

**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,

-against-

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: D.I. 1, 8, 9

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
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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Lordstown Motors Corp. (“**Lordstown**” or “**Company**”) and Lordstown EV Corporation (collectively, “**Plaintiffs**”) submit this opposition to *Defendants’ Motion to Dismiss All Counts of the Adversary Complaint* [D.I. 8] (the “**Motion**”) and the brief in support [D.I. 9] (“**Foxconn Br.**”):

STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

Plaintiffs brought this adversary proceeding to seek redress for the wrongful conduct of Hon Hai Precision Industry Co., Ltd. (“**Hon Hai**”) and certain of its affiliates (collectively, “**Foxconn**” or “**Defendants**”), which had the intended and foreseeable effect of destroying the business of an American start-up. After promising to embark on a partnership to develop the next generation of electric vehicles and acquiring the Debtor’s most valuable asset, Foxconn then breached their agreements with Debtors and caused the Debtors’ business to fail, costing Lordstown’s creditors and shareholders billions of dollars.

The Debtors brought eleven claims against Foxconn, including claims for fraud, breaches of the parties’ various contractual agreements, tortious interference and equitable subordination. Foxconn now seeks to dismiss this adversary proceeding on the basis that all of the claims are subject to arbitration. But this is not true. The fraud and tortious interference claims are asserted against Defendants who are not party to any arbitration agreement; the equitable subordination claim is a core proceeding not subject to arbitration; and most of the claims for breach arise from contracts that lack any arbitration provision. Foxconn relies on an arbitration provision in the JV Agreement, but ignores that the parties agreed to terminate their obligations under the JV Agreement when they entered into the Investment Agreement (but without releasing any claims for prior breaches) and the fact that the Investment Agreement does not contain an arbitration provision. And to the extent any arbitration provision does apply, this Court should not enforce it as it would jeopardize the objectives of the Bankruptcy Code. This dispute involves a number of

contracts that Foxconn concedes to be interrelated and part of one overarching transaction. This dispute cannot be split into fragments for piecemeal adjudication in different forums. And this Court is the only Court that can adjudicate the entire dispute.

Foxconn also asserts that none of the counts of the complaint state a claim. Foxconn's argument that Plaintiffs fail to state a claim for contract breaches rests entirely on the faulty premise that the consequential damages asserted are too speculative. Plaintiffs do not only assert consequential damages and, in any event, the availability and extent of such damages are to be decided at a later stage in these proceedings, not on a motion to dismiss. Foxconn also claims that Plaintiffs' fraud claims are duplicative of their contractual claims, but Plaintiffs assert claims not only based on Foxconn's numerous contractual breaches of the parties' various agreements, but also a pattern of behavior and misrepresentations over a two-year period that evidenced Foxconn's fraudulent intent. Foxconn challenges Plaintiffs' tortious interference claim on the basis that Plaintiffs fail to allege malice, but Plaintiffs' allegations that Foxconn purposefully and maliciously embarked on a plan to strip the Debtors of their most valuable assets and destroy their business easily meets the pleading standard. Finally, Foxconn alleges that the equitable subordination claim fails because it is based on contractual breaches. But the equitable subordination claim is also based on Foxconn's fraudulent conduct and, in any event, contractual breaches can be the basis for equitable subordination. Accordingly, Foxconn fails to identify any basis for dismissal, and the Court should deny the Motion.

SUMMARY OF ARGUMENT

1. Plaintiffs' claims are not subject to arbitration and, to the extent any arbitration provision does apply, its enforcement would jeopardize the objectives of the Bankruptcy Code.

2. Plaintiffs state viable causes of action for breach of contract, fraud, tortious interference and equitable subordination.

FACTUAL BACKGROUND

I. The Company

The Company was founded for the purpose of developing, engineering, manufacturing and selling electric vehicles primarily to commercial fleet customers. Compl. ¶ 20. The Company's initial vehicle, the Endurance, is a unique full-size, all-electric pickup truck. *Id.*

After the Company experienced some initial challenges that delayed its initial product launch, the Company began to look for a strategic partner that would help the Company address its funding needs and, just as importantly, help the Company improve the cost structure of the Endurance and develop a scalable vehicle development platform for the next generation of electric vehicles produced by the Company. Compl. ¶ 21.

II. The Company Begins a Partnership with Foxconn

After exploring potentially attractive options, in September 2021, the Company decided to forge a broad strategic partnership with Foxconn. Compl. ¶ 22. Foxconn is the world's largest electronics manufacturer and had declared its intent to expand its capabilities in new technologies, including the development of electric vehicles, which it said was key to driving its long-term growth strategy. *Id.* Foxconn represented that its scale and expertise were to be of great benefit to the Company. *Id.* By pairing the Company's vehicle and software engineering capabilities, innovation, technology, manufacturing plant and experienced personnel with Foxconn's resources, manufacturing expertise and supply chain capabilities, the Company would thrive. *Id.*

On September 30, 2021, the Company and an affiliate of Foxconn entered into an Agreement in Principle to form a partnership and work jointly on electric vehicle programs. The

agreement contemplated that Foxconn and the Company would (a) enter into an asset purchase agreement whereby a Foxconn affiliate would buy the Company's manufacturing plant in Lordstown, Ohio, (b) enter into a manufacturing supply agreement, and (c) jointly collaborate on the development of future vehicle programs. Compl. ¶ 22. In October 2021, Foxconn made its first investment in the Company, purchasing through an affiliate 7.2 million shares of the Company's Class A common stock for approximately \$50 million. Compl. ¶ 26.

In early November 2021, representatives of the Company met with senior Foxconn executives to discuss Lordstown's proposed product portfolio leveraging Foxconn's Model C and existing capabilities. Compl. ¶ 27. The Foxconn team, including Foxconn Chairman Young Liu, expressed support for the proposal. *Id.* Had Foxconn continued with that support and backed it with any meaningful funding, these products could have been completed and launched by late 2024, which was critical for commercial success with potential fleet customers who were in discussions with the Company. *Id.*

On November 10, 2021, Lordstown EV Corporation, Foxconn EV Technology, Inc. and Foxconn (Far East) Limited, executed the Asset Purchase Agreement,² under which the Company's massive and valuable manufacturing plant would be sold to Foxconn EV Technology, Inc. or its affiliate, subject to several conditions, for a fraction of its replacement cost. Compl. ¶ 28. In addition, hundreds of highly talented employees at the plant would become employees of Foxconn EV System LLC. *Id.* The Company would never have entered into the Asset Purchase Agreement if not for Foxconn's promises that this was an initial step in the process of repositioning the Company's business around the Foxconn partnership. Compl. ¶ 29. Consistent with this approach, the Asset Purchase Agreement provided that the parties would use commercially

² Capitalized terms used herein and not otherwise defined have the meanings set forth in the Motion.

reasonable efforts to, among other things, enter into the Manufacturing Supply Agreement and a joint product development arrangement through a joint venture. *Id.* The joint venture was essential to provide the Company with the strategic partner that would commit significant resources to develop the scalable business model for which it had bargained. Compl. ¶ 30.

