

**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: D.I. 15, 17

**DEFENDANTS' REPLY 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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Defendants respectfully submit this reply in response to *Plaintiffs' Opposition to Defendants' Motion to Dismiss All Counts of the Adversary Complaint* (D.I. 15) (“Opp.”) and the *Equity Committee's Joinder to Plaintiffs' Opposition to Defendants' Motion to Dismiss All Counts of the Adversary Complaint* (D.I. 17) (“EC Opp.”).¹

PRELIMINARY STATEMENT

Fundamentally, Plaintiffs are telling the Court two diametrically opposed stories. In the story alleged in the Complaint, Defendants engaged in an alleged overarching scheme to lure Plaintiffs into a “grandiose collaboration” “to loot Plaintiffs of their most valuable assets,” underpinned by a series of interlinked, interrelated contracts. *See* Compl. ¶¶ 1, 83, 143. At the center was a joint venture agreement with an elaborately negotiated dispute resolution clause requiring arbitration of “any and all disputes, controversies, or Claims . . . arising out of or relating to” the agreement. JV Agreement § 13.8. Faced with the implications of that agreement, Plaintiffs are changing their story, with slicing and dicing designed to now depict this case as involving a series of entirely unrelated contracts, unrelated parties, and unrelated obligations. This play fails.

Buried in Plaintiffs’ Opposition is the concession that at least two Counts are arbitrable. Opp. 21. So, to avoid this implication, Plaintiffs invoke the Court’s “discretion” and “policy.” *Id.* at 21-22. But this runs contrary to controlling Third Circuit precedent requiring enforcement of the parties’ arbitration clause and enforcement of the Federal Arbitration Act (“FAA”). *See In re Mintze*, 434 F.3d 222 (3d Cir. 2006). The fact that not all Foxconn Defendants signed the JV Agreement is of no moment, when the law is clear that the kind of transactional interconnectedness alleged in the Complaint requires arbitration of claims involving both signatories and non-signatories. And in perhaps their biggest fit of desperation, Plaintiffs argue that the Amendment

¹ Undefined capitalized terms have the meaning assigned to them in Defendants’ Motion to Dismiss (D.I. 8) and Opening Brief (D.I. 9) (“Opening Br.”). Unless otherwise noted, internal citations and quotations are omitted.

to the JV Agreement (“JV Amendment”) has terminated the JV Agreement’s arbitration clause, ignoring that the JV Agreement *expressly provides* that its dispute resolution provisions shall survive “in full force” and “notwithstanding any termination.” JV Agreement § 13.14. The JV Amendment, which was executed subsequent to the Investment Agreement, is just that: an *amendment*. It does not extinguish the JV Agreement.

For these reasons, the Court should dismiss this case and compel arbitration. The Court need go no further than that, but if the merits are reached, the claims still fail.

Plaintiffs do not plead recoverable contract damages, instead alleging that they are entitled to “billions of dollars” in consequential damages that could never be awarded as a matter of law, as they are based on the speculation that this failed business venture might have in some fantasy succeeded for decades. And Plaintiffs’ tort claims fail on every level. Among other reasons, those claims duplicate the contract claims, lack specificity, impermissibly rely on press release puffery as a substitute for an actionable misrepresentation, and fly in the face of contractual provisions barring them. Plaintiffs also claim that Defendants’ equity interests should be equitably subordinated, without alleging why this drastic remedy could apply in these circumstances. But that claim is entirely derivative of all other claims and falls down with them.

For all of these reasons, and those explained below, this case should be dismissed.

ARGUMENT

I. All Counts Should Be Arbitrated

No matter what story Plaintiffs choose to tell now, they have conceded arbitrability. In arguing that “here, nine of the eleven claims asserted by Plaintiffs are beyond the scope of the arbitration provisions cited by Foxconn,” Opp. 21, Plaintiffs concede that at least two claims (Counts VI and IX) are arbitrable. And while Plaintiffs and the Equity Committee (“EC”) take issue with the broad scope of the arbitration provisions in the JV Agreement and Manufacturing

Supply Agreement, they never address precedent under the FAA mandating arbitration where, as here, parties have agreed to broad arbitration provisions mandating arbitration of “any and all claims” “arising out of” or “relating to” the agreements. *See* Opening Br. 12-14; *see, e.g., Townsend v. Pinnacle Ent., Inc.*, 457 F. App’x 205, 208-09 (3d Cir. 2012) (holding that a broad arbitration provision containing “arising out of” language mandated arbitration of the dispute).

