

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

In re

Lordstown Motors Corp., *et al.*,¹

Debtors.

Lordstown Motors Corp. and Lordstown EV
Corporation,

Plaintiffs,

v.

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.

Chapter 11

Case No. 23-10831 (MFW)

(Jointly Administered)

Adv. Pro. No. 23-50414 (MFW)

Re: A.D.I. 1, 8

**DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS
ALL COUNTS OF THE ADVERSARY COMPLAINT**

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

Plaintiffs Lordstown Motors Corp. and Lordstown EV Corporation (collectively, “Lordstown” or “Plaintiffs”) filed an Adversary Complaint (the “Complaint”) on June 27, 2023 in the above-captioned proceeding. D.I. 1. The Foxconn Defendants² respectfully submit this opening brief in support of their Motion to Dismiss the Complaint in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.³

SUMMARY OF ARGUMENT

1. Foxconn moves for dismissal and to compel arbitration of all Counts on the ground that the claims are subject to an enforceable agreement to arbitrate.

2. In the alternative, should the Court determine that any of the Counts are not arbitrable, they should be dismissed for failure to state a claim.

PRELIMINARY STATEMENT

The Complaint alleges that Defendants engaged in a sweeping multi-year scheme to defraud Plaintiffs and destroy their business. That is fiction.

The reality is that the parties contractually agreed to resolve their disputes over this false narrative and misreading of the law through binding arbitration, not litigation before this Court.

² Hon Hai Precision Industry Co., Ltd (a/k/a Hon Hai Technology Group) (“Hon Hai”), Foxconn EV Technology, Inc. (“Foxconn Technology”), Foxconn Ventures Pte. Ltd. (“FVP”), Foxconn (Far East) Limited (“Foxconn (Far East)”), and Foxconn EV System LLC (“Foxconn System”) are referred to collectively as “Defendants” or “Foxconn.”

³ Defendants do not consent, and hereby object, to the entry of final orders or judgments by the Court if it is determined that the Court cannot enter final orders or judgments consistent with Article III of the United States Constitution.

Defendants bring this motion to vindicate their rights to arbitrate the claims asserted by Plaintiffs pursuant to their agreements and consistent with binding Third Circuit authority.

At its heart, this adversary proceeding is an attempt by Plaintiffs to find a scapegoat for their failures. They want compensation, not from the founders and management who could not get their idea off the ground and misused and squandered millions of dollars in the process, but from the only investor that has made a demonstrated commitment to try to turn them into a sustainable business.

Plaintiffs, along with the other debtors and debtors-in-possession in the above-referenced chapter 11 cases, formed in the late 2010s with a plan to “revolutionize” the market for commercial pickup trucks with an EV offering. Yet, Plaintiffs’ vision proved larger than their capabilities, and by 2021 they sought a deep-pocketed partner with the hope to shield them from their business failures. That partner was Foxconn.

As the Complaint alleges, by 2021, the self-proclaimed start-up faced “daunting challenges,” Compl. ¶ 3, and had spent tens of millions of dollars on “one of the largest automotive assembly plants in North America” all before having any “go-forward plan,” the “necessary capital,” or a “strategic partner to assist in bringing [their product] to market,” *id.* ¶¶ 2, 23. In retrospect, these admissions make quite clear that Plaintiffs’ only definitive plan was to convert Foxconn into the guarantor of their business and, when that plan failed, to shake down Foxconn for money.

That shakedown started simply enough with a quick property flip, which Lordstown now claims to be a Foxconn fraud with the specious conclusion that the sale was “too cheap” and a “fraction of its replacement cost.” *Id.* ¶¶ 25, 28. This describes fantasy, not reality.

What cash-strapped start-up with no automotive manufacturing experience buys “one of the largest automotive assembly plants in North America”? The answer is that Lordstown either

threw all caution to the wind in the hopes of getting lucky or perhaps had planned from the beginning to flip the asset quickly to an investor it could lure into investing in its nascent business with no proof of profitability. After General Motors (“GM”) had essentially paid Lordstown to take the plant, with Lordstown putting up a token \$20 million, GM in effect returned those funds to Lordstown through a loan of \$40 million.⁴ Despite this gift from GM in 2019, the Complaint reveals that almost immediately following Lordstown’s acquisition of the plant, the company was *still* struggling to “bring in necessary capital” by 2019. So Lordstown determined to flip the plant for \$230 million and other consideration. *Id.* ¶¶ 23, 33. Where did this windfall profit go? And why now do Plaintiffs argue that Foxconn received a windfall based on theoretical replacement costs after Foxconn acquired the same plant for over \$230 million in an arms’ length purchase that Lordstown management approved? *See id.* ¶¶ 23, 33.

Plaintiffs’ Complaint then proceeds from the claim that Foxconn acquired the plant for a song to the next, when Plaintiffs further complain that Foxconn did not do enough to support the Lordstown business. But what the Complaint’s allegations reveal instead is a clear absence of business focus on Lordstown’s part. What business were Plaintiffs pursuing: their legacy Endurance truck business or a new one based on Foxconn’s automotive designs? The Complaint incoherently swings from one project to the next, and back again. Plaintiffs describe switching to “a new vehicle development platform” they characterize as “a completely different program,” after they admitted that it had an out-of-control “cost structure,” delays, and no customers. *Id.* ¶¶ 5, 21, 23. Plaintiffs’ Endurance product had failed. So, instead, the “new” product would be prioritized as the “first vehicle program” for the parties. *Id.* ¶ 35. Lordstown claims it wanted to move forward with this new product model developed with Foxconn—the Model C—“with a significant

⁴ <https://www.detroitnews.com/story/business/autos/general-motors/2019/12/09/gm-loan-lordstown-motors-plant-truck-production/2631094001/>

cost advantage.” *Id.* And, yet, in the same Complaint, Plaintiffs resent the lack of Foxconn support for the failed legacy product—the Endurance—which, according to Plaintiffs’ other allegations, had been put on the back burner. *See id.* ¶¶ 4, 30, 38. Plaintiffs’ mish-mash of allegations lacks coherence, and demonstrates Lordstown’s own incompetence as the key factor in their failing business. And, critically for present purposes, the conflicting allegations utterly fail to state any claim for relief, least of all claims for fraud or other tortious harm. There is nothing in the Complaint that plausibly suggests bad faith, inequity, fraud, or breach on the part of Foxconn.

Nevertheless, instead of taking responsibility for their poor management and incoherent business plan, Plaintiffs bring this proceeding seeking “billions of dollars” in “damages” from Foxconn. *See, e.g., id.* ¶¶ 85, 94, 102, 114, 122, 129, 136, 145, 151, 157. While Plaintiffs fail to allege what those supposed damages are or how Foxconn could possibly be responsible for them, it is apparent that Plaintiffs are seeking to profit from a business that never existed anywhere except in Lordstown’s imagination.

There are a number of fatal flaws in Plaintiffs’ theories (described below), including that Plaintiffs do not and cannot allege that the parties contemplated the imposition of such extraordinary liabilities on Foxconn, that Foxconn never agreed to guarantee Plaintiffs’ unexpressed aspirations for their business, and that the law does not permit the recovery of lost profits in dreamt-up businesses. Plaintiffs’ claims for consequential damages must be dismissed.

