Docket #1259 Date Filed: 06/10/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re Nu Ride Inc., *et al.*,[1] Reorganized Debtors.	Chapter 11 Case No. 23-10831 (MFW) (Jointly Administered) **Hearing Date: July 11, 2024 at 2:00 ET** **Obj. Deadline June 10, 2024** **RE: ECF No. 1211**

CLAIMANTS' OMNIBUS RESPONSE TO POST-EFFECTIVE DATE DEBTORS' SECOND OMNIBUS (SUBSTANTIVE OBJECTION

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[1] The Debtors and the last four digits of their respective taxpayer identification numbers are: Lordstown Motors Corporation (3239); Lordstown EV Corporation (2250); and Lordstown EV Sales LLC (9101). The Debtors' service address is 27000 Hills Tech Ct., Farmington Hills, MI 48331.

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1. The Claimants hereby respond in opposition to the Debtors' Second Omnibus (Substantive) Objection Seeking to Disallow or, Alternatively, to Reclassify Certain Indemnification Claims of DiamondPeak Directors and Officers, [D.I. 1211] (the "**Objection**" or "**Obj.**").[2]

2. The Objection should be overruled as a matter of law. *First*, the Debtors are collaterally and judicially estopped from asserting any claim, by setoff or otherwise, against Mr. Hamamoto and by necessary implication, against the other Claimants as well; a central provision of the Plan of Reorganization released Mr. Hamamoto following a detailed investigation by independent counsel to the Company from the very claims that Debtors now raise in an attempt to avoid their indemnification obligations. *Second*, the claims are not subject to mandatory subordination under Section 510(b) because they do not arise from the purchase or sale of a security and do not constitute claims for reimbursement of contribution. *Finally*, the Debtors' argument that they are not required to indemnify the Claimants is contrary to well established principles of Delaware corporate law and flies in the face of the indemnification agreements. For these reasons, Debtors' objection should be overruled.[3]

BACKGROUND

I. General Case and Procedural Background

2. Lordstown Motors Corp. and its affiliates ("**Lordstown**" or the "**Debtors**") filed for relief under Chapter 11 on June 27, 2023 (the "**Petition Date**"). Prior to the bar date, each of

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

[3] The Objection should also be overruled because it was filed without proper authority. Under the plan, the Debtors were required to obtain the consent of the Claims Ombudsman. *See* Plan at Art. V.D.2 (final paragraph). There is no allegation in the Objection or evidence otherwise that the required consent was obtained prior to filing of the Objection. For this additional reason, the Objection should be overruled.

the Claimants filed substantially similar claims for indemnification against each of the Debtors (collectively, the "**Claim**"). Obj. at ¶ 9.

3. On March 6, 2024, the Court confirmed the Debtor's bankruptcy plan [D.I. 1066] (the "**Plan**," and the Order confirming the Plan [D.I. 1069], the "**Confirmation Order**"), which took effect on March 14, 2024 (the "**Effective Date**"). *Id.* at 11. The Plan was approved by the Derivative Claims Oversight Committee of the Board (the "**Board**"). Ninivaggi Declaration [D.I. 1035] ("**Ninivaggi Decl.**") at ¶ 19. The Plan contains releases (the "**Releases**") for Mr. Hamamoto who continued to serve as a director of Lordstown between the Petition Date and the Effective Date (the **"Released Parties**"). Obj. at ¶ 12. Section XI.B of the Plan indicates that it does not release claims relating to the retained causes of action (the "**Retained Causes of Action**"), which are defined in the schedule of the Plan's supplement (the "**Schedule**"). *See* Plan at XI.B; (Schedule of Retained Causes of Action).

4. The Debtors incorporated as a special purpose acquisition company ("**SPAC**") called DiamondPeak Holdings Corp. ("**DiamondPeak**"), which then merged with Lordstown in August 2020. Obj. at ¶ 14-15. Mr. Hamamoto served as Chairman and CEO of DiamondPeak from its inception through the merger with Lordstown. *Id.* at ¶ 20.

5. In December 2021, two DiamondPeak shareholders (the "**Delaware Plaintiffs**") brought suits in the Delaware Court of Chancery against Claimants, the former Directors of DiamondPeak ("**DiamondPeak D&O Defendants**") for alleged breaches of fiduciary duties. *Id.* at ¶ 18. The DiamondPeak Action plaintiffs settled with the DiamondPeak D&O Defendants (the "**Delaware Settlement Agreement**") for a total of $15.5 million, approximately, $3.5 million of which was expected to exceed the remaining available insurance policies for those claims (the "**Settlement Claim Amount**"). A federal securities class action against certain Lordstown

directors and officers that was pending in the Northern District of Ohio was separately settled in connection with the Confirmation Order (the "**Ohio Securities Class Action Settlement**"). *Id.* at ¶ 22. In addition, several derivative cases were filed against the current and former directors of Lordstown and DiamondPeak and certain current and former officers of Lordstown. Obj. at 18.

6. Pursuant to the indemnity agreement dated February 27, 2019 executed by and between the Claimants and DiamondPeak Holdings Corp. ("**DiamondPeak**"), which became an obligation of Lordstown in the merger with DiamondPeak effective October 23, 2020 ("**DP Indemnity Agreement**"), Lordstown is obligated to indemnify the Claimants against all costs and expenses, judgments, liabilities, and amounts paid in settlement actually and reasonably incurred by the Claimants or on their behalf in connection with such Proceeding (as defined by the DP Indemnity Agreement) or any claim, issue or matter therein, in accordance with the provisions of the DP Indemnity Agreement. Hamamoto POC Addenda, Ex. 2, Vasser Decl., Ex. 2. The DP Indemnity Agreement does not require the Claimants to seek Lordstown's approval of a settlement to be indemnified for any settlement payments. *Id*.

7. Additionally, pursuant to the indemnity agreement dated October 23, 2020 by and between Mr. Hamamoto and Lordstown ("**LMC Indemnity Agreement**"), Lordstown is obligated to indemnify Mr. Hamamoto against all judgments, awards, fines, ERISA excise taxes, penalties, amounts paid in settlement, liabilities and losses and shall pay or reimburse all costs and expenses incurred by him where he is involved in any manner (including, without limitation, as a party or witness) in any Proceeding (as defined by the Agreement). *See* Hamamoto POC Addenda, Ex. 1, Vasser Decl., Ex. 2.