All claims in this case should be arbitrated because the Complaint ties all claims to Defendants’ alleged promise to form a joint venture with Plaintiffs. Opening Br. 14-15. That joint venture was formed, and it is governed by the JV Agreement with an enforceable arbitration provision. Compl. ¶¶ 33-35; Opening Br. 13. Plaintiffs have not shown how any claim is unrelated to the parties’ joint venture. Rather, they concede the opposite, stating that “[t]his dispute involves a number of contracts that Foxconn concedes to be interrelated and part of one overarching transaction,” that “cannot be split into fragments.” Opp. 1-2. Plaintiffs therefore cannot escape their agreement to arbitrate the entirety of their Complaint. The JV Agreement’s arbitration clause—which covers the whole of “any and all disputes, controversies, or Claims . . . relating to” their JV Agreement—includes all of the claims at issue in this proceeding. JV Agreement § 13.8.

Nor can Plaintiffs escape the FAA’s presumption in favor of arbitration. *See Century Indem. Co. v. Certain Underwriters at Lloyd’s, London*, 584 F.3d 513, 523 (3d Cir. 2009). The JV Agreement’s arbitration provision is valid, plainly enforceable as to the non-signatory entities, and nothing in the other agreements prohibits arbitration of all claims asserted. The Court should therefore dismiss this case and compel arbitration.

A. The FAA Applies to All of the Claims Asserted Here

Present throughout Plaintiffs’ arguments against compelling arbitration is a suggestion that the FAA, and its pro-arbitration stance, somehow has less teeth in the bankruptcy context. Plaintiffs make baseless arguments about “discretion” and “policy.” Opp. 20-21. And they

suggest that arbitration is simply unavailable for equitable subordination claims. *Id.* at 19. Not so.

First, Plaintiffs wrongly argue that the Court has discretion to disregard the arbitration clauses in the JV Agreement and the Manufacturing Supply Agreement. *Id.* at 20-22. In doing so, Plaintiffs ignore *Mintze*, opting instead to rely on stale authority decided prior to *Mintze*. *See id.* at 20-21. *Mintze* confirms that under the FAA, courts cannot deny enforcement of an otherwise applicable arbitration clause unless “the party opposing arbitration can establish *congressional intent* . . . to preclude waiver of judicial remedies for the *statutory rights* at issue.” 434 F.3d at 231 (emphasis added). The claims for breach of the JV Agreement and Manufacturing Supply Agreement do not implicate statutory rights; they arise under state law, and this Court therefore lacks the authority to deny arbitration of them. *See In re Fleming Cos.*, No. 03-10945, 2007 WL 788921, at *3 (D. Del. Mar. 16, 2007).²

Second, Plaintiffs’ assertion that their equitable subordination claim is “not subject to arbitration,” Opp. 19, also ignores the law. *Mintze* again controls here, not the 20-year-old, out-of-Circuit case that Plaintiffs rely on, which concluded that an equitable subordination claim should not be subject to arbitration because it is a core claim. *See id.* (citing *Aiello v. Chisick (In re First Alliance Mortgage Co.)*, No. SA CV 01-971, 2002 WL 1303036, at *3 (C.D. Cal. Jan. 9, 2002)). In the Third Circuit, “[t]he core/non-core distinction does not . . . affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement.” *Mintze*, 434 F.3d at 229. For the Court to exercise its discretion in that way, it would have to find an “inherent conflict between arbitration and the Bankruptcy Code.” *Id.* at 231. Nowhere do Plaintiffs point

² The EC expressly concedes that Count IX is otherwise subject to the Manufacturing Supply Agreement’s “binding arbitration provision.” *See* EC Opp. 3. Plaintiffs (and the EC) cannot turn to this Court’s “discretion” to avoid arbitration. *See Mintze*, 434 F.3d at 231.

to any such “inherent conflict,” because there is none. *See id*; *see also In re Rarities Grp. Inc.*, 434 B.R. 1, 11-12 (D. Mass. 2010) (ordering bankruptcy court to compel arbitration of equitable subordination claim).

