Apr. 12, 1994).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

C.A. No. 2021-1066-LWW

March 7, 2022

Page 12 of 13

In this instance, the distinction between the federal claims pleaded in the Securities Action and the plaintiffs’ Delaware law fiduciary duty claims is not an “artificial” one.<sup>44</sup> Without considering the viability of the plaintiffs’ claims, even a superficial review of the Complaint makes plain that the plaintiffs are pursuing more than a narrow disclosure claim.<sup>45</sup> The claims advanced “invoke[] both the duty of loyalty and disclosure duties implicating director loyalty.”<sup>46</sup> They are not “redundant or duplicative of”<sup>47</sup> the first-filed securities claims.<sup>48</sup>

The gap between the claims here and those in the Securities Action widens when the potential remedies are considered. The defendants argue that any monetary damages that could be awarded in this Action would be addressed by the relief sought in the Securities Action. But the bases for measuring the relief (if any) would be entirely different. The Securities Action seeks to recover damages for losses allegedly caused by the decline in Lordstown’s stock price from a class period high

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<sup>44</sup> *Derdiger*, 773 A.2d at 1016-17 (describing the “forceful[] rejection” of an alleged distinction between state and federal “misdisclosure claims” in *Schnell v. Porta Systems Corp.*).

<sup>45</sup> *E.g.*, Compl. ¶¶ 97, 123-25; *see MultiPlan*, 2022 WL 24060, at \*8.

<sup>46</sup> *MultiPlan*, 2022 WL 24060, at \*8.

<sup>47</sup> *Derdiger*, 773 A.2d at 1018.

<sup>48</sup> It bears mentioning that the defendants have also moved to stay the *Cormier* action. *Cormier*, C.A. No. 2021-1049-LWW, Dkt. 13. This decision should not be viewed as determinative of that motion, which concerns a subsequently-filed derivative action. *See id.*

C.A. No. 2021-1066-LWW

March 7, 2022

Page 13 of 13

of \$31.57.<sup>49</sup> The plaintiffs' attempted recovery in this Action, by contrast, could turn on the \$10 redemption price (plus interest) relative to the value the class received in the de-SPAC transaction.<sup>50</sup>

### **III. CONCLUSION**

Delaware has a substantial interest in addressing the issues presented by this case. And there is limited overlap—in terms of the parties, issues, and potential remedies—between this Action and the Securities Action. The defendants' Motion to Stay is denied.

Sincerely yours,

*/s/ Lori W. Will*

Lori W. Will  
Vice Chancellor

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<sup>49</sup> See Securities Compl. ¶ 434.

<sup>50</sup> See Compl. ¶ 147.



**Exhibit M**



7 World Trade Center  
250 Greenwich Street  
37th Floor  
New York, NY 10007

May 08, 2019

Michael Machin  
Willis  
Willis of New York, Inc.  
Brookfield Place, 200 Liberty Street  
New York, NY 10281

**RE: DiamondPeak Holdings Corp**  
**Policy Number:** [REDACTED]  
**Liability Limit: \$5,000,000 Excess of \$10,000,000**

Dear Michael,

Nationwide is pleased to provide you with the enclosed DiamondPeak Holdings Corp Policy, with effective dates 02/27/2019 to 02/27/2021, issued by Freedom Specialty Insurance Company (the "Company") to the above captioned insured.

As requested, the Policy has been issued despite the fact that Nationwide has not received all of the Underlying Excess policy(ies)/endorsements.

As you are aware, the binder for this Policy may contain a subjectivity(ies) regarding receipt, review and acceptance of complete copies of the binders for all of the Underlying Excess policies, as well as complete copies of all of the policies themselves. Please forward complete copies of all of the policies to my attention as soon as possible.

The Company fully reserves its rights to amend the Policy in the event that any inconsistencies exist between the binders related to the policies and the policies when issued. In addition, by issuing the Policy, the Company does not waive any rights or defenses it may have in connection with the Policy, nor is it stopped from asserting all or any defenses that may be available to it with regard to the Policy.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amit Dave'.

Amit Dave

**Enclosures**



Underwritten by: Freedom Specialty Insurance Company  
Home Office: One Nationwide Plaza • Columbus, Ohio 43215  
Administrative Office: 8877 North Gainey Center Drive • Scottsdale, Arizona 85258  
1-800-423-7675 • A Stock Company

**NOTICE** THESE POLICY FORMS AND THE APPLICABLE RATES  
ARE EXEMPT FROM THE FILING REQUIREMENTS OF  
THE NEW YORK INSURANCE LAW AND REGULATIONS.  
HOWEVER THE FORMS AND RATES MUST MEET THE MINIMUM  
STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

2-14176

In Witness Whereof, the Company has caused this policy to be executed and attested.

  
Secretary

  
President

The information contained herein replaces any similar information contained elsewhere in the policy.