8. Moreover, Lordstown is obligated to indemnify the Claimants pursuant to Section 8.1 of the Amended and Restated Bylaws of Lordstown (the "**LMC Bylaws**"), Section 8.2

of the Second Amended and Restated Certificate of Incorporation of DiamondPeak (the "**DP Cert. of Incorp.**"), Section 8.1 of the Bylaws of DiamondPeak (the "**DP Bylaws**"), and any other provisions of the Delaware General Corporate Law (collectively, with the LMC Indemnity Agreement and the DP Indemnity Agreement, the "**Indemnity Agreements**"). *Id*.

ARGUMENT

I. The Debtors' Attempt To Reserve Claims Fails

9. The Debtors attempt to reserve their rights to "assert any claims and causes of action that they hold against Claimants." Obj. at ¶ 51. This is improper. *First*, Mr. Hamamoto was a Released Party under the Plan, and a general reservation cannot serve as an end-run around this Release. *Second,* the Debtors concede, as they must, that an extensive independent investigation found a lack of any cognizable claim or cause of action against Mr. Hamamoto. The Board went on to vote to approve the Plan, including the Releases, in reliance on the representations that there were no claims or indications of wrongdoing, and this Court relied on these findings in confirming the plan.[4] Estoppel now bars the Debtors from changing their tune. This reservation is simply an attempt to circumvent the Releases and the Objection deadline.

A. The Debtors Expressly Released Mr. Hamamoto

10. Pursuant to Article VIII.C of the Plan, the Debtors "shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released, waived, and discharged the Released Parties *from any and all Claims*, Interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, in each case . . ." Plan at VIII.C

[4] In addition to the investigation relied upon by Debtors, the SEC's parallel investigation of Lordstown further indicates the lack of cognizable claims against Mr. Hamamoto. After completing an extensive investigation including serving a subpoena and conducting multiple witness interviews (including of Mr. Hamamoto in 2022), the SEC filed a complaint against Steve Burns, former Lordstown CEO in February 2022 and later settled the claims. *In re Lordstown Motors Corp.*, Respondent., Securities Act Release No. 11274, 2024 WL 893535 (Feb. 29, 2024), https://www.sec.gov/files/litigation/admin/2024/33-11274.pdf. The SEC has taken no action as to Mr. Hamamoto or the other Claimants.

(emphasis added). Notwithstanding this clear language, the Debtors now attempt to reserve future claims "in the nature of breaches of fiduciary duty," including duties of good faith and loyalty, as well as aiding and abetting breach of the same in connection with the SPAC. Obj. at ¶ 52. But Mr. Hamamoto's Release leaves no space for such claims. The *only* caveat to the Release is for claims related to acts "judicially determined by a Final Order to have constituted actual fraud, willful misconduct, or gross negligence[.]" Plan at VIII.C. No such acts have been alleged by the Objection, nor could they after the Debtors eschewed such allegations and procured confirmation of the Plan *based on a record, developed by independent counsel, that no such claim exists*.

11. The Debtors previously represented to the Court that they formed an independent Oversight Committee and retained Winston & Strawn LLP ("**Winston**") as special counsel to examine the same facts and events underlying the claims asserted in the Securities Litigation. See D.I, 658 ("**Am. Disclosure Stmt.**") at 12-15 (explaining that the Debtors retained Winston "to investigate the claims brought on behalf of the Debtors in the derivative litigations," which included claims for breach of fiduciary duties against the Claimants). After completing a thorough investigation, including an interview with Mr. Hamamoto, Winston determined that Mr. Hamamoto and the other current Lordstown directors were entitled to a release under the Plan. See Am. Disclosure Stmt. at 15, 24, 73-74; D.I. 1034 ("**Confirmation Brief**") at ¶ 82; Ninivaggi Decl. at ¶ 19. Winston fully briefed the Debtor's on their investigation, and the Lordstown's Board determined that "in their reasonable business judgment . . . they have no credible causes of action against the directors and officers receiving releases under the Plan (i.e., the Chapter 11 Directors and Officers)." Confirmation Brief at ¶ 82; Ninivaggi Decl. at ¶ 19.

12. As a result of the investigation, Mr. Hamamoto was expressly released from the claims that Debtors now attempt to use as a basis to avoid their indemnification obligations to their

directors and half-heartedly attempt to reserve as affirmative claims. "[A] debtor may release claims in a plan . . . if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *In re Spansion, Inc.*, 426 B.R. 114, 143 (Bankr. D. Del. 2010). In their Confirmation Brief in support of the Plan, the Debtors described the process of negotiating the Releases, indicating that the Release "was necessary to achieve consensus on the Plan" and "appropriate under the circumstances." Confirmation Brief at ¶ 81; *see also* Ninivaggi Decl. at ¶ 18. They went on to mention the importance of their reliance on their Company investigation, indicating that "the inclusion of any person as a released party under the Plan was subject to the recommendations of the Derivative Claims Oversight Committee." Confirmation Brief at ¶ 82. The Debtors have offered no new evidence it believes Winston missed. In addition to the investigations by the Debtors and the SEC, the Ohio Securities Class Action Settlement also indicates that the plaintiffs' counsel conducted a "wide-ranging investigation" which included a review of SEC filings, public statements, witness interviews, consultation of experts, and a review of court filings in related matters concerning the Company. This investigation informed the settlement and made clear the risks associated with pursuing the claims at issue. Bissell-Linsk Decl., [D.I. 1207] ("**Bissel-Linsk Decl.**") at ¶¶ 8-11, 34, 109.