B. The JV Agreement’s Arbitration Provision Survives Termination

Plaintiffs next seek to evade arbitration by arguing, without authority, that the JV Agreement’s arbitration clause is no longer valid because “the parties terminated their obligations under the JV Agreement when they entered into the Investment Agreement without releasing any preexisting claims thereunder.” *See* Opp. 20. In support, Plaintiffs isolate Section 1.1 of the JV Amendment, *see id.* Ex. A, arguing that this provision should be read in a vacuum so as to terminate Lordstown EV Corporation’s obligation to arbitrate under the JV Agreement, *id.* at 20. This argument is as frivolous as it gets.

Putting to one side the fact that Plaintiffs’ entire case is about an alleged failed joint venture and the fact that they sue under the JV Agreement, Compl. ¶¶ 124-160, the JV Agreement contains a survival provision that expressly provides that its arbitration provision “shall survive and continue in full force in accordance with their terms notwithstanding any termination of this Agreement or the termination of the Company,” JV Agreement § 13.14. This language is dispositive: the JV Agreement’s arbitration provision remains enforceable.

Neither the Investment Agreement nor the JV Amendment undermines the JV Agreement’s arbitration mandate. Two weeks *after executing the Investment Agreement*, the parties *amended* the JV Agreement, agreeing in Section 1.2 of the JV Amendment that, “[e]xcept as expressly set forth herein, (a) all of the terms and provisions of the [JV Agreement] remain in full force and effect unmodified.” The JV Agreement’s arbitration provision is precisely one of the “terms and provisions” that Section 1.2 preserves because nothing in the JV Amendment purports to modify

the arbitration clause. The same is true of the JV Agreement’s survival provision.³

C. The JV Agreement’s and Manufacturing Supply Agreement’s Arbitration Clauses Are Binding on the Non-Signatory Entities

Plaintiffs incorrectly argue that because some claims run to or from entities who are not party to the JV Agreement or the Manufacturing Supply Agreement, those claims do not otherwise fall within the scope of those agreements’ arbitration clauses. *See* Opp. 15-19. This argument avoids the entirety of the Complaint, where Plaintiffs complain about alleged acts and agreements of the Foxconn Defendants without distinction as if they are a single entity. *See* Compl. *passim*. In fact, Plaintiffs disavow any such distinction at the very start of the Complaint, alleging specifically that the Foxconn Defendants acted as one. *See, e.g., id.* ¶ 1 (“Hon Hai Precision Industry Co., Ltd (‘Foxconn’) then embarked on a course of conduct, which is littered with a series of broken promises and repeated refusals to take any action in furtherance of the initially proffered venture. . . . This course of conduct is nothing new for Foxconn and its affiliates—their modus operandi in the United States is to overpromise and under or never deliver.”). Basic principles of equitable estoppel preclude Plaintiffs from disavowing their own allegation to avoid arbitration.

The Third Circuit and Delaware courts have compelled arbitration as to non-signatories in a number of situations, including: (i) when there is a “close relationship between the entities involved,” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199, 201 (3d Cir. 2001); (ii) when a non-signatory to a contract containing an arbitration clause “embrace[s]” that contract, *see Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 220-221 (3d Cir. 2014); (iii) when a signatory to an arbitration clause raises allegations of “substantially interdependent and concerted misconduct” by both a signatory and a non-signatory to the clause,

³ Plaintiffs’ faulty argument also ignores the general principle that arbitration provisions typically survive post-termination. *See Primex Int’l Corp. v. Wal-Mart Stores, Inc.*, 679 N.E.2d 624, 626 (N.Y. 1997)); *cf. In re Fleming Cos.*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005).

see Douzinas v. Am. Bureau of Shipping, Inc., 888 A.2d 1146, 1153 (Del. Ch. 2006); and (iv) when a signatory to a written agreement containing an arbitration clause relies on the terms of the written agreement in asserting its claims against the non-signatory, *see Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, No. CIV.A. 2037-N, 2006 WL 2473665, at *5 (Del. Ch. Aug. 22, 2006). All of these circumstances are present here.

First, Plaintiffs cannot avoid their own allegations: without doubt, Hon Hai, FVP, and Foxconn (Far East) (non-signatories) are closely related to Foxconn Technology (the signatory to the JV Agreement) and Foxconn System (the signatory to the Manufacturing Supply Agreement). Plaintiffs define Hon Hai as “Foxconn,” Compl. ¶ 1, and refer to various Foxconn entities simply as “Foxconn” throughout their Complaint, *id. passim*. Further, the Complaint alleges that Hon Hai and Lordstown Motors Corp. negotiated the relevant contracts, including the JV Agreement, Manufacturing Supply Agreement, and Investment Agreement, *see, e.g., id.* ¶¶ 29-30, 32, 43-44, 47, and that Hon Hai was the Foxconn entity that “agreed to enter into the JV Agreement” and requested its termination, *id.* ¶¶ 33-34.