But even more fundamentally, this adversary proceeding is not the proper forum for state-law claims arising under contracts with unambiguous arbitration clauses that require the litigation to be brought elsewhere. Plaintiffs conveniently cherry-pick within the relevant agreements between the parties when it suits them, but they ignore completely the contractual obligations—such as mandatory arbitration and clear liability limitations—that either bar their claims entirely or bar them from being asserted in this forum.

Even if this case remains here, it still must be dismissed, because the Complaint fails to plead any plausible claim arising in law or equity. Plaintiffs do not even try to meet the pleading obligations applicable to their claims, which is telling, because surely they would have done so if they actually had anything to say. The Complaint was not the product of a rushed filing: Plaintiffs have made clear that they entered bankruptcy in an orderly manner to sell their assets and litigate against Foxconn. In these circumstances, the implausibility of Plaintiffs' claims and defective pleading is even more apparent. Among other defects, Plaintiffs' non-contractual claims fail because they are premised on a factually inconsistent, unsupported, and skewed interpretation of Plaintiffs' relationship with Foxconn. In short, the Complaint's conjecture fails to allege any plausible basis for relief.

For these reasons and those that follow, this case should be dismissed due to the parties' agreement to arbitrate pursuant to the JV Agreement or, alternatively, for failure to state a claim for relief.

BACKGROUND

A. Plaintiffs Seek Funding After Their Electric Vehicle (EV) Manufacturing Ambitions Fall Flat.

Plaintiffs are start-ups "in the business of developing, engineering, launching, and selling all-electric vehicles to commercial fleet customers." Compl. ¶ 2. They were allegedly formed in the late 2010s to "revolutionize" the market for commercial pickup trucks. *Id.* ¶ 2.

The first step in Plaintiffs' "revolution[]" involved bringing to market a first-of-its-kind, all-electric full-size pickup truck called the Endurance. *Id.* To do so, in 2019, Plaintiffs purchased a 6.2-million square foot production facility in Lordstown, Ohio, from GM. *Id.*

Plaintiffs intended to launch the Endurance in 2021, only a few years after Plaintiffs' formation. *Id.* ¶ 20. But, by 2021, they still had not executed on their vision, despite having once

had a market capitalization of \$5.3 billion. *See id.* ¶ 2. Failing to execute, they sought yet additional funding. *See id.* ¶¶ 3, 21.

B. Foxconn and Plaintiffs Begin Their Relationship by Entering into an Agreement in Principle.

Beginning in September 2021, Plaintiffs entered into a series of agreements with Foxconn. *See* Compl. ¶¶ 22-23. Plaintiffs had “good reasons” for pursuing Foxconn as an investor. *Id.* ¶ 22. The world leader in electronics manufacturing, with immeasurable technical and operational expertise and revenues of over \$215 billion in 2022, Foxconn has a global reputation, “deep resources[,] and massive economies of scale,” all of which Plaintiffs sought to leverage. *Id.* ¶ 3.

As a first step towards defining their relationship, the parties entered into an agreement in principle on September 30, 2021. *See id.* ¶ 23; Compl. Ex. A (the “Agreement in Principle”). Under the Agreement in Principle, Foxconn would receive “a right of first offer with respect to the contract manufacturing of any vehicle designed and developed by [Plaintiffs].” Agreement in Principle § 5(c)(v). Foxconn also agreed in principle to:

- (1) use “commercially reasonable best efforts” to enter into an asset purchase agreement by October 31, 2021 to purchase Plaintiffs’ Lordstown, Ohio manufacturing facility, *see id.* § 1(a);
- (2) purchase \$50 million in shares of Lordstown Motors Corp. Class A common stock, *see id.* § 2;
- (3) use “commercially reasonable best efforts” to lease Plaintiffs’ workspace at the Lordstown facility, *see id.* § 4; and
- (4) use “commercially reasonable best efforts” to enter into a contract manufacturing agreement by April 30, 2022—a condition to the closing of the contemplated Asset Purchase Agreement, *see id.* § 1(d)—that provided for Foxconn’s manufacture of the Endurance, *see id.* § 5.

Of these commitments, only the agreement to purchase \$50 million in shares created a binding obligation. *Id.* § 17.

The Agreement in Principle does not require that Foxconn do any of the following:

- (1) collaborate with Plaintiffs on the development of any future vehicle programs,
- (2) make any “capital contributions” beyond the \$50 million investment, or
- (3) grant Plaintiffs access to Foxconn’s intellectual property.

Indeed, the Agreement in Principle is explicit in leaving the scope of the parties’ relationship open for future discussion, expressly stating in § 5(v) that “the Parties expect there to be significant advantages to working together on future vehicles designed and developed” by Plaintiffs. In effect, the Agreement in Principle is just that: an agreement to agree (or not) in the future regarding certain matters.

C. Foxconn and Plaintiffs Expand the Scope of Their Relationship by Entering into an Asset Purchase Agreement.

Plaintiffs saw their “stock jump[] significantly” on the day the Agreement in Principle was publicly announced. Compl. ¶ 25. Foxconn also completed its \$50 million investment in Plaintiffs, as provided for in the Agreement in Principle, in October 2021. *See id.* ¶ 26. Thereafter, on November 10, 2021, Plaintiffs and two Foxconn entities, Foxconn Technology (as Purchaser) and Foxconn (Far East) (as Guarantor), executed an asset purchase agreement for the purchase of the Lordstown manufacturing facility, and the transfer of certain facility employees to Foxconn entities, in exchange for a cash payment of \$230 million plus certain reimbursements. *See id.* ¶ 28; Compl. Ex. B (the “Asset Purchase Agreement”) §§ 2.1, 2.6, 5. Unburdening themselves of the overwhelming costs of carrying the plant, in a period where Plaintiffs were not generating profits and lacked a go-forward path to profitability, was the rare sensible business decision Plaintiffs made in trying to escape failure and a further step towards abandoning their ambitions to become a vertically integrated OEM. *See* Compl. ¶ 23 (alleging that “selling the Plant would bring in necessary capital” to Lordstown, “while lowering go-forward operational costs”).

As relevant here, the Asset Purchase Agreement further directed the parties to (1) use “commercially reasonable best efforts” to agree upon a contract manufacturing agreement by April 30, 2022 (the same as envisioned in the Agreement in Principle, *see* Agreement in Principle § 5(a)) and Asset Purchase Agreement § 4.1(h); and (2) use “commercially reasonable efforts” to enter into a joint venture agreement defining the parties’ allocation of resources for new EV programs, *see* Asset Purchase Agreement § 4.1(k). Notably, the parties did not agree in the Asset Purchase Agreement to expressly condition closing on the parties entering into such agreements, or any other form of joint vehicle development arrangement.