13. Despite negotiating and affirming the Release, the Debtors now attempt to point to Section XI.B of the Plan as the permissive authority for their reservation. Obj. at ¶ 51. Section XI.B of the Plan indicates that confirmation of the Plan does not release claims relating to the Retained Causes of Action, specifically defined as those described in the Schedule of the Plan Supplement. *See* Schedule of Retained Causes of Action, [D.I. 1042-3] ("**Schedule of Retained Causes of Action**"). The Schedule, in turn, specifies in the first paragraph that "nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver . . . *other than* the Causes of

Action released under the Plan as to the Released Parties." *Id.* at 2 (emphasis added). If that was not sufficiently clear, the next paragraph of the Schedule states that the Debtors "***shall not retain any claims*** or Causes of Action against any of the Released Parties." *Id.* (emphasis added). The only caveat mentioned is "that such claims or Causes of Action may be asserted as a defense to a Disputed Claim in connection with the claims reconciliation procedures[.]" *Id.* But the Debtors have not asserted a particular claim as a defense here.[5]

14. The Schedule goes on to list several unrelated causes of action: claims against Foxconn and against Workhouse Group and claims related to contribution or related to insurance, vendors, leases, and accounting. *See* Schedule of Retained Causes of Action at 2-5. Critically, nothing on the Schedule could be reasonably construed as preserving some future, unspecified breach of fiduciary claim against Mr. Hamamoto that the Debtors now vaguely propound. Obj. at ¶ 52.[6] Indeed, the only two categories on the Schedule which come close—relating to causes of action arising from the parallel shareholder class action and derivative litigations—each expressly exclude the Released Parties. Schedule of Retained Causes of Action at 2.

15. Under principles of res judicata, the Plan and its supplements constitute a final order. The Debtors may not simply reserve the rights to bring an unspecified claim distinct from those outlined in the Schedule. *See D & K Properties Crystal Lake v. Mut. Life Ins. Co. of New*

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[5] What's more, the Objection suggests the claims they seek to reserve would be *affirmative* claims sounding in breach of fiduciary duty. Obj. at ¶ 52. This they may not do.

[6] To the extent that Debtors may argue their potential claims are reserved based on other, more abstract portions of the Schedule, such as the statement in the opening paragraph of the Schedule of Reserved Claims regarding reliance upon the absence of specific terms, this is unavailing. As specific portions of the Schedule address this issue, Debtors may not simply use the opening paragraphs of the Schedule to elide those portions which specifically contemplate—and discard—such possible claims. "As a matter of contract construction, a provision which deals specifically with a subject controls over a general provision in the same contract." *In re EP Liquidation, LLC*, 583 B.R. 304, 321 (Bankr. D. Del. 2018). *See also In re IT Grp., Inc.*, 377 B.R. 471, 476 (Bankr. D. Del. 2007).

York, 112 F.3d 257, 261 (7th Cir. 1997) ("[I]f the debtor fails to mention the cause of action . . . then [res judicata applies and] he will be precluded from asserting it post confirmation.").

16. Simply put, Section XI.B and the associated Schedule of Retained Causes of Action provides is meant to preserve *particular and specified* claims. It cannot be used as a blank check to generate and reserve new claims relating back to the Objection. *See In re Tippins*, 221 B.R. 11, 23 (Bankr. N.D. Ala. 1998); *D & K Properties*, 112 F.3d at 261. And it especially cannot do so when the Plan and the Schedule's terms *explicitly* exclude the Released Parties repeatedly.

B. <u>The Debtors are Estopped from Asserting Claims Against the Released Parties</u>

17. The Debtors may not put forward one position when it is convenient and then later change course. Under principles of judicial estoppel, the Debtors are barred from arguing they can maintain a breach of fiduciary duty claim because they previously asserted that no claims existed against Mr. Hamamoto, and the court acted at their instance on that position.

1. <u>Judicial Estoppel Bars Claims Against Mr. Hamamoto</u>

18. "The basic principle of judicial estoppel . . . [is that] a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *In re Dex Media, Inc.*, 595 B.R. 19, 36 (D. Del. 2018) (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996)). This doctrine is applied when a party has (1) "taken two positions that are irreconcilably inconsistent," (2) in bad faith with intent to "play fast and loose with the court," and (3) where "no lesser sanction would adequately remedy the damage done by the litigant's misconduct." *Id.* (quoting *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779-80 (3d Cir. 2001)).[7] Debtors' filing plainly runs afoul of this doctrine.

[7] Courts also indicate that "equity requires that the presiding court give the party to be estopped a meaningful

19. *First*, the Debtors have taken irreconcilable positions on the question of whether any claims exist against Mr. Hamamoto. As explained above, the Debtors previously represented to the court that there were no credible claims against the Released Parties. Now, the Debtors suddenly attempt to argue that they "can demonstrate breach" by Claimants, offering conclusory allegations that due to their possession of founder shares, they "stood to receive a unique benefit." Obj. at ¶ 54-55. But these are precisely the type of potential claims that were previously investigated, *and that the Debtors conceded did not exist*.[8] Confirmation Brief at ¶ 82; Ninivaggi Decl. at ¶ 19.

20. The Court in turn relied on this representation in granting the Release and confirming the Plan. The Court's Confirmation Order found that "[t]he Debtors have satisfied their burden with respect to the propriety of the Debtor Releases. Such releases are a necessary and integral element of the Plan, and are fair, reasonable, and in the best interests of the Debtors, the Estates, and Holders of Claims and Interests." Confirmation Order at XVII. Indeed, the Court specified that the Releases were in exchange for valuable consideration provided by the Released Parties, including "a good-faith settlement and compromise of the Claims released by Article VIII.C of the Plan." *Id.* at XIX. *Cf. Edwards v. Wyatt*, 330 F. App'x 342, 351 (3d Cir. 2009) ("Edwards's position . . . contradicts an undisputed fact set forth in the parties' pre-trial stipulation and cited by the District Court in its 2006 opinion.").

21. Simply put, these findings, and the Debtors' explicit conclusion that "[t]he Debtors do not believe that *any* material claims or causes of action . . . exist," Confirmation Brief. at ¶ 83,

opportunity to provide an explanation for its changed position." *In re Dex Media, Inc.*, 595 B.R. at 36. Debtors offer no such explanation.