Underwritten by: Freedom Specialty Insurance Company  
 Home Office: One Nationwide Plaza · Columbus, Ohio 43215  
 Administrative Office: 8877 North Gainey Center Drive · Scottsdale, Arizona 85258  
 1-800-423-7675 · A Stock Company

**EXCESS INSURANCE POLICY**

DEPENDING UPON THE TERMS OF THE FOLLOWED POLICY, THIS POLICY MAY APPLY ONLY TO CLAIMS FIRST MADE DURING THE POLICY PERIOD OR EXTENDED REPORTING PERIOD, IF APPLICABLE, AND THE LIMIT OF LIABILITY MAY BE REDUCED BY PAYMENT OF DEFENSE COSTS. PLEASE READ AND REVIEW THE POLICY CAREFULLY.

**DECLARATIONS**

Item 1. <b>Named Insured &amp; Mailing Address:</b>	DiamondPeak Holdings Corp 40 West 57th Street 29th Floor New York, NY 10019	Policy No.: [REDACTED] Agent No.: 31405 Renewal No.: NEW										
Item 2.	Aggregate Limit of Liability (maximum amount payable by the <b>Insurer</b> under this Policy): \$ 5,000,000											
Item 3. <b>Policy Period:</b>	02/27/2019 to 02/27/2021 12:01 A.M. local time at <b>Named Insured's</b> Mailing Address											
Item 4. Schedule of <b>Underlying Policies:</b>	<p><b>"Followed Policy"</b> means the policy or coverage section identified below in the Schedule of <b>Underlying Policies</b>, as constituted at its inception (unless the <b>Insurer</b> consents to any change thereto by written endorsement to this Policy).</p> <table border="1"> <thead> <tr> <th>Followed Policy</th> <th>Underlying Insurer</th> <th>Underlying Policy</th> <th>Limit of Liability</th> <th>Policy Period</th> </tr> </thead> <tbody> <tr> <td><input checked="" type="checkbox"/></td> <td>XL Specialty Insurance Company DEDUCTIBLE/RETENTION:</td> <td>ELU160145-19</td> <td>\$10,000,000</td> <td>02/27/2019 - 02/27/2021</td> </tr> </tbody> </table> <p>SEE FORM UTF-358 12-07 FOR COMPLETE SCHEDULE OF UNDERLYING POLICIES</p> <p><b>"Underlying Limits"</b> means the following amount: \$ 10,000,000</p> <p><b>"Underlying Policies"</b> means all policies or coverage sections of policies identified in the above Schedule of <b>Underlying Policies</b>, as constituted at their inception (unless the <b>Insurer</b> consents to any change thereto by written endorsement to this Policy). <b>"Underlying Insurer"</b> means any insurer identified in the above Schedule of <b>Underlying Policies</b> as issuing an <b>Underlying Policy</b>.</p>		Followed Policy	Underlying Insurer	Underlying Policy	Limit of Liability	Policy Period	<input checked="" type="checkbox"/>	XL Specialty Insurance Company DEDUCTIBLE/RETENTION:	ELU160145-19	\$10,000,000	02/27/2019 - 02/27/2021
Followed Policy	Underlying Insurer	Underlying Policy	Limit of Liability	Policy Period								
<input checked="" type="checkbox"/>	XL Specialty Insurance Company DEDUCTIBLE/RETENTION:	ELU160145-19	\$10,000,000	02/27/2019 - 02/27/2021								
Item 5.	<b>Premium:</b> \$ [REDACTED]	<b>Terrorism Premium:</b> \$ [REDACTED] <b>Total Premium:</b> \$ [REDACTED]										
Item 6.	Pending and Prior Litigation Date (in accordance with <b>Followed Policy</b> , but date may differ): Continuity Date (in accordance with <b>Followed Policy</b> , but date may differ):											
Item 7.	Endorsements Effective at Inception: SEE SCHEDULE OF FORMS AND ENDORSEMENTS											
Item 8.	<u>Notice of Claims to:</u> Nationwide Management Liability & Specialty Attn: Claims Manager 7 World Trade Center, 37 <sup>th</sup> Floor 250 Greenwich Street New York, NY 10007-0033  <a href="mailto:mlsreportclaim@nationwide.com">mlsreportclaim@nationwide.com</a>	<u>Other Notices to:</u> Nationwide Management Liability & Specialty Attn: Claims Manager 7 World Trade Center, 37 <sup>th</sup> Floor 250 Greenwich Street New York, NY 10007-0033  <a href="mailto:mlsreportclaim@nationwide.com">mlsreportclaim@nationwide.com</a>										

These Declarations, together with the application (as defined in the **Followed Policy**) and any information submitted therewith, the Policy, and any written endorsement(s) attached thereto, shall constitute the contract between the **Insureds** and the **Insurer**.

**NOTICE**

THESE POLICY FORMS AND APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK INSURANCE LAW AND REGULATIONS. HOWEVER THE FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

XMF-D-2 (11-16)



2-14176



FREEDOM SPECIALTY  
INSURANCE COMPANY®  
a Nationwide Insurance® company

A Stock Insurance Company, herein called the **Insurer**

## EXCESS INSURANCE POLICY

UNLESS OTHERWISE PROVIDED IN THE FOLLOWED POLICY, THIS POLICY APPLIES ONLY TO CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD OR EXTENDED REPORTING PERIOD. THE LIMIT OF LIABILITY SHALL BE REDUCED AND MAY BE EXHAUSTED BY PAYMENT OF DEFENSE COSTS.