III. Defendants Avoid Fulfilling their Commitments to the Company

In the months following entry into the Asset Purchase Agreement, Foxconn dragged its feet in working to develop the parties' agreed upon joint vehicle development platform. Compl. ¶ 31. Although the Company quickly circulated term sheets outlining a more detailed plan for the partnership, Defendants were extremely slow to engage, notwithstanding their obligations under the Asset Purchase Agreement. *Id.* Indeed, in April 2022, five months after the Asset Purchase Agreement was signed, Foxconn senior executives, including Chairman Liu, stated that Foxconn would not even discuss joint venture development or the contemplated joint venture before the closing of the Asset Purchase Agreement, a clear breach of the Agreement. *Id.*

On May 11, 2022, Foxconn, after the Company challenged Foxconn's conduct and eager to secure ownership of the Plant, agreed to enter into the JV Agreement. Compl. ¶ 33. On the same day, the parties closed the Asset Purchase Agreement and executed the Manufacturing Supply Agreement. *Id.* Under the Plant APA, Foxconn EV Technology purchased the Plant and certain other assets, for \$230 million plus certain reimbursements. *Id.* Under the Manufacturing Supply Agreement, the Company outsourced all the manufacturing of the Endurance to an affiliate of Foxconn, Foxconn EV System LLC, which would manufacture the Endurance at the Plant for a fee per vehicle. *Id.* In addition, Foxconn EV System LLC committed to use commercially reasonable efforts: (a) to improve commercial terms of procurement with the Company's suppliers and take advantage of sourcing synergy opportunities, including with a list of identified suppliers,

by providing critical strategic support leveraging Foxconn's size and expertise to achieve better pricing and payment terms with suppliers of the Endurance; (b) to transition procurement of components to Foxconn as expeditiously as possible and in any event no later than October 15, 2022; and (c) during the transition period to (i) support the Company's purchasing efforts in relation to components so as to minimize disruptions and inefficiencies, (ii) assist the Company in managing and communicating with suppliers, and (iii) assist the Company in improving the commercial terms of procurement with suppliers. *Id.* Foxconn EV System LLC also agreed to work with the Company in good faith to reduce the production cost of the Endurance, which may have included Foxconn directly participating in Company's value analysis and value engineering and sourcing activities. *Id.* But Foxconn had no intent of doing anything to achieve these initiatives; they were just promises designed to string the Company along so that Foxconn could starve it out of existence. *Id.*

The JV was owned 55% by Foxconn EV Technology and 45% by the Company. Compl. ¶ 34. The JV Agreement contemplated that the JV's first vehicle program would be based on certain vehicle designs that a Foxconn affiliate in Taiwan had already largely developed. Compl. ¶ 35. Foxconn committed that it would provide full access to data and information regarding the vehicle designs necessary for the JV management team to determine what modifications would be required for the North American market. *Id.* The JV would then take the vehicle design, engineer the necessary modifications, and develop a production plan for the Plant. *Id.* The Company began to market the vehicle design to potential customers and publicly supported Foxconn's efforts to promote its EV ambitions, including participation in Foxconn and MIH promotional events in Taiwan and across the United States. *Id.* But Foxconn was slow to respond, or failed to respond at all, to the commitments it made in the JV Agreement. *Id.*

Despite its delays with the Company, Foxconn was quick to move forward with its other plans for the Plant in Lordstown with other EV companies. Compl. ¶ 36. At the same time, Foxconn stymied the Company's attempts to move forward with the partnership to develop future Lordstown vehicles under the JV Agreement. Compl. ¶ 37. Foxconn: (a) failed to grant the Company access to vehicle designs that it committed to provide; (b) stalled the Company's attempts to agree on a budget and timeline for the project as contemplated by the JV Agreement; (c) failed to meaningfully engage with the Company during weekly board meetings on the development of a business plan; (d) no-showed meetings and failed to provide approvals on even the most basic items; and (e) otherwise failed to fulfill other agreed upon commitments. *Id.* Foxconn also caused Foxconn EV System LLC to fail to honor several material commitments under the Manufacturing Supply Agreement, including its promises to assume responsibility for important aspects procurement, use its commercially reasonable efforts to improve commercial terms with suppliers, take advantage of sourcing synergies and otherwise work in good faith to reduce the production cost of the Endurance. *Id.*

Notwithstanding Defendants' lack of engagement, the JV, utilizing Company personnel, began predevelopment work on the design modifications and outreach to potential fleet customers, several of whom were very interested. Compl. ¶ 38. The Company repeatedly requested from Defendants required engineering drawings and data relating to the vehicle designs that were a fundamental basis for the JV. *Id.* More than two months after the JV Agreement was entered into, no engineering drawings or vehicle design data had been shared. *Id.* Defendants ultimately stated that they could not provide access to the requested data to the Company or establish a licensing deal, notwithstanding their representations in the JV Agreement. *Id.* Defendants' actions deprived the Company of the enormous cost savings and time advantages. Compl. ¶ 39.

By entering into the JV Agreement, Foxconn EV Technology agreed to make, or to advance on the Company's behalf, capital contributions to the JV of up to \$100 million. Compl. ¶ 40. A large portion of the capital contributions would not be required until the parties agreed upon a budget, which they were required to use their commercially reasonable efforts to do. *Id.* But Defendants refused to engage with the Company over the proposed budget. *Id.*

Defendants stonewalled the Company's efforts regarding the JV at each and every turn. Compl. ¶ 42. Defendants' actions were driven by Hon Hai, which was determined to destroy Plaintiffs' business in an effort to strip Plaintiffs' assets and poach its talent at little cost. *Id.*

IV. The Parties Alter the Structure of Their Partnership and FVP Commits to Purchase \$70 Million of Common Stock and up to \$100 Million in Preferred Stock

Soon after receiving the Company's letter setting forth Foxconn's various breaches of the JV Agreement, Foxconn scheduled a meeting with the Company to discuss a direct investment by a different Foxconn majority-owned entity, Foxconn Ventures Pte. Ltd. ("FVP"). Compl. ¶¶ 42-43. Since Foxconn had failed to live up to its commitments in the JV Agreement, Foxconn proposed, and the Company agreed, on November 7, 2022, to pivot away from the JV Agreement and instead Lordstown and FVP entered into the Investment Agreement. Compl. ¶ 44. Under the Investment Agreement, under which FVP agreed to make additional equity investments in the Company through the purchase of \$70 million of Common Stock and up to \$100 million in Series A convertible preferred stock, subject to certain conditions. *Id.*

Section 2.01 of the Investment Agreement contemplated: (a) an initial closing (the "**Initial Closing**"), shortly after execution, at which FVP would purchase \$22.7 million in Common Stock and \$30 million in Preferred Stock; (b) a subsequent closing (the "**Subsequent Common Closing**") at which FVP would purchase \$47.3 million in Common Stock, subject to regulatory approval; and (c) additional closings where FVP would purchase up to \$70 million in additional

shares of Preferred Stock purchases (the “**Subsequent Preferred Closings**”), subject to an agreement on the funding milestones and budget for the New Vehicle Programs and satisfaction of those milestones. Compl. ¶ 45. The Initial Closing occurred on November 22, 2022, and the Company immediately began pre-development work on the New Vehicle Programs. *Id.* ¶ 44-45.