[8] Debtors also vaguely claim, without citation, that "emails reveal" a transfer of shares by Hamamoto ahead of the merger that suggest a breach of fiduciary duty. Obj. at ¶54-55. In fact, Mr. Hamamoto transferred shares to a family trust for his children—precisely the type of issue that both Debtors' thorough investigation into any possible causes of action and the SEC investigation unquestionably addressed.

stands in stark contrast to the Debtors' new position that "strong arguments exist that the Claimants breached their duties of loyalty." Obj. at ¶ 55.

22. *Second*, this sudden change of heart was made in bad faith with intent to "play fast and loose" with the Court. *In Re Dex Media*, 595 B.R. at 36 (quoting *Montrose Med. Grp.*, 243 F.3d at 779-80). "There is a presumption of bad faith when [a] party does not disclose in a bankruptcy proceeding a potential claim of which the party had knowledge." *Yetter v. Wise Power Sys., Inc*., 929 F. Supp. 2d 329, 331 (D. Del. 2013). "A party has knowledge of a potential claim when the events underlying the claim have occurred prior to the filing of the bankruptcy petition." *Id.*

23. If the Debtors did in fact have claims against Mr. Hamamoto for breach of fiduciary duty—which they do not, based on several independent inquires[9]—they would have had knowledge of these at the time of the internal investigation, which would have revealed any such claims. As such they could have—and *should have*—raised them ahead of the Plan's confirmation. *Cf. Yetter*, 929 F. Supp. 2d at 331 ("Yetter asserted the legal position that he had no claims against the Defendants in his submission . . . ."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988) ("Oneida's failure to list its claim against the bank worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect."). The failure to do so demonstrates the Debtors' intent to "play fast and loose" with the Court. *In Re Dex Media,* 595 B.R. at 36 (quoting *Montrose Med. Grp.*, 243 F.3d at 779-80). The bait-and-switch is an attempt by the Debtors to have it both ways—secure the cooperation

[9] As mentioned previously, the SEC has not charged Mr. Hamamoto with any wrongdoing, and the Ohio Securities Class Action settlement did not identify any claims against the relevant parties. These findings buttress the conclusion that there are simply no cognizable claims against Mr. Hamamoto.

of parties they claim to have "Released," while keeping the specter of vague claims alive in order to threaten those very same claims in the future.

24. *Third*, no lesser sanction would adequately remedy the damage done here. *See Montrose Med. Grp.*, 243 F.3d at 779. "Applying a lesser sanction here . . . would reward [Debtors] for what appears to be duplicitous conduct in the course of its bankruptcy proceeding." *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 325 (3d Cir. 2003) (finding judicial estoppel appropriate where debtor failed to disclose claims because "the integrity of both the bankruptcy process and the judicial process would suffer"). Without action, the Debtors would be free to "Release" claimants such as Mr. Hamamoto in name only, undermining the Plan.

2. <u>The Debtors are also Barred by Collateral Estoppel</u>

25. The Debtors' change in course is also barred by collateral estoppel. Collateral estoppel "bars the relitigation of a fact or legal issue that has already been actually litigated." *Wallace v. United Parcel Serv*., 387 F. App'x 127, 128 (3d Cir. 2010). The requirements of collateral estoppel are "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision in the previous litigation; and (4) the party to be estopped from relitigating the issue was fully represented in the prior action." *IOENGINE, LLC v. PayPal Holdings, Inc.*, 607 F. Supp. 3d 464, 488 (D. Del. 2022).[10] These prongs are readily met.

26. *First*, the issue of whether any claims exist against Mr. Hamamoto is clearly identical to the issue at the heart of the present question—whether the Debtors are obligated to abide by their indemnification obligations or may reserve rights for any such claims. It goes

[10] Courts also consider "whether the issue was determined by a final and valid judgment." *Jean Alexander Cosms., Inc. v. L'Oreal USA, Inc*., 458 F.3d 244, 249 (3d Cir. 2006). Here, there is no doubt as to the finality of the Court's Confirmation Order of the Plan.

without saying that there can be no claims to reserve if they were found non-existent. Indeed, the initial framing by the Debtors, first saying they "do not believe that *any* material claims or causes of action . . . exist," Confirmation Brief at ¶ 83, makes this identity of issue clear when compared to their present stance that "strong arguments exist that the Claimants breached their duties of loyalty." Obj. at ¶ 55.

27. *Second*, this issue was actually litigated. As described above, the Debtors specifically argued in their brief that "the inclusion of any person as a released party under the Plan was subject to the recommendations of the Derivative Claims Oversight Committee," who adopted the findings of Winston & Strawn's investigation in full. Confirmation Brief at ¶ 82. They represented that Winston's investigation was "detailed," and covered "potential causes of actions and claims against the current and former directors and officers." *Id.* Lest there be any doubt on how directly this issue was litigated, the Debtors' brief summed up its argument by concluding that "[t]hus, the Debtors in their reasonable business judgment *believe that they have no credible causes of action* against the directors and officers receiving releases under the Plan." *Id.*

28. *Third*, the previous determination—that there were no claims—was necessary to the decision in the previous litigation. The Court confirmed a Plan which included Releases, based in part on the Debtors' representations that no credible claims were extant. In approving the Releases, the Court's Confirmation Order concluded that the releases were "appropriate in light of . . . the value provided by the Released Parties to the Post-Effective Date Debtors' Estates *and the critical nature of the Debtor Releases to the Plan."* Confirmation Order at XVIII (emphasis added). The Court's characterization of the "critical" necessity of the Releases to the Plan underscores that they were a "central issue" in the previous litigation and necessary to the

confirmation the Plan. *L'Oreal,*, 458 F.3d at250. In this way, "the court supported its decision with a reasoned opinion," *In re Town Sports Int'l, LLC*, 2023 WL 124860, at *16 (Bankr. D. Del. Jan. 6, 2023) (quoting Restatement (Second) of Judgments § 13 cmt. g.), concluding that the Releases were "a good-faith settlement and compromise of the Claims Released" and "given, and made, after due notice and opportunity for hearing." Confirmation Order at XIX.

29. Importantly, Mr. Hamamoto himself relied on the Debtors' positions. In reliance on being a Released Party based on the lack of claims to be present against him, he voted for the Plan. Had Mr. Hamamoto been told of the possibility that the Debtors would attempt to raise claims they previously represented that they did not have, and attempt an end-run around the Release, he most likely would have changed his conduct, negotiations, and ultimate vote.