Second, Lordstown Motors Corp. is similarly tethered to the alleged joint venture, and unquestionably “embraced” the JV Agreement and Manufacturing Supply Agreement. Where the Complaint sets out the factual background of the JV Agreement, Plaintiffs do not even mention Lordstown EV Corporation (the party to the JV Agreement) but instead refer to Lordstown Motors Corp. some 52 times as directly benefiting from the JV Agreement or otherwise seeking to enforce its provisions. *See id.* ¶¶ 29-42. The same is true of the Manufacturing Supply Agreement, which Lordstown Motors Corp. expressly alleges that it directly benefited from. *See, e.g., id.* ¶ 33. And while Hon Hai may not be a party to the JV Agreement or the Manufacturing Supply Agreement, the entire premise of Plaintiffs’ case is that Hon Hai benefitted from the alleged “scheme” to lure Plaintiffs into a series of agreements, *see, e.g., id.* ¶ 1, and that the JV Agreement was an integral

part of Hon Hai’s “effort to strip Plaintiffs’ assets and poach its talent at little cost,” *see, e.g., id.* ¶ 42.

Finally, Plaintiffs concede the JV Agreement’s and Manufacturing Supply Agreement’s interrelatedness as to all parties: “This dispute involves a number of contracts that . . . [are] interrelated and part of one overarching transaction.” *See* Opp. 1-2. And each of the Plaintiffs brings claims that rely on the terms of the JV Agreement, signaling that they are bound by the scope of its arbitration clause. *See* Compl. ¶¶ 42, 81-83, 135, 142, 155, 160. Once again, Plaintiffs’ allegations refute their arguments.

D. Arbitrating All Counts Under the JV Agreement’s Arbitration Provision Is Not Prohibited by the Other Agreements’ Contractual Language

The JV Agreement’s arbitration clause is purposeful. To the extent a claim arises out of or relates to the JV Agreement, it is arbitrable even if the claim would also arise out of and/or relate to the parties’ other agreements. *See, e.g., Wald v. 1 Fin. Marketplace Sec., LLC*, No. CIV.A.209-CV-1116-WY, 2009 WL 3209930, at *9 (E.D. Pa. Oct. 5, 2009) (compelling arbitration of claims because “factual underpinnings” of the complaint clearly arise out of and are related to the parties’ business relationship); Opening Br. 12-17. With the JV Agreement drafted in the context of “a series of agreements,” as alleged by Plaintiffs, *see* Compl. ¶ 81,⁴ the parties clearly foresaw the potential for arbitration pursuant to the JV Agreement of “any and all” such related agreements. Plaintiffs unconvincingly argue to the contrary, with cherry-picked language from the Investment Agreement and Asset Purchase Agreement in an attempt to characterize each contract as existing in a vacuum. *See* Opp. 17-19.

The alleged breach of the Asset Purchase Agreement—which was executed before the JV Agreement—relates to efforts to enter into the JV Agreement, which in turn represents an

⁴ Part (a) of Plaintiffs’ Prayer for Relief also refers to Foxconn as inducing Plaintiffs to “enter into a series of agreements.” Compl. 42.

intentional decision to have the parties arbitrate claims that “arise out of” or “relate to” it. *See* Opening Br. 14. The allegations underlying the alleged breaches of the Investment Agreement also squarely encompass Defendants’ efforts to enter into the JV Agreement. *See id.* To the extent Plaintiffs suggest that there is any conflict between the JV Agreement’s arbitration clause and the Investment Agreement such that breach claims under the latter cannot be arbitrated, the coextensive nature of Plaintiffs’ allegations—with the JV Agreement at its center—mandates otherwise. Plaintiffs’ superficial attempt at making this argument confirms as much. *See* Opp. 17. And any dispute about the scope of the JV Agreement’s arbitration provision “should be resolved in favor of arbitration.” *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 55 (3d Cir. 2001); *see also Century Indem. Co.*, 584 F.3d at 527 (holding that the “presumption in favor of arbitration applies” to “whether the merits-based dispute in question falls within the scope of that valid agreement”); Opening Br. 12-17.