The Investment Agreement imposed obligations on FVP to facilitate the fulfillment of conditions precedent to the Subsequent Common Closing and the Subsequent Preferred Closing. Compl. ¶ 46. Section 5.02 requires FVP to “use reasonable best efforts to work cooperatively together to, as promptly as reasonably practicable, complete governmental processes . . . in connection with the Subsequent Common Purchase.” *Id.* Section 5.02(b) further provides the parties will “use their respective reasonable best efforts to, as promptly as practicable, obtain CFIUS Clearance and to prevent impediments to the consummation of the Transactions.” *Id.* Section 5.20 of the Investment Agreement includes a covenant that FVP will use commercially reasonable good faith efforts to agree upon the Preferred Funding Milestones and the EV Program Budget (each as defined in the Investment Agreement) no later than May 7, 2023. *Id.*

As part of the pivot to the Investment Agreement, Foxconn EV Technology, Inc. and Lordstown EV Corporation entered into Amendment No. 1 to Limited Liability Company Agreement of MIH EV Design LLC (the “**JV Agreement Amendment**,” attached as **Exhibit A**). The parties agreed that “[a]ll obligations of the Members under the Agreement shall be terminated, including but not limited to any obligations to make capital contributions to the Company under Article III, any restrictions imposed on the Members under Section 11.2 or any other provision thereof.” The JV Agreement Amendment did not contain releases.

V. **Foxconn Tries to Avoid Fulfilling FVP's Promise to Purchase the Company's Common Stock and Preferred Stock**

When Foxconn convinced the Company to terminate the JV Agreement and pivot to the Investment Agreement, Foxconn directed that the new vehicle program would focus on different vehicle platform. Compl. ¶ 47. But within days of entering into the Investment Agreement, Foxconn directed the Company to resume work on the previous internal program that was similar to what was first discussed in November 2021. *Id.* The parties then entered into an amendment to the Investment Agreement, effective November 15, 2022, allowing the Company to use the net proceeds from the purchases of Preferred Stock for the substitute program, which Foxconn claimed to fully support. *Id.*

While the Company's engineering team pivoted to the substitute program, FVP was dragging its feet on a required regulatory filing with the Committee on Foreign Investment in the United States ("CFIUS"). Compl. ¶ 48. Under Section 5.02(b) of the Investment Agreement, the parties were required to make the filing as promptly as reasonably practicable and in any event within 20 business days from the execution of the Investment Agreement, or December 7, 2022. *Id.* Section 5.02(b) further provides the parties will "use their respective reasonable best efforts to, as promptly as practicable, obtain CFIUS Clearance and to prevent impediments to the consummation of the Transactions." *Id.*

In the course of preparing the filing, in early December, Foxconn executives in Taiwan apparently became aware for the first time of the Investment Agreement amendment and demanded that the Company agree to its immediate rescission, with retroactive effect. Compl. ¶ 49. On December 14 – when the CFIUS filing was already late – FVP's Chief Product Officer advised the Company that Foxconn's Chief Financial Officer in Taiwan "insists to have [the rescission document] signed before filing CFIUS this week." *Id.* Similarly, Foxconn's outside

legal counsel indicated that they would be prepared to file the CFIUS application but only after the rescission agreement was executed. *Id.*

Even though FVP had no contractual basis to withhold its cooperation, the Company, with a tremendous need for the financing FVP promised, agreed to execute the rescission and enter into a new, more restrictive amendment that also identified the substitute program, which Foxconn continued to claim to fully support. Compl. ¶ 50. The CFIUS application was filed on the evening of December 23 – two weeks after the absolute deadline and after the start of the holiday shutdown. *Id.* FVP’s breach of the CFIUS covenant not only demonstrates extreme bad faith but it ultimately delayed CFIUS Clearance and therefore the date of the Subsequent Common Closing. *Id.*

Between December 2022 and March 2023, the Company completed the first phase of the new vehicle development work. Compl. ¶ 51. The Company also held regular meetings with potential customers, including a major vehicle fleet owner in the United States, to discuss predevelopment collaboration and potentially large purchase orders. Compl. ¶ 52. In January 2023, the Company sent Foxconn its proposed program budget, development milestones and deliverables and held a meeting with Chairman Liu to discuss the budget, program direction, opportunities for collaboration with the Foxconn EV Ecosystem, the status of the Endurance, and Foxconn’s expectations for future reviews. *Id.* Chairman Liu stressed four topics that he wanted to see covered in the milestone reviews, and the Company confirmed that these topics would be part of the Company’s early phase product development work and that Foxconn would see these topics covered in regular program milestone scorecards and reviews. *Id.* at ¶¶ 52-53. The Company subsequently provided Foxconn, including Chairman Liu, with regular updates about its work, scorecards on the completion status of each deliverable, and topics where assistance was needed from Foxconn. *Id.* at ¶ 53.

On March 22, 2023, the Company delivered the first set of program deliverables contemplated by the Investment Agreement. *Id.* at ¶ 54. Once those deliverables were approved by FVP, FVP was required to pursue and to fund the Second Tranche Preferred Purchase (as defined in the Investment Agreement). *Id.* But Defendants continued their longstanding pattern of delay. *Id.* at ¶ 55. A meeting with Chairman Liu to discuss the deliverables scheduled for March 23 was cancelled by Foxconn and ultimately never re-scheduled. *Id.* Foxconn refused to schedule any follow-up meetings. *Id.*

On April 24, 2023, FVP received CFIUS approval to complete the Subsequent Common Closing. *Id.* at ¶ 56. Under the Investment Agreement, the Subsequent Common Closing—and FVP’s purchase of \$47.3 million shares of Common Stock—was slated to occur no later than 10 business days from receipt of the CFIUS approval, *i.e.*, on May 8, 2023. *Id.* The only other relevant conditions to the Subsequent Preferred Closings were agreement on the Preferred Funding Milestones and the EV Program Budget, and satisfaction of the Preferred Funding Milestones, but Defendants refused to even meet, much less use commercially reasonable efforts to reach agreement on the Preferred Funding Milestones and the EV Project Budget. *Id.* at ¶ 57. Thus, while the Company worked in good faith to accommodate Foxconn’s ever shifting views with respect to which programs should be developed, Foxconn ensured that FVP never met its contractual obligations and sabotaged the Company’s product development efforts. *Id.* at ¶ 59.

VI. The Improper Attempt to Terminate the Investment Agreement

On March 7, 2023, with increasing delay and uncertainty regarding the strength of the Company’s partnership with Foxconn, the Company’s common stock dropped below the \$1.00 per share threshold set forth in Nasdaq Listing Rule 5450(a)(1). *Id.* at ¶ 60. On April 19, 2023, the Listing Qualifications Department of Nasdaq, where the Common Stock is listed, issued a

notice (“**Nasdaq Notice**”) to the Company. *Id.* The Nasdaq Notice notified the Company that it had a 180-day period to return the stock price to above \$1.00 per share. *Id.* The Company, having anticipated that its stock price could drop below the \$1.00 level, had already included a proposal for a reverse stock split in the agenda for its annual meeting to be held on May 22, 2023. *Id.*

Seizing on the Nasdaq Notice, by letter dated April 21, 2023, just 17 days before the anticipated Subsequent Common Closing, Defendant sent a notice of default (the “**Notice of Default**”) under the Investment Agreement. *Id.* at ¶ 61. The Notice of Default provided that Defendant would terminate the Investment Agreement effective May 21, 2023, one day prior to the Company’s shareholders’ meeting and the approval of the reverse stock split, in the event the Company failed to cure such default. *Id.*

On April 25, 2023, the Company responded to the Notice of Default, disputing Foxconn’s right to terminate and noting that if the termination notice was not immediately retracted, the Company would be forced to publicly disclose the purported termination, which would result in material irreparable harm. *Id.* at ¶ 62. Foxconn did not respond to the Company’s letter and the Company was forced to file a Current Report on Form 8-K with the Securities and Exchange Commission announcing FVP’s purported termination, which caused the Company’s stock price to plummet and caused unfavorable media coverage. *Id.* at ¶ 63. The announcement also materially harmed the Company’s customer, employee, supplier and other business relationships. *Id.* On May 2, 2023, seven days after having been warned that its purported termination was inconsistent with the terms of the Investment Agreement, Foxconn acknowledged both in correspondence to the Company and publicly that it had no right to terminate the Investment Agreement.