In consideration of the payment of the premium and in reliance upon the application (as defined in the **Followed Policy**) and any information submitted therewith, and subject to the Declarations and terms and conditions of this Policy, the persons and entities entitled to coverage under the **Followed Policy** (the “**Insureds**”) and the **Insurer** agree as follows:

### I. INSURING AGREEMENT

The **Insurer** shall provide insurance coverage excess of the **Underlying Limits** in accordance with the same terms, definitions, conditions, exclusions and limitations as are contained in the **Followed Policy**, except with respect to the premium, the limit of liability and as otherwise provided herein.

### II. DEFINITIONS

- A. “**DIC Insurer**” means any insurer which wrote a difference-in-conditions policy excess of this Policy that drops down to pay any amount due under the **Underlying Policies** pursuant to the difference-in-conditions provisions of such policy; provided, however, any such policy issued by such insurer shall not be considered one of the **Underlying Policies**.
- B. “**Financial Insolvency**” means the status of any **Underlying Insurer** being subject to the appointment, by any state, federal or foreign official, agency or court, of any receiver, conservator, liquidator, trustee, rehabilitator or similar official to take control of, supervise, manage or liquidate such **Underlying Insurer**.

### III. REDUCTION OR EXHAUSTION OF UNDERLYING LIMITS

- A. The **Insurer** shall not provide any coverage under this Policy until the full amount of the **Underlying Limits** has been exhausted through payments by, on behalf of or in the place of the **Underlying Insurers** of amounts covered under the terms of the **Underlying Policies** by any or all of the following:
  - (1) the **Underlying Insurers** under the **Underlying Policies**;
  - (2) the **Insured**; or
  - (3) a **DIC Insurer**, in the event the difference-in-conditions policy written by such **DIC Insurer** drops down to pay any amount due under the **Underlying Policies**.
- B. In the event that the **Underlying Limits** are partially reduced by reason of actual payments as described in Section III.A. above, then subject to the Limit of Liability this Policy shall continue to apply as excess over the reduced **Underlying Limits**.
- C. In the event that the **Underlying Limits** are wholly exhausted by reason of actual payments as described in Section III.A. above (and the full amount of any applicable deductible or uninsured retention has been paid under the **Followed Policy** by the **Insured** or others), then subject to the Limit of Liability this Policy shall continue to apply as primary insurance in accordance with the terms, definitions, conditions, exclusions and limitations of the **Followed Policy** and the terms, definitions, conditions, exclusions and limitations of this Policy; provided always that this Policy shall only pay excess of such deductible or retention, which shall be applied in the same manner as specified in the **Followed Policy**.
- D. This Policy shall only pay in the event of the reduction or exhaustion of the **Underlying Limits** by reason of actual payments as described in Section III.A. above and shall not drop down for any other reason, including but not limited to the existence of any sub-limit in any **Underlying Policy**; provided, however, this Policy will recognize erosion of any of the **Underlying Policies** due to the existence of a sub-limit.
- E. The **Insureds** expressly retain the risk of any gap in coverage or uncollectibility and the **Insurer** does not in any way insure or assume such risk.

### IV. CONDITIONS OF COVERAGE

- A. As a condition precedent to this Policy’s coverage, in the event of the **Financial Insolvency** of any of the **Underlying Policies** or the reduction or exhaustion of any of the **Underlying Policies**, the **Insureds** shall notify the **Insurer** in writing as soon as practicable thereafter, with full particulars.
- B. If during the **Policy Period** or any discovery or extended reporting period, any terms, definitions, conditions, exclusions and limitations of the **Followed Policy** are changed, this Policy shall not be subject to such change unless the **Insurer** consents by written endorsement to this Policy.



FREEDOM SPECIALTY  
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## SCHEDULE OF FORMS AND ENDORSEMENTS

Policy No. [REDACTED] Effective Date 02/27/2019

12:01 A.M. Standard Time

Named Insured DiamondPeak Holdings Corp Agent No. 31405

UTF-COVPG	01-17	COVER PAGE
XMF-D-2	11-16	EXCESS INSURANCE POLICY - DECLARATIONS
XMF-P-2	07-10	EXCESS INSURANCE POLICY
UTF-SP-2	06-11	SCHEDULE OF FORMS AND ENDORSEMENTS
UTF-358	12-07	SCHEDULE OF UNDERLYING POLICIES

FREEDOM SPECIALTY  
INSURANCE COMPANY®**SCHEDULE OF UNDERLYING POLICIES**

Policy No. [REDACTED] Effective Date 02/27/2019

12:01 A.M. Standard Time

Named Insured DiamondPeak Holdings Corp Agent No. 31405

Issuing Insurer	Policy Number	Limits of Liability	Attachment
Primary: XL Specialty Insurance Company	[REDACTED]	\$10,000,000	See Followed Policy Retention