D. Foxconn and Plaintiffs Enter Into a Contract Manufacturing Agreement, as Envisioned by the Agreement in Principle.

On May 11, 2022, the same day they closed the Asset Purchase Agreement, the parties entered into a contract manufacturing agreement. *See* Compl. ¶ 33 & Ex. C (the “Manufacturing Supply Agreement”). Pursuant to the Manufacturing Supply Agreement, Foxconn System would manufacture the Endurance, known as “Version 1.0.” *See* Manufacturing Supply Agreement, Recital C & § 1 (Definition of “Vehicle”). However, Foxconn System made no commitment under the Manufacturing Supply Agreement or in any other agreement with regards to the manufacture of any other version of the Endurance or other EV. The agreement also required the parties to use “commercially reasonable efforts” in their performance of certain obligations relating to operational efficiencies and cost reductions. *See, e.g., id.* § 2(vii); *see also id.* § 1 (defining “commercially reasonable efforts”).

The Manufacturing Supply Agreement contains specifically negotiated provisions that limit Foxconn’s potential liability. In fact, section 17(b) of the Manufacturing Supply Agreement places a strict cap on Foxconn’s liability, providing that Foxconn’s aggregate liability in any calendar year cannot exceed the greater of \$6,000,000 and 100% of the trailing twelve month’s

manufacturing value add payment from the first full month prior to the date of the occurrence of the claim. *Id.* § 17(b). The parties further agreed to a consequential damages exclusion, which plainly states that neither party shall be liable to the other—under any contractual, tort, or equitable theory—for any consequential or indirect damages. *Id.* § 17(a). Plaintiffs nonetheless here claim “billions of dollars” of consequential damages from Foxconn for supposed breaches of the Manufacturing Supply Agreement, in sheer disregard of these clearly drafted contractual limitations on damages.

In addition, the Manufacturing Supply Agreement contains an arbitration clause providing that “[a]ny and all claims, counterclaims, demands, cause of action, disputes, controversies, and other matters in question arising out of or under this Agreement or the alleged breach of any provision hereof . . . whether such Disputed Claims arise at law or in equity, under state or federal law, for damages or any other relief” be submitted to binding arbitration before the American Arbitration Association. *Id.* § 23(b).

E. The Parties Agree to Create a Foxconn Majority-Owned JV.

Also on May 11, 2022, the parties agreed to a limited liability company agreement (the “JV Agreement”) creating a joint venture called MIH EV Design LLC (the “JV”). *See* Compl. ¶ 33 & Ex. D. As noted, entry into the JV Agreement was *not* a condition to closing the Asset Purchase Agreement. Rather, discussions concerning the joint venture arrangement ran parallel to negotiations concerning the closing of the Asset Purchase Agreement and the Manufacturing Supply Agreement—themselves merely *indicia* of Defendants’ good faith in working with Plaintiffs to develop a joint venture. *Id.* ¶¶ 29, 33.

The JV is owned 55% by Foxconn Technology and 45% by Plaintiffs. *Id.* ¶ 34. The JV was formed to design, develop, manufacture, and maintain all-electric commercial vehicles. JV Agreement § 1.1 (Ownership Percentage; In-Scope Business). The JV Agreement provides that

the JV's first vehicle program would be based on Foxconn affiliate-developed designs, with Foxconn (1) providing the JV access to intellectual property concerning the Foxconn affiliate-developed designs as "necessary" to commence "Pre-Development Activities," and (2) using "commercially reasonable efforts" to grant the JV, within 60 days from the date of the JV Agreement, a "perpetual, irrevocable, non-exclusive, worldwide, license to" the Foxconn-affiliate developed vehicle designs. JV Agreement §§ 1.1, 2.10; *see also* Compl. ¶ 35.

Critically, for purposes of this motion, the JV Agreement contains a detailed dispute resolution process that requires the parties to attempt to resolve any dispute through multiple rounds of negotiations at the operational and senior management level and through mandatory mediation. *See* JV Agreement §§ 13.8(a)-(c). Moreover, the parties agreed that any dispute that cannot be resolved through good-faith negotiation or mediation must be submitted to binding arbitration before the International Chamber of Commerce (the "ICC"). *Id.* § 13.8(d). The arbitration clause agreed to by the parties is broad and unambiguous: it requires the arbitration of "all disputes, controversies or Claims (whether sounding in contract, tort, common law, statutory law, equity or otherwise), other than a Board Deadlock, arising out of or relating to this Agreement" *Id.* § 13.8. Yet Plaintiffs filed their claims in this Court and did so without any effort whatsoever to engage in good-faith negotiations or mediation prior to bringing the action.

F. The Parties Enter into an Investment Agreement.

Foxconn engaged with Plaintiffs throughout the summer and fall of 2022. *See, e.g.,* Compl. ¶¶ 38, 40. However, Plaintiffs' lack of focus and overreliance on Foxconn to get the JV off the ground doomed the JV from the start. *See, e.g., id.* ¶¶ 37-39. Plaintiffs failed to satisfy the standards Foxconn expected of a JV partner.

By November 7, 2022, Plaintiffs "pivot[ed] away from the JV Agreement" and entered into an Investment Agreement with FVP. *Id.* ¶ 44 & Ex. E (the "Investment Agreement"). Plaintiffs

negotiated for an additional injection of capital amounting to as much as \$170 million. *See* Investment Agreement § 2.01.

The initial closing under the Investment Agreement took place on November 22, 2022. Compl. ¶ 45.

G. Plaintiffs Breach Their Listing Requirements.

On March 7, 2023, Plaintiffs’ common stock—listed on Nasdaq—fell below \$1 per share, in breach of Nasdaq listing rules. *See* Compl. ¶ 60. Nasdaq notified Plaintiffs on April 19, 2023 that they would be delisted unless they cured the breach within 180 days. *Id.* ¶ 60 & Ex. H (the “April 2023 Nasdaq Letter”).

On April 21, 2023, FVP notified Plaintiffs that their non-compliance with the Nasdaq listing rules constituted a breach of the Investment Agreement. Compl. ¶ 61; Compl. Ex. I (the “Termination Notice”) at 1; Investment Agreement §§ 3.13, 6.03(a)(i). Accordingly, FVP provided notice of its intent to exercise its termination rights under the Investment Agreement, subject to Plaintiffs’ cure of the breach. Compl. ¶ 61; Termination Notice at 1. By letter dated April 25, 2023, Plaintiffs disputed that the Nasdaq notice constituted a breach or that the Investment Agreement allowed for a termination post-initial closing, and otherwise blamed Foxconn for their self-created predicament. *See id.* ¶ 62. By May 2023, Foxconn decided not to terminate the Investment Agreement and notified Plaintiffs accordingly. *See id.* ¶ 64.

Eventually, Plaintiffs alleged to have cured their breach by conducting a reverse stock split to push the shares above \$1 per share. *See* Compl. ¶ 72. On June 7, 2023, Nasdaq sent a notice closing the matter. *See id.* ¶ 77 & Ex. K (the “June 2023 Nasdaq Letter”). FVP then attempted to proceed with the subsequent closing pursuant to the terms of the Investment Agreement, but Plaintiffs refused to sell their common stock to FVP at its actual price, in disregard of § 2.01. *See*

id. ¶ 73 & Ex. J (the “Letter Regarding Plaintiffs’ Public Statements re Subsequent Common Closing”); Investment Agreement § 2.01.