30. *Finally*, there can be little doubt that the Debtors were fully represented. Under this prong courts analyze whether the estopped party had a "full and fair opportunity to litigate." *Biogen Int'l GmbH v. Amneal Pharms. LLC*, 487 F. Supp. 3d 254, 264 (D. Del. 2020) (quoting *L'Oreal*, 458 F. 3d at 249). Here "[a]s a party in the bankruptcy case," the Debtors were "fully entitled to appear and be heard, and they have." *Town Sports,* 2023 WL 124860 at *17.

31. At bottom, by suddenly insisting there are "strong arguments," Obj. at ¶ 55, for a claim after they *specifically disclaimed the existence of* any claim, the Debtors are taking a position that is directly contrary to their previous representation. The Debtors are doing so in order to avoid their indemnification obligations to a director found to be without fault, which principles of estoppel prohibit.

C. <u>There Are No Reserved Claims Against Claimants</u>

32. Only the facts that led the Debtors—on Winston's recommendation—to conclude that no claims—including derivative claims—exist against the Chapter 11 Directors and Officers (including Mr. Hamamoto) could support any derivative claims against the Claimants. The

Claimants served as former directors of DiamondPeak over the same time period as Mr. Hamamoto in his role as DiamondPeak's Chairman and CEO. *See* Obj. at ¶¶ 20-21. And the Debtors concede as much in the Objection by describing the potential claims they could assert without distinction among the claims as against Mr. Hamamoto or the other Claimants. *See id.* at ¶¶ 22-24.[11] These facts lead to one logical and inevitable conclusion: since no claims exist against Mr. Hamamoto, then in the absence of unique facts that apply to the other Claimants' conduct as directors alongside Mr. Hamamoto, no claims exist against any Claimants. No such special facts or circumstances are alleged or even suggested in the Objection, which is unsurprising since none exist.

33. The Debtors have no viable claims to setoff or recoup against the Claimants' claims. Thus, the "reservation of claims" and setoff and recoupment allegations they assert are nothing more than a poorly-constructed threat of litigation if the Court overrules the Objection and should be disregarded when considering the merits of the claims for indemnification.

II. **<u>The Claimants' Claims Are Class 3 General Unsecured Claims And Are Not Subject to Subordination Under Section 510(b)</u>**

34. Contrary to the Debtors' Objection, the Claimants' claims are simply not subject to subordination under 11 U.S.C. § 510(b). *First*, the Claims are not the type that Congress intended to be subordinated when drafting Section 510(b). Second, the Debtors' arguments that the claims seek reimbursement or contribution are off the mark. The claims are for indemnification of the Claimants' liability under the Settlement Agreement and the fees they incurred defending themselves, as directors of DiamondPeak and Lordstown, against the Delaware Plaintiffs' claims—the very type of claim that Delaware law seeks to protect directors from.

[11] We note that counsel to the Debtors also served as counsel to the Equity Committee, one of the Committees with whom Debtors shared Winston's conclusions and supported the Plan which contains the release of any potential derivative claims against Hamamoto. *See* Confirmation Brief at ¶ 82.

A. **<u>The Claims are not of the Type Intended to be Subordinated under Section 510(b)</u>**

35. Section 510(b) of the Bankruptcy Code states that:

> a claim arising from recission of a purchase or sale of a security of the debtor . . . for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal that claim or interest represented by such security . . . .

11 U.S.C. § 510(b).

36. Claimants' claims are for (1) contractual and legal indemnification of the Claimants' personal liability for the Settlement Claim Amount; and (2) all liabilities arising from judgments, fines penalties, amounts paid in settlement; and (3) all attorneys' fees and litigation expenses incurred in connection with the Securities Actions. Obj. at ¶ 10. For these claims to be subordinated, the Debtors must establish either that (1) the claims are for damages "arising from" a purchase or sale of a security of the debtor, or (2) that the claims are seeking "reimbursement or contribution" on account of such a claim. *See* 11 U.S.C. § 510(b). The claims do not fall under either category. As an initial matter, the Debtors do not even attempt to argue that the claims are for damages as required for subordination under Section 510(b). Instead, the Debtors incorrectly argue that the claims seek reimbursement or contribution; but their claims seek only indemnification for their liability on the Settlement Claim Amount and their counsel's fees. It is plain that the claims are not the type of claim that Section 510(b) subordinates.

37. As an initial matter, the Debtors utterly ignore that the claims at issue in DiamondPeak Action are claims for breaches of fiduciary duty, which the Court of Chancery has already ruled are separate and distinct from any type of securities law claims, noting that the Delaware fiduciary duty claims at issue are "fundamentally different" from the parallel securities class action and relate to "quintessential Delaware concerns, not . . . a rebranding of securities

claims about material misstatements as fiduciary duty claims." *See In re Lordstown Motors Corp. Securities Litigation*, CA. No. 2021-1066-LWW, Order dated Mar. 7, 2022, at 10, attached to the Declaration of Shmuel Vasser (the "**Vasser Decl.**") as Ex. 4; *see also* Order at 12. The Debtors were required to address this issue in their moving brief and are estopped for raising new arguments in a reply.

38. Turning first to the language of the statute, courts have found that the term "arising from" as used in Section 510(b) is ambiguous, and accordingly, courts look to the legislative history to assist with interpreting the statute. *In re Telegroup, Inc.*, 281 F.3d 133, 138 (3d Cir. 2002). When originally drafting Section 510(b), Congress "relied heavily upon a law review article by Professors John J. Slain and Homer Kripke[.]" *Id.* at 139. Thus, courts often rely on the Slain/Kripke article to "shed[] light on the policies animating § 510(b)." *Id.* at 140. Slain and Kripke viewed subordination of shareholders' claims to those of general creditors as an issue of risk allocation between shareholders and creditors. *Id.* at 139. The professors focused on the risk of business insolvency and the risk of illegality in securities issuance and found both risks should be allocated to the shareholder. *Id.* at 140. This is because shareholders assume these risks in exchange for the opportunity to share in the corporation's profits, while creditors lend a fixed dollar amount with the expectation of repayment on agreed terms. *Id.* at 139.