On May 23, 2023, the Company executed a reverse stock split to improve the marketability and liquidity of the Common Stock. *Id.* at ¶ 72. As of June 7, 2023, the Common Stock price had

remained above \$1.00 per share for 10 consecutive trading days following the reverse stock split. *Id.* As a result, even under FVP’s flawed interpretation of the agreement, all conditions to closing would have been satisfied and FVP’s pretext for not closing was gone. *Id.* at ¶ 72.

Knowing that its most recent excuse for failing to meet its contractual obligation was about to disappear, on June 5, FVP asserted for the first time in a letter that because of the Company’s 1:15 reverse stock split, it was now entitled to purchase not the 10% of the Common Stock of the Company that had been agreed, but 62.7% for the same \$47.3 million price. *Id.* at ¶ 73. FVP’s assertion contradicts several provisions of the Investment Agreement and the terms of its own certifications to CFIUS, where it represented to the United States government that the transactions contemplated by the Investment Agreement, together with FVP’s existing holdings of the Company’s capital stock and warrants on an as-converted basis, could not result in FVP owning anywhere near a 65.9% voting interest in the Company. *Id.* at ¶¶ 74-75.

Meanwhile, even if FVP’s earlier reliance on the Nasdaq Notice were valid—and it was not—Nasdaq sent a notice closing the matter on June 7, 2023. *Id.* at ¶ 76. Under Section 2.03(a) of the Investment Agreement, the Subsequent Common Closing shall occur on the tenth business day after all of the conditions to the closing have been satisfied. *Id.* Thus, even if the Nasdaq Notice had been an impediment to closing, the Subsequent Common Closing should have occurred on June 26, 2023, but FVP refused to close. *Id.* at ¶ 77.

FVP’s actions, driven by Hon Hai, had a devastating effect on the Company’s business. Rather than embracing Lordstown as its partner in “a trillion-dollar business opportunity for electric vehicles,” Foxconn has maliciously and in bad faith sabotaged the ability of Lordstown to execute its business plan to design, engineer, and develop electric vehicles for scalable production in North America. *Id.* at ¶ 78. The Company was forced to lay off a substantial number of its

employees, some of whom were hired by Foxconn while it simultaneously refused to provide financing and cooperation that was essential for Lordstown to sustain its ongoing operations. *Id.*

VII. The Debtors' Bankruptcy Proceeding

On June 27, 2023, faced with the reality that there were no circumstances under which Foxconn would meet its contractual obligation, the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (collectively, the “**Chapter 11 Cases**”). On the same day, Plaintiffs commenced this adversary proceeding.

ARGUMENT

I. The Plaintiffs' Claims Are Not Subject to Arbitration

Foxconn argues incorrectly that dismissal is warranted because the claims in the complaint are subject to arbitration. But the vast majority of Plaintiffs' claims are not subject to arbitration, as they involve claims outside the scope of the two arbitration provisions cited by Foxconn, or concern core proceedings not subject to arbitration. As for the two counts of the Complaint that are arguably subject to arbitration, the Court should decline to enforce the arbitration provision as they would jeopardize the objectives of the Bankruptcy Code under these circumstances.

A. Plaintiffs' Common Law Fraud Claims Are Not Subject to Arbitration

Foxconn asserts incorrectly that Counts I and VIII are subject to arbitration because they “are based on allegations that Defendants fraudulently misrepresented that they would enter into a joint venture.” Foxconn Br. 14. But Defendants' common law fraud claims are based more than Foxconn's representations with respect to a joint venture. And more importantly, Foxconn ignores that Counts I and VIII are asserted against defendants who are not party to the two agreements with arbitration provisions. Count I is asserted against Hon Hai, Compl. p. 28, and Count VIII is asserted against Foxconn (Far East) Limited, Compl. p. 38. Neither entity is party to the JV

Agreement and the Manufacturing Supply Agreement. The JV Agreement is between MIH EV Design LLC, Foxconn EV Technology, and Lordstown EV Corporation. *Id.* Ex. D at 1. The Manufacturing Supply Agreement was made between Foxconn EV System LLC and Lordstown EV Corporation. *Id.* Ex. C at 1.

The arbitration clauses in the JV Agreement and the Manufacturing Supply Agreement are governed by Delaware and Ohio law, respectively. Foxconn Br. 13. In both jurisdictions, a nonparty may not enforce an arbitration provision unless it is an intended third-party beneficiary of the contract. *Kuroda v. SPJS Holdings, L.L.C.*, 2010 Del. Ch. LEXIS 232, at *16 (Del. Ch. Nov. 30, 2010) (“As a nonparty to the Consulting Agreement, plaintiff cannot invoke its arbitration clause.”); *Fives Bronx Inc. v. Kraft Werks Eng’g, LLC*, 2023 U.S. Dist. LEXIS 47912, at *22 (N.D. Ohio 2023) (holding that Ohio law “prevents nonparties from enforcing arbitration clauses unless they are intended third-party beneficiaries.”) (quotation marks omitted).

Both the JV Agreement and the Manufacturing Supply Agreement expressly state that they do not create any third party beneficiaries. *Id.* Ex. D at 49 (stating that, but for one irrelevant exception, the JV Agreement “is solely for the benefit of the Company and the Members and their successors and permitted assigns, and no provision of this Agreement shall be deemed to confer upon any other Person, including any equityholders of any Member, any remedy, Claim, Liability, reimbursement, cause of action or other right.”); *Id.* Ex. C at 27 (stating, but for one irrelevant exception, the Manufacturing Supply Agreement “benefits solely the parties to this Agreement and their respective permitted successors and permitted assigns, and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.”). Thus, Hon Hai and Foxconn (Far

East) Limited have no standing to enforce the arbitration provisions in the JV Agreement and Manufacturing Supply Agreement.

B. Plaintiffs' Claims Based on Breaches of the Investment Agreement Are Not Subject to Arbitration

Counts II, III, IV, and V of the Complaint assert breaches by Foxconn Ventures Ptd. Ltd. under the Investment Agreement. Foxconn does not assert that the Investment Agreement contains an arbitration provision.³ Instead, Foxconn attempts to shoehorn the claims arising from the Investment Agreement into the scope of the arbitration provision of the JV Agreement, asserting that the Investment Agreement “was born out of the JV Agreement.” Foxconn Br. 14. This argument fails. The parties to the Investment Agreement are Lordstown Motors Corp. and Foxconn Ventures Ptd. Ltd. Compl. Ex. E. 1. Neither entity was party to the JV Agreement. *Id.* Ex. D at 1. And even if the arbitration provision in the JV Agreement were somehow applicable to the Investment Agreement (and it is not), Foxconn Ventures Ptd. Ltd., as a nonparty to the JV Agreement, cannot enforce it. *See supra* at §I.A.