ARGUMENT

“To survive a motion to dismiss under Rule 12(b)(6), a plaintiff’s complaint must contain sufficient ‘factual allegations’ which, if true, would establish ‘plausible grounds’ for a claim.” *In re Midway Games Inc.*, 428 B.R. 303, 312 (Bankr. D. Del. 2010) (citation omitted). Although courts must assume the truth of a complaint’s allegations and draw reasonable inferences in the plaintiff’s favor, “a court need not credit a plaintiff’s bald assertions or legal conclusions when deciding a motion to dismiss.” *Sands v. McCormick*, 502 F.3d 263, 267-68 (3d Cir. 2007) (internal quotations and citation omitted). In addition, claims sounding in fraud must be stated with particularity. Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009(b).

Defendants request that the Court: (1) dismiss all Counts due to the existence of an enforceable arbitration provision in the JV Agreement; or, in the alternative, (2) dismiss all Counts for failure to state a claim.

A. The Parties’ Agreement to Arbitrate Claims “Arising out of or Relating to” the JV Agreement Warrants Dismissal of All Counts.

The Federal Arbitration Act (“FAA”) provides that arbitration agreements “‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’” *In re Paragon Offshore PLC*, 588 B.R. 735, 750 (Bankr. D. Del. 2018). As this Court has observed, “the FAA ‘is a congressional declaration of a liberal federal policy favoring arbitration agreements’ that, under settled Supreme Court precedent, requires “‘any doubts concerning the scope of arbitrable issues [to be] resolved in favor of arbitration.’” *In re GWI, Inc.*, 269 B.R. 114, 116-17 (Bankr. D. Del. 2001) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Where, as here, “it is apparent, based on the face of a

complaint, and documents relied upon in the complaint, that certain of a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay." *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 776 (3d Cir. 2013) (internal quotations and citation omitted).⁵ To the extent a case contains both arbitrable and non-arbitrable claims, the latter should be stayed pending arbitration. *See Appforge, Inc. v. Extended Sys., Inc.*, No. C.A. 04-704-GMS, 2005 WL 705341, at *10 (Bankr. D. Del. Mar. 28, 2005).

The JV Agreement and the Manufacturing Supply Agreement both contain valid arbitration clauses. JV Agreement § 13.8(d) (mandating arbitration before the International Chamber of Commerce); Manufacturing Supply Agreement § 23(b) (mandating arbitration before the American Arbitration Association). Plaintiffs not only fail to make any allegation that would render these arbitration provisions inapplicable; they conveniently omit any reference to these provisions in the Complaint, in yet another example of the cherry-picking of contractual provisions that is a central theme of their skewed narrative.

The JV Agreement's arbitration provision extends to,

any and all disputes, controversies or Claims (*whether sounding in contract, tort, common law, statutory law, equity or otherwise*), other than a Board Deadlock, *arising out of or relating to* this Agreement, including any question regarding its existence or scope, the meaning of its provisions, or the proper performance of any of its terms by either Member, or its breach, termination or invalidity

JV Agreement § 13.8(a) (emphasis added).

⁵ "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *In re Paragon Offshore PLC*, 588 B.R. 735, 750 (Bankr. D. Del. 2018) (internal quotations and citation omitted; ellipsis in original). Thus, in addition to applicable federal law, Delaware law applies to whether compelling arbitration under the JV Agreement is proper. JV Agreement § 13.7 (Delaware law governs). Ohio law applies to the Manufacturing Supply Agreement. *See* Manufacturing Supply Agreement § 24(s). For the Court's purposes, Ohio and Delaware law are sufficiently similar.

The parties negotiated the broadest possible arbitration clause, reflecting the intent to arbitrate any claim that has some relation to the joint venture arrangement. All Counts in the Complaint fall comfortably within the provision’s broad scope. *See Battaglia v. McKendry*, 233 F.3d 720, 727 (3d Cir. 2000) (“When phrases such as ‘arising under’ and ‘arising out of’ appear in arbitration provisions, they are normally given broad construction, and are generally construed to encompass claims going to the formation of the underlying agreements.”); *see also Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (internal quotations omitted) (characterizing a clause to arbitrate “any claim or controversy arising out of or relating to” the agreement as “the paradigm of a broad clause”). Specifically, Plaintiffs’ asserted claims either “arise out of” or “relate to” the JV Agreement.

- Counts I and VIII—Plaintiffs’ fraud claims—are based on allegations that Defendants fraudulently misrepresented that they would enter into a joint venture. *See, e.g.*, Compl. ¶ 33 (alleging that Foxconn signed the JV Agreement with “no intent of doing anything to achieve these initiatives [therein]; they were just promises designed to string the Company along so that Foxconn could starve it out of existence”); *see also id.* ¶¶ 81-85, 141-45.
- Counts II-V relate to FVP’s alleged breaches of the Investment Agreement, which, by Plaintiffs’ own telling, was born out of the JV Agreement.⁶ *Id.* ¶¶ 44-45 (drawing a direct connection between Foxconn’s alleged breaches of the JV Agreement and the inception and execution of the Investment Agreement).
- Count VI concerns Foxconn Technology’s alleged breach of the JV Agreement. *See id.* ¶¶ 125-30.
- While Count VII speaks to a breach of the Asset Purchase Agreement, the underlying allegations hinge on Defendants’ efforts to enter into the JV Agreement. *See id.* ¶ 135 (alleging that Foxconn Technology’s “repeated[] breach[]” of the Asset Purchase Agreement stymied efforts to enter into the JV Agreement).

⁶ In the alternative, Plaintiffs’ claims for breach of the Investment Agreement (Counts II-V) mandate dismissal on the additional ground that the Investment Agreement contains a broad and mandatory forum selection clause dictating that claims “arising out of or relating to” the Investment Agreement should be properly heard in the Delaware Court of Chancery. *See Investment Agreement* § 8.06(b); *In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008).

- Count IX alleges breach of the Manufacturing Supply Agreement, on the basis that Foxconn System allegedly failed in certain of its obligations thereunder. *Id.* ¶ 149. The underlying alleged conduct at issue relates to and is intertwined with the parties' negotiation of the JV Agreement. *Id.* ¶ 33.⁷
- Count X—Plaintiffs' tortious interference claim—arises from allegations that Defendants interfered with the JV Agreement. *See id.* ¶ 155.
- Count XI—Plaintiffs' equitable subordination claim—is premised on Plaintiffs' other ten counts, all of which arise from or relate to the JV Agreement. *See id.* ¶¶ 160-163.

The fact that these claims are asserted in an adversary proceeding pending before a bankruptcy court does not save them from arbitration. *See In re Mintze*, 434 F.3d 222, 232-33 (3d Cir. 2006). As the Third Circuit has explained, where an otherwise applicable arbitration clause exists, a bankruptcy court lacks the authority and discretion to deny its enforcement, unless the party opposing arbitration can establish Congressional intent to exclude the particular claims at issue from the FAA's pro-arbitration policy. *Id.* at 229-30. This is true regardless of whether the proceedings subject to arbitration are core or non-core. *Id.* at 229-32. Nor is there evidence Congress intended to exclude a predominantly state law-based contract case like this one from the FAA's sweeping ambit. *See In re GWI Inc.*, 269 B.R. at 119 (finding "no evidence" that "permitting arbitration of claims is a threat to the bankruptcy process. Instead it often results in a quicker and more economic resolution of claims. We find no reason to conclude that this case will be any different from the myriad other cases which are regularly decided in arbitration."); *In re Rarities Grp., Inc.*, 434 B.R. 1, 11-12 (D. Mass. 2010) (mandating arbitration of an equitable subordination claim and noting that "not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the [FAA]; nor would arbitration of such

⁷ In the alternative, Count IX—breach of the Manufacturing Supply Agreement—must be submitted to arbitration pursuant to the Manufacturing Supply Agreement's broad arbitration provision. *See* Manufacturing Supply Agreement § 23.

proceedings necessarily jeopardize the objectives of the Bankruptcy Code”) (internal quotation and citation omitted).