Moreover, it is notable that here Plaintiffs remain silent on—and therefore concede—the arbitrability of any and all claims arising out of or under the Manufacturing Supply Agreement. Opening Br. 15. Plaintiffs are also wrong to argue that their tort claims are excluded from arbitration simply because they relate to more than just the joint venture. Plaintiffs’ express acknowledgement that those claims relate in part to both the JV Agreement and the Manufacturing Supply Agreement ends the inquiry. *See* Opp. 15, 19; *Detroit Med. Ctr. v. Provider Healthnet Servs., Inc.*, 269 F. Supp. 2d 487, 493 (D. Del. 2003) (concluding that broad arbitration provision in one agreement applied to claims arising out of another agreement because they were part of the same overall transaction).

II. The Complaint Fails to State a Claim

A. Plaintiffs Cannot Pursue Consequential Damages

Plaintiffs' focus on the availability of direct damages for breach provides no defense for their impermissibly speculative claim for "billions of dollars" that are purportedly consequential in nature. Compl. ¶¶ 94, 102, 114, 122, 129, 136, 151. Plaintiffs do not address this point. Instead, they blandly argue, without citing to Delaware cases or any binding in-Circuit precedent, that this issue should be kicked to some later stage in the proceedings. *See* Opp. 23-24.

Hornbook contract law provides that consequential damages are not recoverable unless foreseeable and traceable to the alleged breach. *See* 24 WILLISTON ON CONTRACTS § 64:12 (4th ed. 2010); Opening Br. 17-19 (citing cases). Plaintiffs must sufficiently plead foreseeability and traceability. *See, e.g., Scheuer v. United States Liab. Ins. Co.*, No. 7:22-CV-09474 (NSR), 2023 WL 4275114, at *4 (S.D.N.Y. June 27, 2023) (dismissing claim for consequential damages for failure to plead sufficient facts). This is not a matter of "evaluat[ing]" the "preposterous[ness]" of Plaintiffs' alleged damages. *See* Opp. 23. Rather, the relevant inquiry is whether Plaintiffs plausibly plead the rare, exceptional situation where unattributed billions in damages are a foreseeable and traceable consequence of some breach. *See Scheuer*, 2023 WL 4275114, at *4; Opening Br. 17-20. There are no such allegations. Nor do any allegations tie the "billions of dollars" to any individual contractual claims, making it impossible to unscramble what Plaintiffs seek. Plaintiffs cannot make those requisite connections, nor do the cases they cite lend support. *See* Opp. 23-24. Plaintiffs cite two cases considering consequential damages in an insurance claim denial context, and another narrowly evaluating the scope of a parties' agreement to limit damages, none of which address pleading foreseeability and traceability concerning the type of commercial collaboration at the heart of Plaintiffs' claims.

B. Plaintiffs’ Attempt to Convert Common Law Fraud Claims into Fraudulent Inducement Claims Does Not Save Counts I and VIII from Dismissal

Plaintiffs’ brief recasts their common law fraud claims into fraudulent inducement claims. *Compare* Opp. 25-26 *with* Compl. ¶¶ 80-85; 141-45. “[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988). This strategy cannot save Plaintiffs’ fraud claims from dismissal.

1. Plaintiffs’ Fraud Claims Are Impermissibly Bootstrapped to Their Breach of Contract Claims

Plaintiffs’ fraud allegations are indistinguishable from their breach of contract allegations. *See* Opening Br. 21-22. Plaintiffs’ shift to the rubric of fraudulent inducement does not change that. The alleged inducements are bargained-for promises *in the contracts themselves*. Any “scheme” to enter into an agreement and then not perform, thereby purportedly “depriv[ing]” Plaintiffs of agreed-upon capital funding and joint development promises, *see* Compl. ¶¶ 82-85, 142-145, is at best an allegation of damages arising from breach. Put simply, Plaintiffs are “couching an alleged failure to comply with the contract at issue as a failure to disclose an intention to take certain actions arguably inconsistent with that contract,” which “is exactly the type of bootstrapping [courts] will not entertain.” *MicroStrategy Inc. v. Acacia Rsch. Corp.*, No. 10-5735, 2010 WL 5550455, at *17 (Del. Ch. Dec. 30, 2010).