39. Applying this logic, courts attempting to decide whether a claim should be subordinated under Section 510(b) analyze whether "the nature of the [claimant's] interest makes the [claimant] more like an investor or a creditor[.]" *In re Linn Energy, LLC*, 936 F.3d 334, 341 (5th Cir. 2019). Thus, claims involving a sale or purchase of a debtor's security that involve fraudulent concealment are subject to subordination under Section 510(b), *Telegroup*, 281 F.3d at 143, while claims that involve shareholders who exchange their stock for promissory notes that

are more closely related to claims of creditors are not, *In re Mobile Tool Intern., Inc.*, 306 B.R. 778, 782 (D. Del. 2004). Further applying the logic of the Slain/Kipke article and that of the surrounding legislative history, the Third Circuit noted, "Congress enacted § 510 (b) to prevent disappointed shareholders from recovering their investment loss *by using fraud and other securities claims* to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding." *Telegroup*, 281 F.3d at 142 (emphasis added).

40. Here, there can be no question that the claims are creditor claims rather than shareholder's interests and therefore do not "arise from" the purchase or sale of the Debtors' securities. The right to indemnity stems not from the purchase or sale of securities, but rather from the Claimants' role as directors of DiamondPeak and Lordstown through (1) the DP Indemnity Agreement; (2) the DP Cert. of Incorp.; (3) the DP Bylaws; (4) The LMC Indemnity Agreement; and (5) the LMC Bylaws. None of the claims are based on, or measured by the success of either company and are not based on an instrument the value of which is tied to the risks of either company's business failures or share directly in either company's business success. *Cf. Telegroup*, 281 F.3d at 142 (3d Cir. 2002) (stating, "because claimants retained the right to participate in corporate profits if [the corporation] succeeded, we believe that § 510(b) prevents them from using their breach of contract claim to recover the value of their equity investment in parity with general unsecured creditors"); *In re Int'l Wireless Commc'ns Holdings, Inc*., 279 B.R. 463, 470 (D. Del. 2002), *aff'd*, 68 F. App'x 275 (3d Cir. 2003) (finding subordination appropriate when parties "retained the right under the applicable agreements to participate in corporate profits if [the corporation] succeeded"). Unlike the claimants in *Telegroup* or *International Wireless*, the Claimants here are not seeking to recover on account of any equity interest, nor does the amount of the indemnification claim hinge on the performance of Lordstown. *See Telegroup*, 281 F.3d at

142 (finding that a key consideration in whether a claim must be subordinated is whether "the claims in [the] case seek to recover a portion of claimants' equity investment").

41. The claims seek payments for amounts due under, among other things, the Indemnity Agreements which are not subject to subordination under Section 510(b). As explained above, Congress intended Section 510(b) to subordinate "fraud and other securities claims," *Telegroup*, 281 F.3d at 142, which plainly would not encompass amounts arising under a standard indemnification obligation. Although the Third Circuit in *Telegroup* found that breach of contract claims *may sometimes* be subordinated under Section 510(b), the court only extended the scope of the statute to breach of contract claims in which the underlying contract was part and parcel of a transaction involving the purchase or sale of stock transaction, *i.e*. *a stock purchase agreement*. *See Telegroup*, 281 F.3d at 143-44 (collecting cases).

42. In *Telegroup*, the Claimants sought damages arising from the stock purchase agreement which required Telegroup to use its best efforts to register its stock. *Id.* at 138. The Third Circuit found that the claim arose from the sale of the purchase of stock because (1) "the claim would not exist but for claimants' purchase of the debtor's stock;" (2) "the claim seeks compensation of a decline in the stock's value caused by actionable conduct on the debtor's part;" and (3) "because the stockholder, as an equity investor, assumed the risk of the business failure, the stockholder must bear the risk . . . of any unlawful conduct on the debtor's part that causes the stock's value to drop." *Id.* at 143. Not a single one of those elements exist here: (1) the claims would exist whether or not the Claimants purchased stock of the Debtors; (2) the claims do not seek compensation for the decline in the stock's value; and (3) the only risk that the Claimants assumed in relation to Lordstown's failure was the risk of the company's inability to meet its contractual indemnification obligations.

43. In sum, the claims result from the Claimants' role as directors/creditors, not from their stockholdings and are essentially for amounts due under their contracts with the Debtors, their organizational documents and Delaware law; they do not arise from the purchase or sale of stock. Accordingly, the claims are not subject to subordination under Section 510(b).

B. The Claims Are Not For "Reimbursement Or Contribution"

44. Recognizing that the claims plainly do not arise from the purchase or sale of the Debtors' stock, the Debtors argue that the claims are for "reimbursement or contribution." Obj. at ¶¶ 48-49. However, in light of recent United States Supreme Court opinions as well as general policies of Delaware corporate law, the claims cannot accurately be characterized as such. For a claim for reimbursement or contribution to be subordinated under Section 510(b), it must exist "on account of" a claim for damages arising from the purchase or sale of a security of the debtor. 11 U.S.C. § 510(b). Thus, the Debtors must establish both (1) that the Delaware Plaintiffs' claims underlying the indemnification claims arise from the purchase of the Debtors' stock, and (2) that the claims can be characterized as claims for reimbursement or contribution. The Objection fails to establish either element.