Furthermore, Counts I-X are undeniably non-core state law pre-petition claims. *See In re Axiant, LLC*, No. 09-14118 MFW, 2012 WL 5614588, at *3-4 (Bankr. D. Del. Nov. 15, 2012) (citing *In re AstroPower Liquidating Tr.*, 335 B.R. 309, 323 (Bankr. D. Del. 2005)). They constitute traditional state law claims that arose prior to the petition date, could have been brought prior to and independent of these chapter 11 cases, and in no way depend on an interpretation of the Bankruptcy Code. *See In re TK Holdings, Inc.*, 653 B.R. 33, 42 (D. Del. 2023) (“[C]ourts generally find that state law causes of action brought by or on behalf of the debtor, which do not fall within the provisions of 28 U.S.C. § 157(b)(2)(B)-(N), are non-core matters.”); *Hoffmeyer v. Loewen Grp. Int’l. Inc.*, 279 B.R. 471, 477 (Bankr. D. Del. 2002) (holding that shareholders’ claims were non-core because such claims sounded in tort, contract, and property law, arose prior to the petition date, and in no way depended on an interpretation of the Bankruptcy Code); *In re Donington, Karcher, Solmond, Ronan & Rainone, P.A.*, 194 B.R. 750, 758 (Bankr. D.N.J. 1996) (“Courts in this circuit also deem relevant whether the claim arose pre-petition or post-petition and often find that post-petition claims are more appropriately designated as a core proceeding.”) (citing cases); *see also In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1178 (3d Cir. 1996) (finding claims that could exist outside of bankruptcy to be non-core).

And in the interest of judicial efficiency, to the extent that any claims deemed non-arbitrable survive dismissal,⁸ it is in the interest of justice and judicial economy to stay proceedings subject to the outcome of the arbitrations. The equitable subordination claim, specifically, is dependent entirely on the viability of the state law claims and thus should be stayed

⁸ To the extent that any of Plaintiffs’ state law claims (Counts I-X) survive dismissal, Defendants reserve the right to move to withdraw the reference.

pending the outcome of the arbitral proceedings. *See In re Saigon Plaza Ass’n, LLC*, No. 07-4149, 2007 WL 3357641, at *7 (N.D. Cal. Nov. 5, 2007) (“[T]he Court finds all of the claims based on bankruptcy law to be derivative of the state law claims. Therefore, it seems appropriate to stay litigation of those claims.”); *In re Transp. Assocs., Inc.*, 263 B.R. 531, 536 (Bankr. W.D. Ky. 2001) (“We make no determination as to the merits of the Trustee’s § 510(c) claim and elect to stay the Trustee’s adversary proceeding . . . pending a final decision by the arbitrators. Once the amount of [movant’s] claim is determined by the arbitrators, this court will consider the Trustee’s equitable subordination claim.”). Plaintiffs can still get their day in court after the arbitration concludes; but the parties should not have to deal with the “inefficien[cy]” of “arbitrating concurrently with the litigation,” which would require resolving their controversies in two different forums. *See Appforge, Inc.*, 2005 WL 705341, at *10 (staying proceedings pending arbitration, reasoning that a stay would be more efficient than concurrent proceedings and would not prejudice the parties). Staying this adversary proceeding pending arbitration would inevitably streamline or minimize the matters that would remain for litigation before this Court after the arbitration concludes.

For these reasons, the Court should enforce the parties’ bargained-for agreement to arbitrate and dismiss all Counts in favor of arbitration.

B. The Complaint Also Fails to State a Claim for Relief.

1. Plaintiffs’ Breach of Contract Claims Should Be Dismissed for Failure To Allege Damages (Counts II, III, IV, V, VI, VII, and IX)

It is blackletter Delaware law that consequential damages are not recoverable for breach of contract claims unless the damages were “reasonably foreseeable or contemplated by the parties at the time the contract was entered into as a probable result of a breach.” *Pharma. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, No. 5688-VCS, 2011 WL 549163, at *6 (Del. Ch. Feb. 16, 2011) (quoting 24 WILLISTON ON CONTRACTS § 64:12 (4th ed. 2010)); *accord RTN Invs., LLC v.*

RETN, LLC, No. 08C-04-007JRJ, 2011 WL 862268, at *18 (Del. Super. Ct. Feb. 10, 2011) (“[C]onsequential damages for breach of contract must be reasonably foreseeable.”) (internal quotations omitted).

This limitation on the availability of consequential damages recognizes the centuries-old bedrock principle of contract law that “[t]he law does not hold one liable for all injuries that follow a breach of contract, but only for such injuries as are the direct, natural and proximate result of the breach.” *Hajoca Corp. v. Sec. Tr. Co.*, 25 A.2d 378, 381 (Del. Super. Ct. 1942) (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Reprint 145, 5 E.R.C. 502 (English Ct. of Exchequer 1854)); *see also Diamond Fortress Techs., Inc. v. EverID, Inc.*, 274 A.3d 287, 305 (Del. Super. Ct. 2022) (quoting *Siga Tech., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1132-33 (Del. 2015)) (“[T]he standard remedy for breach of contract is based on the reasonable expectations of the parties that existed before or at the time of the breach.”); *see also Kenford Co. v. Cnty. of Erie*, 73 N.Y.2d 312, 321 (1989) (“The evident purpose of this well-accepted principle of contract law is to limit the liability for unassumed risks of one entering into a contract and, thus, diminish the risk of business enterprise.”).⁹ As such, recovery of consequential damages in breach of contract claims is extremely limited, and available only in the rare, exceptional situation where the breaching party “knew that ‘particular, though unusual, damages will follow or may follow [its] failure to perform its agreement[.]’” *Pharma. Prod. Dev., Inc.*, 2011 WL 549163, at *6 (quoting 24 WILLISTON ON CONTRACTS § 64:12 (4th ed. 2010)); *Kenford Co.*, 73 N.Y.2d at 319 (“[I]n order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], *i.e.*, in the ordinary course of things, arising from a breach of contract, such unusual or

⁹ Delaware and New York follow “traditional contract law principles.” *Villare v. Beebe Med. Ctr., Inc.*, No. 08C-10-189 JRJ, 2014 WL 1095331, at *4 (Del. Super. Ct. Mar. 19, 2014), *aff’d*, 108 A.3d 1226 (Del. 2015).

extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.”).