2. Plaintiffs Fail to Plead Material Misrepresentation

Plaintiffs clarify their “chief allegation” of material misrepresentation is that Hon Hai told Plaintiffs that they wanted to enter into a business venture together. *See* Opp. 26 (citing Compl. ¶¶ 81-82). Setting aside the fact the parties *did* enter into a joint venture, as Plaintiffs allege, *see* Compl. ¶¶ 33, 125, the Opposition fails to point to any material misrepresentation pleaded in the Complaint, and the generalized statements alleged are devoid of any particularity, *see* Opp. 26-27.

The EC suggests that marketing statements made by Hon Hai's Chairman are sufficient to plead a false representation. *See* EC Opp. 4. Plaintiffs, however, do not even attempt this frivolous argument, and for good reason. Public statements of non-actionable "expectations," "goals," "belie[fs]," directed to the entire world cannot have had a "natural tendency" to influence any decision maker, let alone Plaintiffs. *See In re OSC 1 Liquidating*, 529 B.R. 825, 832 (Bankr. D. Del. 2015); *see also* Opening Br. 22-23 (collecting cases).

3. Plaintiffs Fail to Plead Scienter

Scienter based on circumstantial evidence must be plausibly pleaded, *see* Opening Br. 23-24, and Plaintiffs' conclusory allegations of a "pattern of behavior" do not suffice, *see* Opp. 27. That is especially true under an inducement theory. Plaintiffs point to no allegation that Hon Hai and Foxconn (Far East) acted with knowledge or reckless indifference in inducing Plaintiffs to destroy their own business. *See, e.g., Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, No. 2017-0500-JRS, 2018 WL 2727542, at *10, *12 (Del. Ch. June 6, 2018). Plaintiffs' only effort to allege scienter is a completely conclusory assertion, devoid of any factual support, that Foxconn (Far East) acted with the requisite intent. Opp. 27-28; Compl. ¶ 143. Plaintiffs do not identify any specific statements or conduct that can be attributed to Foxconn (Far East)'s mental state. *See* Opening Br. 24.

4. Plaintiffs' Silence as to Reliance Concedes No Such Allegation Is Pleaded

Plaintiffs on the one hand acknowledge that they must allege reliance. Opp. 25. Yet they fail to cite to any such allegation. The later references to paragraph 85 of the Complaint largely concerns damages and is itself an inadequate conclusory statement. Plaintiffs cite nothing in support of an allegation of reliance on the part of Foxconn (Far East). Having failed to plead

reliance, Plaintiffs' fraud claims must be dismissed.⁵

5. The Merger Clauses in the Relevant Agreements Further Preclude Justifiable Reliance

Conceding that the JV Agreement contains enforceable anti-reliance language, Plaintiffs argue that the merger clauses in the Asset Purchase Agreement, Manufacturing Supply Agreement, and Investment Agreement are "customary" and "standard" in that they "do not promise lack of reliance on other statements." Opp. 28. This conveniently ignores expressly agreed-to language to the contrary. The Manufacturing Supply Agreement's merger clause, Section 24(j), contains express anti-reliance language. Plaintiffs fare no better with the Asset Purchase Agreement's merger clause, Section 10.10, which represents the "entire understanding" of the parties, "supersed[ing] and replac[ing] any and all prior agreements, arrangements and understandings." The merger clause in Section 8.05 of the Investment Agreement is nearly identical. It is of no import that these merger clauses do not include the word "rely" or "reliance" because "Delaware law does not require magic words." *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 51 (Del. Ch. 2015). These sophisticated Plaintiffs should not be permitted to avoid negotiated clauses by claiming that they are "standard" and therefore meaningless.

Plaintiffs cherry pick language from the JV Agreement's anti-reliance provision, Section 13.12, to argue contrary to its plain terms that the anti-reliance language does not preclude fraud claims. Opp. 28-29. Plaintiffs cite in support the language that "nothing in this Section 13.12 limits or excludes any Liability for fraud and fraudulent misrepresentation." Plaintiffs ignore, however, the preceding sentence that each party "is entering into this Agreement in reliance *solely* on the statements made or incorporated *in this Agreement and the documents expressly referred to*

⁵ The EC likewise cannot point to allegations of reliance. Of the six paragraphs in the Complaint that the EC cites to, the only two that speak to reliance, Compl. ¶¶ 23, 84, are simply talismanic invocations of reliance with no substantive allegations of fact, *see* EC Opp. 5.