Foxconn Ventures Ptd. Ltd. cannot compel Lordstown Motors Corp. to arbitrate based on an agreement to which Lordstown Motors Corp. is not a party. *See In re Magna Entm't Corp.*, 2012 Bankr. LEXIS 330, at *8 (Bankr. D. Del. Jan. 30, 2012) (if a party “is not a party to the arbitration clause . . . it cannot be forced to participate in any arbitration.”).

In addition, the Investment Agreement contains a merger clause that provides that it “constitutes the entire agreement and supersedes all other prior agreements and understandings,

³ The Investment Agreement provides that “[a]ll Actions arising out of or relating to this Agreement shall be heard and determined in the Chancery Court of the State of Delaware (or, if the Chancery Court of the State of Delaware declines to accept jurisdiction over any Action, any state or federal court within the State of Delaware).” Compl. Ex. E at 52. The Court of Chancery has jurisdiction to hear “all matters and causes in equity” (10 Del. C. § 341), but none of Plaintiffs’ claims are based in equity, aside from Plaintiffs’ equitable subordination claim which is premised on section 510(c) of the Bankruptcy Code.

both written and oral, among the parties and their Affiliates, or any of them, with respect to the subject matter hereof and thereof.” Compl. Ex. E at 52. Notably, the merger clause specifically indicates that it supersedes written agreements between the parties’ affiliates, and thus supersedes the JV Agreement and its arbitration agreement. *Id.* And the Investment Agreement contemplates enforcement in court and contains no arbitration provisions. *Id.* In such circumstances, the resolution dispute provisions in the Investment Agreement supersede any arbitration provision in the JV Agreement. *See Applied Energetics, Inc. v. Newoak Capital Mkts., LLC*, 645 F.3d 522, 525-26 (2d Cir. 2011); *see also DeWitt Stern Grp., Inc. v. Eisenberg*, 257 F. Supp. 3d 542, 582 (S.D.N.Y. 2017) (concluding a later agreement superseded earlier agreement where there was an integration clause and the agreements addressed the same subject matter).

C. Plaintiffs’ Claims Based on Breaches of the Asset Purchase Agreement Are Not Subject to Arbitration

Foxconn asserts that Count VII against Foxconn EV Technology, Inc. and Foxconn (Far East) Limited for breaches of the Asset Purchase Agreement “hinge[s] on Defendants’ efforts to enter into the JV Agreement” and is therefore subject to arbitration. Foxconn Br. 14. But the Asset Purchase Agreement contains no arbitration provisions, and instead provides in section 10.14(a) that “any Proceeding in connection with or relating to this Agreement or any matters contemplated hereby shall be brought exclusively in a court of competent jurisdiction located in the State of Delaware, sitting in Wilmington, Delaware, whether a state or federal court.” Compl. Ex. B at 59. This Court is precisely such a court. Nothing in the JV Agreement indicates any attempt to modify the provisions of the Asset Purchase Agreement. Indeed, section 10.2 the Asset Purchase Agreement provides that “this Agreement may not be amended or waived except in a written instrument signed by the Parties and which references the specific section of this Agreement which is to be amended or waived.” *Id.* Ex. B. at 56. Nothing in the JV Agreement

references 10.14 of the Asset Purchase Agreement or otherwise evidences intent to amend the Asset Purchase Agreement to include an arbitration provision.

D. Plaintiffs' Tortious Interference Claim Is Not Subject to Arbitration

Count X of the complaint asserts a tortious interference claim against Hon Hai. Compl. p. 40. Foxconn argues that this claim is subject to arbitration because it “arises from allegations that Defendants interfered with the JV Agreement.” But Hon Hai is not party to the JV Agreement and not a third party beneficiary of the agreement. *See supra* at §I.A. And it interfered not just with the JV Agreement, but also the Investment Agreement, APA, and MSA. Accordingly, Hon Hai lacks standing to enforce the arbitration provision.

E. Plaintiffs' Equitable Subordination Claim Is Not Subject to Arbitration

Foxconn argues that Plaintiffs' equitable subordination claim “is premised on Plaintiffs' other ten counts, all of which arise from or relate to the JV Agreement.” Foxconn Br. 15. “Equitable subordination is unquestionably a ‘core’ proceeding pursuant to section 157(b)(2).” *Shubert v. Lucent Techs. Inc. (In re Winstar Communs., Inc.)*, 348 B.R. 234, 249 (Bankr. D. Del. Dec. 21, 2005). Courts have rejected the argument that equitable subordination, as a core claim premised on the Bankruptcy Code, is subject to arbitration. *See, e.g., Aiello v. Chisick (In re First Alliance Mortg. Co.)*, 2002 U.S. Dist. LEXIS 5856, at *9 (C.D. Cal. Jan. 9, 2002) (“[I]t does not appear that a claim for equitable subordination is subject to arbitration. Such a claim is a core proceeding, as it is central to the Court’s equitable power to administer the assets of the estate. 28 U.S.C. § 157(b)2(A). Arbitration could therefore not be had when it infringes on the heart of a bankruptcy court’s jurisdiction.”).

F. The Arbitration Clause of the JV Agreement Is No Longer Valid

Foxconn seeks to compel arbitration of Count VI, which asserts claims against Foxconn EV Technology, Inc. for breaches of the JV Agreement, but ignores that the parties terminated their obligations under the JV Agreement when they entered into the Investment Agreement without releasing any preexisting claims thereunder. In connection with the parties' decision to pivot from the JV Agreement and enter into the Investment, Foxconn EV Technology, Inc. and Lordstown EV Corporation executed the JV Agreement Amendment. The parties agreed that “[a]ll obligations of the Members under the Agreement shall be terminated, including but not limited to any obligations to make capital contributions to the Company under Article III, any restrictions imposed on the Members under Section 11.2 or any other provision thereof.” Thus, the amendment relieved Lordstown EV Corporation of any obligation to arbitrate its claims. The amendment did not contain a release of any claims, however, and Lordstown EV Corporation remains free to pursue those claims in this adversary proceeding.

G. Enforcement of the Arbitration Provisions as to Counts VI and IX Would Jeopardize the Objectives of the Bankruptcy Code

Even if the arbitration provision of the JV Agreement remains valid, as well as the arbitration provision in the Manufacturing Supply Agreement, that does not prevent this Court from exercising its discretion to adjudicate Counts VI and IX. Even with respect to a non-core claim, a court may decline to order arbitration if doing so would jeopardize the objectives of the Bankruptcy Code. *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156–57 (3d Cir. 1989). In making this determination “a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and

reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.” *In re Winstar Commc’ns, Inc.*, 335 B.R. 556, 565 (Bankr. D. Del. 2005).