Plaintiffs’ pie-in-the-sky damages claims contravene these basic Delaware legal principles. Plaintiffs fail to limit their damages claims to the damages that flow naturally and directly from the alleged breaches, as required by Delaware law. Nor do they even attempt to distinguish between the two. Instead, Plaintiffs seek an extraordinary judgment of “billions of dollars” in unattributed damages for each of the seven breach of contract claims. What is more, they do so without any allegation that Foxconn entered into the relevant contracts knowing that it was assuming liability for what, functionally, amounts to the entirety of what the business might have become had it succeeded for decades. There is no basis in law for this patently absurd position.

Nothing Plaintiffs allege crosses the threshold of plausibly alleging that Foxconn ever assumed liability for purported consequential damages. Plaintiffs’ Complaint reveals a struggling business that was mismanaged, overspending what capital it had and unable to launch a product after a decade in business. To claim consequential damages is not only preposterous, but also contrary to the plain reading of the parties’ agreement: Plaintiffs expressly contracted in the Manufacturing Supply Agreement to foreclose the availability of consequential damages, and agreed to cap liability.¹⁰ See Manufacturing Supply Agreement § 17. Foxconn simply did not agree to guarantee the success of Plaintiffs’ business. Plaintiffs’ damages theories thus fail as a matter of law.

Furthermore, a non-breaching party may not recover a “windfall” from a breach. See *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009). Nor may it rely on “uncertain,

¹⁰ The Manufacturing Supply Agreement is governed by Ohio law, which follows the same well-established principles of contract law. See *Williams v. Gray Guy Grp., L.L.C.*, 79 N.E.3d 1146, 1154-55 (Ohio Ct. App. 2016).

contingent, conjectural, or speculative” basis for recovery. *See Callahan v. Rafail*, No. Civ.A. 99C-02-024, 2001 WL 283012, at *1 (Del. Super. Ct. Mar. 16, 2001) (citation omitted). In relation to the breach claims, Plaintiffs recite the same damages allegation no less than seven times: that they have “suffered, and will continue to suffer, billions of dollars in damages,” *see* Compl. ¶¶ 94, 102, 114, 122, 129, 136, 151, because “Plaintiffs’ ability to continue operations is in jeopardy” as a result of the alleged breaches, *see id.* ¶¶ 94, 102, 114, 122. While Plaintiffs’ use of the word “jeopardy” alone proves the speculative nature of their damages claims, the “billions” sought are an impermissible grasp for a damages windfall that Delaware law does not allow.

As Vice Chancellor Slights explained in *Zayo Group, LLC v. Latisys Holdings, LLC*, “[c]ontract damages are not like some works of abstract art; the plaintiff cannot simply throw its proof against the canvas and hope that something recognizable as damages emerges.” No. 12874-VCS, 2018 WL 6177174, at *15 (Del. Ch. Nov. 26, 2018). This, however, is precisely what Plaintiffs are trying to do. The more than half-dozen recitations of the same conclusory allegation, with no explanation or connection to the conduct alleged, are wholly insufficient to plead the damages element of Plaintiffs’ breach of contract claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Air Prods. & Chems., Inc. v. Wieseemann*, 237 F. Supp. 3d 192, 217 (D. Del. 2017) (a plaintiff must allege facts supportive of the damages element of a breach of contract claim in order to prove such a claim).

For these reasons, the Court should dismiss Plaintiffs’ contract claims for failure to allege damages or, in the alternative, dismiss Plaintiffs’ claims for consequential damages and enter a ruling that Plaintiffs are limited to recovering only direct damages that Plaintiffs can prove on their claims for supposed breach of contract.

2. The Common Law Fraud Claims Are Impermissibly Duplicative of the Breach of Contract Claims, and the Complaint Otherwise Fails To Plead Misrepresentation, Scier, or Justifiable Reliance (Counts I and VIII)

As an initial matter, Plaintiffs' fraud claims are wholly and improperly duplicative of each other and their breach of contract claims.

To allege both a fraud claim and a breach of contract claim, a plaintiff must assert wrongful conduct beyond the breach of contract itself, as well as damages from the fraud separate from the breach of contract damages. *See Norman v. Elkin*, 860 F.3d 111, 131 (3d Cir. 2017) (fraud damages cannot just "rehash" contract damages). A plaintiff cannot "bootstrap" a breach of contract claim into a fraud claim "by alleging that a contracting party never intended to perform its obligations." *See Universal Am. Corp. v. Partners Healthcare Sols. Holdings, L.P.*, 176 F. Supp. 3d 387, 403 (D. Del. 2016) (internal quotations and citation omitted); *see also Lion 2004 Receivables Tr. v. Long Term Preferred Care, Inc.*, No. 16-723-RGA-MPT, 2017 WL 1053100 (D. Del. Mar. 20, 2017), *report and recommendation adopted*, No. 16-723-RGA, 2017 WL 3783258, at *3 (D. Del. Aug. 31, 2017) ("As a general rule, where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.").

Each of the fraud claims relies on the same factual allegations used to support Plaintiffs' breach of contract claims—*i.e.*, that Foxconn allegedly never intended to perform its contractual obligations, in some fanciful scheme to create dependency and then starve Lordstown of cooperation and funding, all in a manner directly contrary to Foxconn's own interests as an investor in Lordstown who had acquired over \$100 million in equity and injected \$230 million in additional capital when purchasing the manufacturing plant. *Compare, e.g.*, Compl. ¶¶ 141-45 (alleging common law fraud as to the Asset Purchase Agreement), *with* Compl. ¶¶ 131-39 (alleging breach

of the Asset Purchase Agreement); *compare* Compl. ¶¶ 80-85 (alleging common law fraud as to the Agreement in Principle, Asset Purchase Agreement, Manufacturing Supply Agreement, JV Agreement, and Investment Agreement), *with* Compl. ¶¶ 86-139, 146-152 (alleging seven counts of breach of the same). And Plaintiffs repeat the exact same, vague recitation of alleged damages—*i.e.*, on account of the alleged misconduct, they have “suffered, and will continue to suffer, billions of dollars in damages.” *See* Compl. ¶¶ 85, 94, 102, 114, 122, 129, 136, 145, 151, 157. More is required of the Complaint to proceed. Without any fraud allegations distinct from their contract allegations, Plaintiffs’ fraud claims must fail.

The fraud claims fail for the additional reason that the Complaint does not plead sufficient facts to state a claim. To plead a claim for common law fraud, a complaint must plausibly allege with sufficient particularity, among other elements: (1) a misrepresentation of material fact; (2) a knowing intent to defraud, also known as *scienter*; and (3) justifiable reliance by plaintiff on the misrepresentation. *See In re OSC 1 Liquidating Corp.*, 529 B.R. 825, 832 (Bankr. D. Del. 2015). The Complaint fails to sufficiently plead each of these elements.

a) The Complaint fails to plead that Foxconn made a material misrepresentation

Plaintiffs’ fraud claims improperly rely on sweeping and unsupported allegations of misrepresentations, made by Defendants, regarding their obligations under the various contracts and expectations for the business relationship. *See, e.g.*, Compl. ¶ 81 (alleging a “false representation that [Defendants] sought a partnership with Plaintiffs to jointly develop the next generation of electric vehicles”); *id.* at ¶ 83 (alleging that “Foxconn made . . . statements regarding its interest in a partnership”). Indeed, Plaintiffs allege only one representation with any degree of detail: a single instance of Foxconn’s Chairman stating that he had “high expectations through this partnership that we will be able to successfully integrate our resources with Lordstown Motors. . .