herein and therein.” (emphasis added). Nothing about the sentence permitting a party to bring fraud claims negates the meaning of the prior sentence barring reliance on understandings outside the four corners of the JV Agreement. The simple ability to bring a fraud claim does not change what Plaintiffs may justifiably rely on. Plaintiffs’ untethered reading of Section 13.12 would render the rest of it a nullity. It plainly does not give Plaintiffs carte blanche to ignore the express language of the JV Agreement. *See, e.g., ChyronHego Corp. v. Wight*, No. 2017-0548, 2018 WL 3642132, at *6 (Del. Ch. July 31, 2018) (finding that an anti-reliance provision similar to that in the JV Agreement did not allow for plaintiff to “bootstrap a dog’s breakfast of extra-contractual fraud claims onto contractual misrepresentations”).

C. Plaintiffs Fail to State a Claim for Tortious Interference

Defendants have shown how Plaintiffs fail to plead the interference and related damages elements of their tortious interference claim against Hon Hai. *See* Opening Br. 25-26. Plaintiffs’ lack of response warrants dismissal. Plaintiffs’ attempt to invoke the “affiliate exception,” by pointing to two of the Complaint’s 163 paragraphs as alleging Hon Hai acted “maliciously and in bad faith,” *see* Opp. 29 (citing Compl. ¶¶ 7, 42), relies on talismanic conclusions that do not meet the “stringent bad faith standard” to save their claim from dismissal, *see* Opening Br. 26.

D. Plaintiffs Fail to State a Claim for Equitable Subordination

Plaintiffs fail to show how the conduct underlying their equitable subordination claim amounts to the “egregious conduct” necessary to sufficiently plead the “drastic and unusual” remedy of equitable subordination against a non-insider. *See* Opening Br. 26-27. Plaintiffs instead make conclusory statements that rely on their breach and fraud theories. Opp. 29-30. These sweeping statements miss the point. Equitable subordination is not an iron wall: Plaintiffs cannot hide behind it to avoid their bargained-for obligations and force their outlandish narrative that

Defendants should be responsible for Plaintiffs' own mismanagement and poor business decisions.

To the extent that the equitable subordination claim sounds in fraud, which it does not, Plaintiffs have failed to plead fraud. *See supra* Section II.B; *In re Desmond*, 334 B.R. 78, 85-86 (Bankr. D.N.H. 2005) (dismissing a fraud-based equitable subordination claim). Plaintiffs point to no Third Circuit precedent where an equitable subordination claim based on an alleged contractual breach survived dismissal. Plaintiffs' attempt to distinguish *In re Zohar III Corp.* falls flat. *See* Opp. 30 (citing 639 B.R. 73 (Bankr. D. Del. 2022), *aff'd* 620 F. Supp. 3d 147 (D. Del. 2022)). In *Zohar III*, the court dismissed an equitable subordination claim sounding in contract, where the contract at issue, like here, "sprung from arms-length bargaining between highly sophisticated parties," and in doing so reiterated that "[f]irms that have negotiated contracts are entitled to enforce them to the letter[.]" 639 B.R. at 114.⁶

Plaintiffs' conclusory recitation of the law does not sufficiently plead harm. Further, Plaintiffs disregard Defendants' arguments that the relief sought is inconsistent with the Bankruptcy Code and thus impermissible under controlling Third Circuit precedent. *See* Opening Br. 29 (citing *In re Winstar Comm'ns, Inc.*, 554 F.3d 382, 411 (3d Cir. 2009)). Plaintiffs seek to subordinate Defendants' preferred and common equity interests below common stock, with the effect of disallowing Defendants' interests. Equitable disallowance, to the extent it is even an available remedy under the Bankruptcy Code, is plainly not justified based on the conclusory facts alleged. Authorizing the equitable disallowance of Defendants' interests in the guise of equitable subordination would be inconsistent with the Bankruptcy Code and should be rejected.

CONCLUSION

For the foregoing reasons, the Court should dismiss this adversary proceeding.

⁶ Plaintiffs' reliance on *In re LightSquared Inc.*, 511 B.R. 253 (Bankr. S.D.N.Y. 2014) ignores the court's express refusal to apply the Third Circuit's standard for non-insiders. Opp. 30.

Dated: November 30, 2023
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Donna L. Culver, certify that I am not less than 18 years of age, and that service of the foregoing was caused to be made on November 30, 2023, via CM/ECF upon those parties registered to receive such electronic notifications and served additionally as indicated below.

Date: November 30, 2023

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