The decision in *In re APF Co.*, 264 B.R. 344 (Bankr. D. Del. 2001), is instructive. There disputes arose concerning several contracts, some of which did not include arbitration clauses. The Court found that “staying the subject adversary proceeding in favor of arbitration seriously jeopardizes Bankruptcy Code objectives,” considering that litigating in multiple forums would be costly to the estate, the parties had not commenced or requested arbitration outside of bankruptcy, and the bankruptcy court was “the most efficient and effective forum in which to resolve these fundamental Bankruptcy Code issues.” *Id.* at 364. The court noted that: “[a]rbitrarily staying the adversary proceeding to resolve only those claims which are based on contracts that happen to contain arbitration clauses will result in piecemeal litigation and unnecessary expense for both parties.” *Id.* The court rejected an attempt to “force an unwilling debtor to litigate a number of actions in a number of forums merely because those creditors’ contracts happen to include a standard arbitration clause. In such a world, the mere cost of defending these various suits could deplete the corpus of substantial funds.” *Id.* The court explained that “enforcing the arbitration clauses here also disrupts equality of distribution, another fundamental bankruptcy policy. It is inequitable since it would give any aggrieved party who could cite to an arbitration clause in its contract an exalted status over all other creditors. This would occur even though the other creditors were not privy to the underlying contract and reaped no benefit from the contractual bargain.” *Id.*

Here, nine of the eleven claims asserted by Plaintiffs are beyond the scope of the arbitration provisions cited by Foxconn. *See supra* at §I.A- F. Those claims overlap with the two remaining claims arising from what Foxconn itself recently admitted to this Court are “related, integrated agreements that comprise the overall commercial relationship among the Foxconn Parties and their

affiliates and the Debtors.” [Case No. 1:23-bk-10831, D.I. 280]. Those two claims could be resolved more efficiently and expeditiously by this Court, as opposed to two separate ICC and AAA arbitrations. Foxconn Br. 13. Those claims assert violations of two commercial agreements and do not require any particular expertise to resolve. The impact of arbitration would negatively affect other stakeholders, as the determination of the priority of Foxconn’s claims would delay distributions under the Debtors’ proposed plan. And the bifurcation of Plaintiffs’ claims into arbitrable and non-arbitrable claims would also increase the expenses of the estate by creating piecemeal litigation that could be more efficiently resolved in one proceeding before this Court.

II. Plaintiffs State Viable Causes of Action

Foxconn also challenges the legal sufficiency of the claims set forth in the Complaint. The purpose of a motion to dismiss is to test the legal sufficiency of a complaint. *Wright v. Pepsi Cola Co.*, 243 F.Supp.2d 117, 120 (D. Del. 2003). In reviewing a motion to dismiss for failure to state a claim, “all allegations in the complaint and all reasonable inference that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party.” *Wright*, 243 F.Supp.2d at 120. A court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Id.* at 120. The moving party has the burden of persuasion. *Continuing Creditors’ Comm. of Star Telecomm. Inc. v. Edgecomb*, 385 F.Supp.2d 449, 456 (D. Del. 2004).

Fed. R. Civ. P. 8(a) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Tillman v. Pepsi Bottling Group, Inc.*, 2005 U.S. Dist. LEXIS 18891, at *21 (D. Del. Aug. 30, 2005) The statement need not contain detailed facts, but it requires that plaintiff give defendant fair notice of what the claim is and the grounds upon which it rests. *Id.* Rule 9 of the Federal Rules of Civil Procedure “requires that all pleadings of fraud or mistake be

stated with particularity” but “[t]hese averments [] remain subject to the liberal pleading standard of Rule 8, which requires only a ‘short and plain’ statement of a claim or defense. *Trueposition, Inc. v. Allen Telecom, Inc.*, 2003 U.S. Dist. LEXIS 881, at *3 (D. Del. Jan. 21, 2003).

A. Plaintiffs State Claims for Breach of Contract

Foxconn argues Plaintiffs’ breach of contract claims should be dismissed for failure to allege damages. Foxconn’s entire argument is that consequential damages are not recoverable here because they were not reasonably foreseeable. As an initial matter, Plaintiffs do not seek only merely consequential damages for Foxconn’s of contract; they also seek direct damages. *See, e.g.*, Compl. ¶ 129 (alleging that “Lordstown EV Corporation incurred substantial costs” as a result of Foxconn EV Technology, Inc.’s breach of the JV Agreement); Compl. ¶ 151 (alleging that “Lordstown EV Corporation incurred substantial costs” as a result of Foxconn EV System LLC’s breach of the Manufacturing Supply Agreement); *see also Thomas H. Lee Equity Fund V, L.P. v. Grant Thornton LLP (In re Refco Inc. Sec. Litig.)*, 2011 U.S. Dist. LEXIS 33554, at *23 (S.D.N.Y. Mar. 28, 2011) (noting “the basic principle that the plaintiff is entitled to all direct damages proximately caused by a wrong,” including fraud). Foxconn acknowledges as much, asking this Court to issue in the alternative “a ruling that Plaintiffs are limited to recovering only direct damage that Plaintiffs can prove on their claims for supposed breach of contract.” Foxconn Br. 20.

Foxconn nonetheless argues for dismissal of the breach of contract claims on the basis that Plaintiffs’ allege “pie-in-the-sky damages” are “preposterous.” *Id.* 19. But the court does not evaluate whether the alleged damages are “preposterous” on a motion to dismiss; it evaluates whether Plaintiffs state a claim. *See, e.g., Catena v. NVR, Inc.*, 2020 U.S. Dist. LEXIS 108921, at *27 (W.D. Pa. 2020) (arguments concerning consequential damages “require[] a fact-based inquiry that extends beyond the pleading stage. This inquiry is particularly not well-suited for the

Motion to Dismiss stage of litigation. Therefore, the Court will not dismiss Plaintiffs’ claims for consequential damages at this stage.”); *Roman Catholic Diocese of Rockville Ctr. v. Gen. Reinsurance Corp.*, 2016 U.S. Dist. LEXIS 133724, at *15 (S.D.N.Y. Sept. 23, 2016) (“Whether the injuries that gave rise to Plaintiffs claims for consequential damages were ‘reasonably foreseeable and contemplated by the parties,’ . . . is a factual issue and thus reserved for the merits stage of litigation.”); *T.J. McDerm Cummings v. Allstate Ins. Co.*, 2011 U.S. Dist. LEXIS 112404, at *28-29 (E.D. Pa. Sept. 30, 2011) (“a decision regarding the extent of damages available under Plaintiffs’ Count I, breach of contract, would be purely speculative at this juncture.”)

The cases cited by Foxconn are not to the contrary. *Pharma. Prod. Dev. Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 Del. Ch. LEXIS 33, at *25 (Del. Ch. Feb. 16, 2011) involved a contract that specifically precluded consequential damages—a provision that Defendants admit only applies to the Manufacturing Supply Agreement. Foxconn Br. 19. And the court denied the motion to dismiss in that case. *Id.* Foxconn’s other cases concerned decisions made shortly before or following a trial. *See Zayo Grp., LLC v. Latisys Holdings, LLC*, 2018 Del. Ch. LEXIS 540 (Del. Ch. Nov. 26, 2018) (judgment following trial); *RTN Investors, LLC v. RETN, LLC*, 2011 Del. Super. LEXIS 103 (Del. Super. Feb. 10, 2011) (judgment following trial); *Paul v. Deloitte & Touche LLP*, 974 A.2d 140 (Del. 2009) (reviewing judgment following trial); *Callahan v. Rafail*, 2001 Del. Super. LEXIS 88 (Del. Super. Mar. 16, 2001) (decision on motion to preclude evidence) *Kenford Co. v. Cnty of Erie*, 73 N.Y.2d 312 (1989) (reviewing judgment following trial).