. [The Endurance] will undoubtedly thrive under our partnership and business model.” *Id.* ¶ 24. Setting aside that “high expectations” is a strange stand-in for a false representation of a firm and unwavering commitment that Lordstown baselessly alleges it had at all relevant times from Foxconn, these allegations, taken in the context of a purported multi-year, billion-dollar scheme of fraud, are wholly insufficient to support Plaintiffs’ fraud claims.

Additionally, the Complaint fundamentally fails to plead sufficient facts supporting the falsity of any of the alleged representations. An example is illustrative. Foxconn’s alleged statement about “high expectations” as to the parties’ relationship is alleged to have been made the same day that the parties entered the Agreement in Principle. *Id.* ¶ 24. Yet, on its face and as alleged, a purported statement by Foxconn’s Chairman about “expectations” of a newly announced partnership—on the day of entry into the agreement, *after* the parties’ successful negotiations to enter that agreement—can hardly be claimed to be false, or material. *See In re OSC 1 Liquidating Corp.*, 529 B.R. at 832 (internal quotations omitted) (a false statement is material when it has a “natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed”). An “expectation”—i.e., a *belief* that something *may occur*—is not an actionable representation of fact. *See In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 279 (3d Cir. 2004) (holding, in the context of securities fraud, that “vague expressions of hope” do not constitute misrepresentations). Plaintiffs repeat the same faulty sentiment throughout the Complaint, in essence requesting that the Court ignore the lack of allegations concerning falsity and materiality, and, instead, make advanced inferences on nothing other than a blind acceptance of Plaintiffs’ forced narrative.

b) The Complaint fails to plead scienter

The Complaint fails to plead an inference of scienter for similar reasons. “Under Delaware law, scienter can be proven by establishing that the defendant acted with knowledge of the falsity

of a statement or with reckless indifference to its truth.” *In re Wayport, Inc. Litig.*, 76 A.3d 296, 326 (Del. Ch. 2013). Although malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally, plaintiffs must aver more than “threadbare recital of the scienter/knowledge elements.” *See Van Roy v. Sakhr Software Co.*, No. 1:11-CV-00863-LPS, 2014 WL 3367275, at *5 (D. Del. July 8, 2014). Plaintiffs’ self-incurred business blunders cannot, and do not, suggest anything about Defendants’ mental state when contracting and partnering with Plaintiffs. *See Deloitte LLP v. Flanagan*, No. 4125-VCN, 2009 WL 5200657, at *8 (Del. Ch. Dec. 29, 2009).

Moreover, Plaintiffs improperly impute Foxconn’s alleged actions onto Foxconn (Far East), with no allegation to connect them beyond their corporate affiliation. *SLF Holdings, LLC v. Uniti Fiber Holdings, Inc.*, 499 F. Supp. 3d 49 (D. Del. 2020), *aff’d*, No. 20-3427, 2022 WL 3442353 (3d Cir. Aug. 17, 2022) (for the scienter of a subsidiary to impute to its parent, a plaintiff must show that the “parent . . . possessed some degree of control over, or awareness about, the fraud”). The Complaint pleads no facts from which it can be reasonably inferred that Foxconn’s alleged misrepresentation would have been “something [that] was knowable” by Foxconn (Far East) and that Foxconn (Far East) “[was] in a position to know it.” *See Van Roy*, 2014 WL 3367275, at *4.

c) The Complaint fails to plead justifiable reliance.

To the extent that any of Plaintiffs’ claims may be based on extra-contractual statements, Plaintiffs cannot have justifiably relied on them due to the anti-reliance and integration provisions in the agreements. The JV Agreement contains an anti-reliance provision stating that the parties entered into the agreement “in reliance solely on the statements made or incorporated in [the JV Agreement]” and that Plaintiffs were “not relying on any other statement, representation, warranty, assurance or undertaking made or given by any person, in writing or otherwise, at any time prior

to the date of this Agreement.” JV Agreement § 13.12. The Asset Purchase Agreement, the Investment Agreement, and the Manufacturing Supply Agreement contain similar integration clauses in which the parties agreed that each respective agreement superseded all prior agreements and understandings relating to the subject matter of each contract. *See* Asset Purchase Agreement § 10.10, Investment Agreement § 8.05, and Manufacturing Supply Agreement § 24(j).

Where an agreement contains an anti-reliance clause, courts limit reliance to statements within the four corners of the document. A plaintiff “cannot promise . . . that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a ‘but we did rely on those other representations’ [fraud] claim.” *Universal Am. Corp.*, 176 F. Supp. 3d at 403 (citing *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1057 (Del. Ch. 2006)). On this basis alone, Plaintiffs’ fraud claim must fail.

3. Plaintiffs Fail to State a Claim for Tortious Interference (Count X)

To state a claim for tortious interference with contract, a complaint must plausibly allege, among other things, that (i) defendant intentionally and unjustifiably interfered with a contract and caused a breach thereof, and (ii) plaintiffs were damaged as a result. *See AM Gen. Holdings LLC on behalf of Ilshar Cap. LLC v. Renco Grp., Inc.*, No. 7639-VCN, 2013 WL 5863010, at *12 (Del. Ch. Oct. 31, 2013). According to Plaintiffs, Hon Hai tortiously interfered with its affiliates’ obligations under the JV Agreement, Investment Agreement, Asset Purchase Agreement, and Manufacturing Supply Agreement. Compl. ¶¶ 155-56.

Notwithstanding Plaintiffs’ conclusory and unsupported allegations of interference (*see id.* ¶ 155) and unacceptably grasping claim for damages (*see supra* Section B.1), Plaintiffs’ tortious interference claim fails as a matter of law because Plaintiffs do not and cannot allege that Hon Hai is a “stranger” to the contracts at issue.

Under Delaware’s “affiliate exception,” the alleged tortfeasor must “be a stranger to both the contract and the business relationship giving rise to and underpinning the contract.” *Tenneco Auto., Inc. v. El Paso Corp.*, No. Civ. A. 18810-NC, 2007 WL 92621, at *5 (Del. Ch. Jan. 8, 2007); *see also AM Gen. Holdings LLC*, 2013 WL 5863010, at *12 (“where an entity under the control of a contracting party is used by that party as an instrument to breach the contract, it is improper to accord it separate status as a tortfeasor”). To overcome this legal limitation, a plaintiff must sufficiently allege facts to show that the affiliated entity’s purported interference was “motivated by some malicious or other bad faith purpose.” *AM Gen. Holdings LLC*, 2013 WL 5863010, at *12 (internal quotations and citation omitted); *see Kuhn Constr. Co. v. Ocean & Coastal Consultants, Inc.*, 844 F. Supp. 2d 519, 531 (D. Del. 2012). “Such an allegation must meet a stringent bad faith standard and state that the interfering party was not pursuing in good faith the legitimate profit seeking activities of the affiliated enterprises.” *AM Gen. Holdings LLC*, 2013 WL 5863010, at *12 (internal quotations and citation omitted).