1. The Delaware Plaintiffs' claims do not arise from the purchase or sale of the Debtors' stock.

45. The Debtors argue that the Delaware Plaintiffs' allegations in the Securities Actions are fraudulent retention claims which should be subordinated under Section 510(b). Obj. at ¶¶ 3, 44. Claimants dispute the characterization of the Delaware D &O Claims as "fraudulent retention" claims. As explained above, the claims are for breach of fiduciary duties, rather than securities claims. But even if the claims were fraudulent retention claims, whether they are subject to Section 510(b) is a matter of first impression in the Third Circuit. However, with the benefit of a long line of United States Supreme Court decisions, the Third Circuit would inevitably reject the Debtors

arguments and find that the Debtors' alleged "fraudulent retention" claims are not subject to subordination under Section 510(b). This Court should do the same. *Id.*

46. As stated above, for a claim to be subordinated under Section 510(b), it must be a claim for damages arising from the *purchase or sale* of the Debtors' stock. 11 U.S.C. § 510(b). It is undisputed that the Delaware Plaintiffs do not even assert that the Claimants' alleged breaches of fiduciary duty had any impact whatsoever on their initial purchase of DiamondPeak stock. Nor do they argue that they sold the stock; quite the opposite—they claim that they retained the stock. Therefore, because the clear language of Section 510(b) subordinates only claims relating to the purchase or sale of stock and Delaware Plaintiffs' claims do not involve a purchase or sale, they *cannot be subject to mandatory subordination under Section 510(b)*.

47. Supreme Court directives also preclude the Debtors' argument. The Debtors ask the court to read Section 510(b) not as it is written, which includes only damages arising from the *purchase or sale* of a security, but to add damages arising from the *decision not to sell* a security. This approach of seeking to rewrite rather than interpret the Bankruptcy Code has repeatedly been rejected by the Supreme Court. In *Lamie v. U.S. Trustee*, the Court rejected the party's invitation to read an absent word into Section 330(a)(1) of the Bankruptcy Code and explained that:

> [The] argument would result not in a construction of the statute, but in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. With a *plain, nonabsurd meaning* in view, we need not proceed this way. There is a basic difference between filling a gap left by Congress' silence *and rewriting rules that Congress has affirmatively and specifically enacted*. Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.

540 U.S. 526, 538 (2004) (emphasis added) (internal citations and quotations omitted); *see also Bartenwerfer v. Buckley*, 598 U.S. 69, 75, 77 (2023) (listing cases in which the Court, examining the Bankruptcy Code, "reached a result that was plainly expressed by the text and ordinary tools

of interpretation") (internal quotation omitted); *Ransom v. FIA Card Services, N. A.*, 562 U.S. 61, 69 (2011) ("Our interpretation of the Bankruptcy Code starts where all such inquires must begin: with the language of the statute itself.") (internal quotations and citations omitted); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) ("Where the meaning of the Bankruptcy Code's text is itself clear its operation is unimpeded by contrary prior practice[.]") (internal quotations and alterations omitted).

48. In fact, when faced with the decision of whether to expand the scope of 17 CFR § 240.10b-5, the Supreme Court expressly refused to do so. Rule 10b-5, in relevant part, makes it unlawful to use interstate commerce to commit fraud "in connection with the purchase or sale of any security." 17 CFR § 240.10b-5. In *Blue Chip Stamps,* the appellant argued that Rule 10b-5 should be broadly defined to include claims for shareholders who allege they decided not to sell their shares due to the company's misrepresentations. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-38 (1975). The Court refused to approve such an "inexorable broadening" of the rule because doing so would open the door to "vexatious litigation" including that of individuals who claim to have not bought stock due to fraudulent misrepresentations which could be entirely "dependent on uncorroborated oral evidence". *Id.* at 739, 746.

49. Here, limiting Section 510(b) to its plain text—claims involving a purchase or sale of the debtor's security—results in a "plain, nonabsurd" interpretation of the statute. In fact, the Debtors' only case involving a fraudulent retention claim makes this precise point.[12] In *Granite*, the court explained:

> A literal reading implies that the injury must flow from the actual purchase or sale; a broader reading suggests that the purchase or sale must be part of the causal link

[12] The Debtors also cite to *International Wireless*, which does not involve a fraudulent retention claim, but rather, similar to *Telegroup*, involves a breach of a contract which required the debtor company to consummate an IPO in a set amount of time. *In re Int'l Wireless Commc'ns Holdings, Inc.*, 257 B.R. 739, 746 (Bankr. D. Del. 2001).

> although the injury may flow from a subsequent event. . . . Reasonably well-informed persons could interpret section 510(b) in either sense.

In re Granite Partners, L.P., 208 B.R. 332, 339 (Bankr. S.D.N.Y. 1997). Rather than stopping at the plain language of the statute, the *Granite* court adopted a much broader interpretation that reads absent words into the statute and invites "vexatious litigation" in violation of the mandates of the Supreme Court. *See Lamie*, 540 U.S. at 538; *Blue Chip Stamps*, 421 U.S. at 739. In fact, unlike *Granite*, the bankruptcy court is this district refused to apply Section 510(b) beyond its statutory text. *In re Montgomery Ward Holding Corp.*, 272 B.R. 836, 842 (Bankr. D. Del. 2001).

50. *Since Granite's* expansive interpretation of Section 510(b) does not survive proper application of Section 510(b), the Claimants' claims are not subject to Section 510(b)'s mandatory subordination.

2. <u>The claims are not of the type intended to be subordinated under Section 510(b)</u>

51. Even if this Court were to find that the Delaware Plaintiffs' claims arise out a purchase or sale of the Debtors' securities, the claims are clearly not the type of claims Congress intended to subordinate. The Debtors argue that the claims for indemnification, are claims for reimbursement or contribution under Section 510(b). Obj. at ¶¶ 48-49. This argument is flawed on numerous grounds. *First*, indemnification is a concept distinct from reimbursement and contribution. *See In re Am. Int'l Grp., Inc*., 965 A.2d 763, 802 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011) (stating "contribution is a remedy between two actors . . . while indemnification is the remedy for an innocent actor that is liable for indemnifier's conduct."); *Levy v. HLI Operating Co.*, 924 A.2d 210, 221 (Del. Ch. 2007) (stating "indemnification differs from contribution because it places the entire burden of a loss upon the party ultimately liable or responsible for it, and by whom the loss should have been discharged initially."); *Quereguan v. New Castle Cnty*., No. CIV.A. 20298-NC, 2006

WL 2522214, at *5 (Del. Ch. Aug. 18, 2006) (finding "contractual indemnification" to be distinct from "common law indemnification," which is a claim for reimbursement). If Congress intended Section 510(b) to subordinate indemnity claims, it could have easily so specified.