To the extent Foxconn labels Plaintiffs’ damages allegations as “conclusory,” Foxconn Br. 20, Foxconn ignores the pertinent allegations: rather than embracing Lordstown as its partner in “a trillion-dollar business opportunity for electric vehicles,” Foxconn has maliciously and in bad faith sabotaged the ability of Lordstown to execute its business plan to design, engineer, and

develop electric vehicles for scalable production in North America. Compl. ¶ 78. The Company has laid off nearly all of its employees and is no longer able to continue its electric vehicle operations. The Company has also sold off its Endurance vehicle program, IP, and physical assets used to make electric vehicles. *Id.* Meanwhile, Foxconn is hiring Lordstown employees and continues to refuse to provide financing and cooperation that is essential for Lordstown to sustain its ongoing operations. *Id.* Foxconn thus far has succeeded in executing its plan to force the Company to shut down so that it can take over the Company's remaining assets and talent, while evading liability for its repeated breaches. *Id.*

B. Plaintiffs State Claim for Fraud

Foxconn argues that Plaintiffs' claims of fraud fail because they "bootstrap" the breach of contract claims. Foxconn states that Plaintiffs must assert wrongful conduct beyond the breach of contract, and damages separate from the breach of contract damages. Foxconn Br. 21. But Plaintiffs do just that. Plaintiffs' fraud claims are not based on the breaches of contract themselves, but rather (i) Foxconn's actions to induce Plaintiffs to enter into a series of agreements based on the false representation that it sought a partnership with Plaintiffs to jointly develop the next generation of electric vehicles, Compl. ¶ 81, (ii) its knowledge that it never intended to have a partnership and its statements regarding its interest in a partnership with Plaintiffs were false, Compl. ¶ 82, (iii) its statements regarding its interest in a partnership with Plaintiffs with the intent to induce Plaintiffs to sell their unique and most valuable asset, their manufacturing plant, to transfer highly talented and experienced manufacturing and operational employees to the Foxconn team, and to refrain from pursuing opportunities with other strategic partners, Compl. ¶ 83, (iv) Plaintiffs' justifiable reliance on Foxconn's statements, and (v) the damages resulting from Foxconn's conduct, Compl. ¶ 85. Such damages are not limited to the damages attributable to

particular breaches identified in other counts of the complaint, but rather the damages and lost opportunities resulting from Foxconn's complete destruction of Plaintiffs' business through Foxconn's fraudulent conduct over a two-year period.

Foxconn's own authority is directly on point. In *Universal Am. Corp. v. Partners Healthcare Sols. Holdings, L.P.*, 176 F. Supp. 3d 387 (D. Del. 2016), the court rejected an argument that the plaintiff improperly "bootstrapped" a fraud claim based on a breach of contract claim, holding that "[Plaintiff] does not merely allege that Defendants failed to comply with their disclosure obligations under the agreement; [plaintiff] alleges that certain contractual statements were false" which "properly alleged common law fraud." *Id.* at 403. Likewise, in *Lion 2004 Receivables Tr. v. Long Term Preferred Care, Inc.*, 2017 U.S. Dist. LEXIS 39381 (D. Del. Mar. 20, 2017), the court found that the plaintiff's "fraud claim is collateral to its breach of contract claim, and is thus, not barred from being asserted" and that the plaintiff's allegations that it "suffered damages as a result of its reliance on [defendant's] false representations . . . is enough to satisfy the pleading requirements for fraud." *Id.* at 17-18.

Foxconn next asserts that Plaintiffs have failed to plead the elements of fraud. *First*, Foxconn asserts that Plaintiffs have failed to plead a material misrepresentation. But Foxconn simply ignores the chief allegation in the complaint: Foxconn made a false representation that it sought a partnership with Plaintiffs to jointly develop the next generation of electric vehicles to induced Plaintiffs to enter into a series of agreements when it knew that it never intended to have a partnership and instead intended to deprive the Company of necessary capital and sabotage its business in an effort to strip Plaintiffs' assets and poach its talent at little cost. Compl. ¶¶ 81-82. Foxconn's own authority demonstrates that these allegations are sufficient. *See Universal Am. Corp.*, 176 F. Supp. 3d at 403 (denying motion to dismiss based on false statements related to

contract). Foxconn also cites *In re OSC 1 Liquidating Corp.*, 529 B.R. 825 (Bankr. D. Del. 2015), where the court found that whether a counteroffer for the purchase of a ground lease was solicited or unsolicited was an immaterial fact for the purpose of a fraud claim. *Id.* at 833. That is a far cry from these circumstances, where Plaintiffs were looking for a manufacturing and supply chain partner, thought they had found such a partner in Foxconn, one of the world’s largest electronics manufacturers, and pivoted their entire business model and sold their most valuable asset based on Foxconn’s representations. Nor were Foxconn’s representations “vague expressions of hope,” Foxconn Br. 23; they were promises of a partnership, with specific commitments, that induced Plaintiffs to shift its business model to the exclusion of other potentially attractive options.

Second, Foxconn argues that the Complaint fails to plead scienter. Foxconn Br. 23. But “[a] question of intent is always a question of fact,” *H.B. Fuller Co. v. Nat’l Starch & Chem. Corp.*, 595 F. Supp. 622, 625 (D. Del. 1984), and Plaintiffs allege more than “threadbare” allegations – they assert specific allegations about Foxconn’s scienter:

Foxconn knew that it never intended to have a partnership and its statements regarding its interest in a partnership with Plaintiffs were false. Rather than seeking to develop a partnership with Plaintiffs, Foxconn intended to deprive the Company of necessary capital and sabotage its business in an effort to strip Plaintiffs’ assets and poach its talent at little cost.

Compl. ¶ 82. Once again, Foxconn’s authority is directly on point, as the court in *Deloitte LLP v. Flanagan*, 2009 Del. Ch. LEXIS 220, at *32 (Del. Ch. Dec. 29, 2009) found that a party’s pattern of behavior “leaves only one reasonable inference, that of scienter.” So too here, Foxconn’s representations to Plaintiffs and its subsequent behavior support the inference of a scheme to strip Plaintiffs of their most valuable assets. Foxconn also argues that the fraud claim against Foxconn (Far East) Limited has “no allegation to connect them beyond their corporation affiliation.” Foxconn Br. 24. But the allegations against Foxconn (Far East) Limited are tied to its role inducing

Lordstown EV Corporation to enter into the Asset Purchase Agreement, to which Foxconn (Far East) Limited was a party. Compl. ¶ 28. Plaintiffs alleged that “Foxconn (Far East Limited) made its statements regarding Foxconn’s interest in a partnership with Plaintiffs with the intent to induce Plaintiffs to enter into the Plant APA and deprive Plaintiffs of their most valuable asset.” Compl. ¶ 143. Thus, Count VIII is based on Foxconn (Far East) Limited’s specific conduct.