Plaintiffs’ conclusory allegations as to Hon Hai’s alleged malice and bad faith cannot satisfy the “stringent” standard required to overcome the affiliate exception’s privilege. *See* Compl. ¶ 156. Indeed, the Complaint contains factual allegations pointing decidedly in the opposite direction—that Hon Hai was an essential, good-faith participant in the business relationship between the Foxconn entities and Plaintiffs. *See, e.g., id.* ¶ 29 (alleging that Plaintiffs’ relationship with Hon Hai was in pursuit of “repositioning [their] business”).

4. Plaintiffs Fail to State a Claim for Equitable Subordination (Count XI)

While section 510(c)(1) of the Bankruptcy Code provides the Court with authority to “subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim,” such an action is a “‘drastic’ and ‘unusual’ remedy that should only be applied in limited circumstances.” *In re Zohar III, Corp.*, 639 B.R. 73, 90 (Bankr. D. Del. 2022), *aff’d*, 620

F. Supp. 3d 147 (D. Del. 2022), *appeal dismissed sub nom. In re Zohar III, Corp.*, No. 22-2695, 2022 WL 19038638 (3d Cir. Nov. 10, 2022); *Walnut Creek Mining Co. v. Cascade Inv., LLC (In re Optim Energy, LLC)*, 527 B.R. 169, 175 (D. Del. 2015) (“It is ‘an extraordinary remedy which is applied sparingly.’”) (quoting *In re Epic Cap. Corp.*, 307 B.R. 767, 773 (D. Del. 2004)). Before this drastic, extraordinary remedy can be imposed, three conditions must be satisfied: (i) “[t]he claimant must have engaged in some type of inequitable conduct”; (ii) “[t]he misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant”; and (iii) “[e]quitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code.” *In re Winstar Commc’ns, Inc.*, 554 F.3d 382, 411 (3d Cir. 2009) (quoting *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir. 1977)); *see also In re Surfango, Inc.*, No. 09-30972 (RTL), 2009 WL 5184221, at *13 (Bankr. D.N.J. Dec. 18, 2009) (applying the same test in the context of subordination of equity interests).

Where a creditor is a non-insider, as here, “the circumstances supporting an equitable subordination claim are few and far between.” *In re Zohar III*, 639 B.R. at 91 (internal quotation and citation omitted). The alleged “inequitable conduct” must amount to “egregious conduct such as fraud, spoliation, or overreaching.” *Id.* Plaintiffs make no such allegation.

Plaintiffs’ “inequitable conduct” allegations are based squarely on the theory that Defendant failed to live up to their contractual promises. Compl. ¶ 160 (alleging that “Defendants have engaged in grossly inequitable conduct . . . by, among other things, refusing to honor the contractual promises that they made in order to secure the Lordstown plant, failing to invest approximately \$170 million of additional equity capital in Lordstown’s business, and refusing to work with [Plaintiffs] to develop the next generation of electric trucks”). A far cry from the type of “egregious conduct” envisioned under the doctrine, Plaintiffs’ theory is that the so-called “inequity” is merely Defendants exercising their bargained-for contractual rights or, at worst, and

if Plaintiffs' allegations are accepted as true, breaching certain of their obligations under the relevant agreements. This is insufficient to support an equitable subordination claim.¹¹ *In re CTS Truss, Inc.*, 868 F.2d 146, 148 (5th Cir.1989) (holding that a bank's alleged breach of an oral agreement to extend further financing did "not fall within any of the classic patterns of conduct that have led the courts to fashion the extraordinary remedy of equitable subordination"); *In re Zohar III, Corp.*, 620 F. Supp. 3d 147, 153 (D. Del. 2022) (holding that there is nothing inequitable about using contractual rights even if used for a strategic advantage).

And insofar as Plaintiffs allege that the inequitable conduct at issue arises from their allegations of fraud—which they do not—Plaintiffs fail to plead a viable fraud claim. *See supra* Section B.2.

Plaintiffs have equally failed to show how any purportedly "egregious conduct" has resulted in harm to other creditors, or has conferred an unfair advantage on Defendants. *In re Zohar III*, 639 B.R. at 93 ("Because equitable subordination is remedial, a claim or claims should be subordinated only to the extent necessary to offset the harm which the bankrupt and its creditors suffered on account of the inequitable conduct.") (internal quotations and citation omitted); *see*

¹¹ Ultimately, Plaintiffs may not recover damages and prevail in their efforts to equitably subordinate Defendants' claims and interests. It is well-established that if a defendant is held liable for money damages, a debtor cannot also "obtain a remedy of subordination to rectify the same harm." *See In re Ashinc Corp.*, 60 B.R. 1, 57 (Bankr. D. Del. 2022) (finding that because all of the alleged harm had already been remedied in full in damages pursuant to prior judgment of the court, and as such a remedy of subordination cannot be obtained to rectify the same harm); *see also ABF Cap. Mgmt. v. Kidder Peabody & Co. Inc. (In re Granite Partners L.P.)*, 210 B.R. 508, 517 (Bankr. S.D.N.Y. 1997) (stating that plaintiff cannot recover damages and obtain equitable subordination for the same wrong); *Century Glove v. Iselin (In re Century Glove)*, 151 B.R. 327, 332 (Bankr. D. Del. 1993) (stating that debtor may not ultimately prevail on a claim for equitable subordination and damages). Plaintiffs' litigation tactics ultimately will fail to achieve their futile objectives of both equitably subordinating Foxconn's claims and interests *and* seeking an affirmative recovery from Foxconn. Instead, Plaintiffs' tactics will only increase the costs of the administration of these chapter 11 cases and reduce potential recoveries to creditors.

also In re ASHINC Corp., 640 B.R. 1, 56-58 (Bankr. D. Del. 2022) (denying equitable subordination where trustee of a litigation trust established under the debtor’s confirmed chapter 11 plan failed to demonstrate that the equity holder caused any damage to the debtor or its creditors in connection with breach of its duty of loyalty to the debtor). Rather, Plaintiffs’ “harm” allegation is limited to a conclusory sentence reciting the law without any facts. *See* Compl. ¶ 161. Notably absent is any allegation as to the nature and extent of the so-called harm caused by the alleged inequitable conduct—which, again, as alleged, is limited to Defendants’ exercise of bargained-for rights under the parties’ contracts. *See Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 991 (3d Cir. 1998).

On top of this, Plaintiffs’ claim, as alleged, runs contrary to the Bankruptcy Code. *See also In re Winstar Commc’ns, Inc.*, 554 F.3d at 414 (holding that equitable subordination of creditor’s claims to equity interests were contrary to section 510(c) of the Bankruptcy Code that provides that a court may equitably subordinate “all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest”).

CONCLUSION

For the foregoing reasons, the Court should dismiss this adversary proceeding and grant such other and further relief as the Court may consider appropriate.

Dated: September 29, 2023
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Matthew O. Talmo, certify that I am not less than 18 years of age, and that service of the foregoing was caused to be made on September 29, 2023, via CM/ECF upon those parties registered to receive such electronic notifications and served additionally as indicated below.

Date: September 29, 2023

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