Third, Foxconn argues that the fraud claims because of integration clauses in the Asset Purchase Agreement, the JV Agreement, the Investment Agreement, and the Manufacturing Supply Agreement preclude justifiable reliance. Foxconn Br. 24-25. But an integration clause alone is insufficient to defeat a claim for fraud. Rather, “the contract must contain language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.” *Blattman v. Siebel*, 2016 U.S. Dist. LEXIS 48674, at *9 (D. Del. Apr. 12, 2016). “The presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and is not accompanied by other contractual provisions demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims.” *Id.* The customary integration clauses in the Investment Agreement, Asset Purchase Agreement and Manufacturing Supply Agreement contain standard integration clauses that do not promise lack of reliance on other statements. *See* Compl. Ex. B at 58-59 (Asset Purchase Agreement); *id.* Ex. E at 52 (Investment Agreement); *id.* Ex. C at 26 (Manufacturing Supply Agreement). Meanwhile, Foxconn omits a crucial provision from the integration clause from the JV Agreement that entirely undermines its argument, as section 13.12 states that “nothing in this Section 13.12 limits or excludes any Liability for fraud and fraudulent

misrepresentation.” *id.* Ex. D. at 52. Foxconn cannot avoid the common law fraud claims by misrepresenting to this Court the contents of the parties’ contracts.

C. Plaintiffs State a Claim for Tortious Interference

Foxconn argues that the tortious interference claim against Hon Hai fails because Hon Hai is not a stranger to the contracts at issue. Foxconn Br. 25. But Foxconn concedes that the “affiliate exception” can be overcome where a plaintiff alleges that the affiliated entity’s purported interference was “motivation by some malicious or other bad faith purpose.” *Id.* 26. That is precisely what is alleged here. *See* Compl. ¶ 7 (“Instead of building a thriving business for the benefit of all Lordstown’s stakeholders, Foxconn maliciously and in bad faith destroyed that business, costing Lordstown’s creditors and shareholders billions.”) And the allegation that Hon Hai sought to “reposition [its] business” is entirely consistent with the malicious conduct alleged. Hon Hai sought an opportunity to commence electric vehicle manufacturing in the United States, and decided to exploit Lordstown’s financial difficulties as a means to acquire a manufacturing plant and other valuable assets through its fraudulent conduct. Compl. ¶ 42 (“Defendants’ actions were driven by Foxconn, which was determined to maliciously and in bad faith destroy Plaintiffs’ business in an effort to strip Plaintiffs’ assets and poach its talent at little cost”).

D. Plaintiffs State a Claim for Equitable Subordination

Foxconn argues that Plaintiffs fail to state a claim for inequitable equitable conduct because its allegations “are based squarely on the theory that Defendant failed to live up to their contractual promises.” Foxconn Br. 27. Foxconn is wrong as a matter of both fact and law. Plaintiffs’ claims are not limited to Foxconn’s breaches of contract. Rather, Plaintiffs allege that (i) Foxconn induced Plaintiffs to enter into a series of agreements based on the false representation that it sought a partnership with Plaintiffs to jointly develop the next generation of electric vehicles, (ii)

Foxconn knew that it never intended to have a partnership and its statements regarding its interest in a partnership with Plaintiffs were false, (iii) Foxconn made its statements regarding its interest in a partnership with Plaintiffs with the intent to induce Plaintiffs to sell their unique and most valuable asset, their manufacturing plant, to transfer highly talented and experienced manufacturing and operational employees to the Foxconn team, and to refrain from pursuing opportunities with other strategic partners, (iv) Plaintiffs justifiably relied on the statements of Foxconn, one of the world's largest multinational manufacturing companies, and (v) as a direct and proximate cause of Foxconn's fraudulent conduct, Plaintiffs have suffered, and will continue to suffer, billions of dollars in damages. Compl. ¶¶ 81-85. There is no question that equitable subordination made be based on fraudulent conduct. *Century Grove, Inc. v. Iselin*, 151 B.R. 327, 335 (Bankr. D. Del. 1993) (fraud was sufficiently egregious to warrant equitable subordination).

Moreover, the assertion that equitable subordination cannot be based on contractual breaches is wrong. *See LightSquared LP v. SP Special Opportunities LLC (In re LightSquared Inc.)*, 511 B.R. 253, 348 (Bankr. S.D.N.Y. 2014) (equitable subordination may be based on “a substantial breach of contract and advantage-taking by the creditor.”) (quotation marks omitted). “Where a proponent is able to establish inequitable conduct in connection with contractual obligations, courts have granted equitable subordination.” *Id.* Plaintiffs' reliance on *Tilton v. MBIA Inc. (In re Zohar III Corp)*, 639 B.R. 73 (Bankr. D. Del. 2022) is unavailing; there the court found that “using contractual rights to a strategic advantage” is not inequitable; here, however, Foxconn *breached* its contractual obligations, and did so as part of a scheme to strip Plaintiffs of their most valuable assets. That is sufficient to state a claim.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court to deny the Motion.

Dated: November 6, 2023

Respectfully submitted,

/s/ Morgan L. Patterson

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Counsel to Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I, Morgan L. Patterson, certify that service of the foregoing was caused to be made on November 6, 2023, via CM/ECF upon those parties registered to receive such electronic notifications.

/s/ Morgan L. Patterson
Morgan L. Patterson (DE Bar No. 5388)

EXHIBIT A

**AMENDMENT NO. 1 TO LIMITED LIABILITY COMPANY AGREEMENT
OF MIH EV DESIGN LLC**

This AMENDMENT NO. 1, dated as of November 22, 2022 (this “Amendment”) to the Limited Liability Company Agreement of MIH EV Design LLC (the “Agreement”), a Delaware limited liability company (the “Company”), dated as of May 11, 2022, is adopted, executed and entered into by and among the Company and its Members. Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Agreement.

WHEREAS, Foxconn EV Technology, Inc., an Ohio corporation (“FX”), and Lordstown EV Corporation, a Delaware corporation (“LMC”), are the two members of the Company (the “Members”, each a “Member”, and together with the company the “Parties”);

WHEREAS, pursuant to Section 13.4(b) of the Agreement, no amendment of the Agreement shall be effective unless previously approved by the Board; and

WHEREAS, the Parties desire to amend the Agreement pursuant to and in accordance with the provisions of Section 13.4(b) thereof and as set forth herein.

NOW, THEREFORE, the Parties hereby agree that, effective as of the date hereof, the Agreement is amended as follows:

Section 1.1 Amendment to the Agreement. All obligations of the Members under the Agreement shall be terminated, including but not limited to any obligations to make capital contributions to the Company under Article III, any restrictions imposed on the Members under Section 11.2 or any other provision thereof.

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

Section 1.3 Counterparts. This Amendment may be executed in any number of counterparts (including by .pdf file exchanged via email or other electronic transmission), each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Section 1.4 Governing Law. This Amendment shall be governed exclusively by and construed and enforced exclusively in accordance with the internal laws of the State of Delaware, including its statute of limitations, without regard to any laws or rules, including any borrowing statute that would result in the application of the laws, rules or provisions of any jurisdiction other than the State of Delaware.

[Signature Page Follows.]

IN WITNESS WHEREOF, the undersigned have executed and delivered this Amendment as of the date first above written.

MIH EV DESIGN LLC

DocuSigned by:

By: Edward T. Hightower

Name: Edward T. Hightower

Title: Chief Executive Officer

FOXCONN EV TECHNOLOGY, INC.

DocuSigned by:

By: Jerry Hsiao

Name: Jerry Hsiao

Title: Director

LORDSTOWN EV CORPORATION

DocuSigned by:

By: Adam Kroll

Name: Adam Kroll

Title: Chief Financial Officer

[Signature Page to Amendment No. 1 to Limited Liability Company Agreement]