52. *Second*, it is black letter law that the Bankruptcy Code preempts incompatible State law where State law directly, or implicitly, interferes with the Bankruptcy Code. *See Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929) ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount."); *In re Bos. Reg'l Med. Ctr., Inc.*, 291 F.3d 111, 126 (1st Cir. 2002) (same). No such conflicts exist here.

53. *Third*, the very purpose of Section 145 of the Delaware General Corporation Law (the "**DGCL**") "is to encourage capable [people] to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve." *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) (internal quotations omitted). To further that purpose, the DGCL affords significant protections—including indemnification—to directors of Delaware corporations. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006); Del. Code Ann. tit. 8, § 145. Accordingly, a claim for fiduciary duty "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (internal quotations omitted). Keeping these basic tenants of Delaware law in mind, it cannot be the case that Section 510(b) strips any meaningful value from indemnification obligations when the statute clearly does not mandate such a result.

54. In fact, the only Delaware case the Debtors cite in support of their argument does not analyze whether claims by directors should be subordinated. *See In re Mid-Am. Waste Sys., Inc.*, 228 B.R. 816, 828 (Bankr. D. Del. 1999). In *Mid-American Waste*, the officer and director

claimants asserted claims for indemnification based on the corporation's certificate of incorporation and Delaware corporate law. *Id.* at 820. However, the claimants filed their indemnity claims as administrative expense claims rather than claims of general creditors. The debtors, in turn, made not claim under Section 510(b), but rather only objected to the administrative expense classification. *Id.* at 820-21. Accordingly, the court did not have the opportunity to decide whether the claims for indemnity fell under the scope of Section 510(b). *Id.* at 823. Determining that the claims were not administrative, the court noted that the directors' attorneys' fees were paid by insurance and thus had not been incurred. *Id*.

55. Instead, the court analyzed the insurance underwriters' general unsecured claims for damages under the underwriting agreement and attorneys in connection with defending the officers and directors in securities litigation under Section 510(b). *Id.* at 826, 829. Relying in part upon *In re De Laurentiis Ent. Grp., Inc.*, 124 B.R. 305, 307, 310 (C.D. Cal. 1991), the court examined the fair allocation of risk between creditors and insurance underwriters and found that allowing an underwriter's claims to be classified as general unsecured claims, "would be shifting the risks associated with the issuance of stock from the underwriter, who is in a better position to evaluate such risks, to the general unsecured creditors." *Id.* at 828 (citing *De Laurentiis*, 124 B.R. at 310). Accordingly, the *Mid-American Waste* court found that the underwriter's claims must be subordinated. *Id.* at 829. Because the directors did not assert claims for indemnity, the Court had no opportunity to review whether to subordinate those claims in light of the strong policy in Delaware corporate law to protect directors.

56. *Finally*, even if the claims for indemnification could fit under Section 510(b)'s reimbursement or contribution language (which they do not), the claims would still not be subordinated because the claim is a fixed debt obligation arising from the settlement. *See In re*

Cybersight LLC, No. 02-11033, 2004 WL 2713098, at *3 (D. Del. Nov. 17, 2004) (a suit to settle the purchase price of a claimants' shares that is settled in arbitration is not subject to subordination, because upon the entry of the arbitration ruling the judgment became a "fixed debt obligation" of the debtors, and that claimant's equity stake in the debtors was "extinguished pre-petition and with it [the claimant's] ability to participate in any of [the debtors'] profits or losses."); *see also In re DirectTV Latin America, LLC*, 2004 WL 302303, at *4 (D. Del., Feb. 4, 2004) (equity put agreement claim not subject to subordination under Section 510(b)); *Montgomery Ward*, 272 B.R. at 844. ((promissory note issued to redeem stock not subordinated under Section 510(b)); *In re Motels of America, Inc.*, 146 B.R. 542, 544 (Bankr. D. Del. 1992) (common stock put option agreement gave rise to a claim).

57. For all of these reasons, the claims are not subject to the mandatory subordination provision of Section 510(b) of the Bankruptcy Code.

III. Delaware Law Does Not Preclude Claimants' Claims

58. As explained above, the DGCL provides significant protections to directors to encourage capable individuals to serve as directors. *Supra* at 23. Under Section 145(a), a corporation may indemnify a director "against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with" a "pending or completed action, suit or proceeding . . . by reason of the fact that the person is or was a director . . . of the corporation . . . if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation[.]" 8 *Del. C.* § 145(a). Similarly, Section 145(b) permits a corporation to indemnify the director for an action or suit by or in the right of the corporation against a director. *Id.* § 145(b).

59. The DiamondPeak directors were granted broad indemnification rights consistent with Delaware law, and Claimants agreed to serve on DiamondPeak's Board in exchange for these

broad indemnification rights. DP Indemnity Agreement at 1. The Debtors acknowledge that the DP Certificate of Incorporation, DP Bylaws and Indemnity Agreements between DiamondPeak and the Claimants require DiamondPeak to indemnify Claimants "to the fullest extent permitted by applicable law." Obj. at ¶ 34. The Indemnity Agreements make Section 145's permissive indemnity provisions mandatory, do not require written consent for any resolution of claims subject to indemnification, and include a strong presumption of good faith. DP Indemnity Agreement at 3-4, 13(a); LMC Indemnity Agreement at 2.

60. The Debtors object to the Claimants' indemnification claims sought in connection with several litigations that preceded the filing of the Chapter 11 case on the basis that the Claimants have not affirmatively established that they have carried out their duties to the corporation in good faith. Obj. at ¶¶ 3, 33-36. Claimants are not required to make such a showing under the Bylaws, Claimants' indemnification agreements or Delaware law. To the contrary, the agreements provide that good faith is *presumed.* DP Indemnity Agreement § 13(a). Moreover, the Debtors cannot plausibly allege that Claimants did not act in good faith based on the findings of an investigation that provided the basis for a release of the Claimant who served as the CEO and Chairman of DiamondPeak. The Objection should be overruled because the Claimants are entitled to indemnification by the Debtors under Section 145(a) and (b) of the DGCL.[13]

A. **<u>The Debtors Cannot Prove that Claims for Indemnification for the Litigations are Improper Under 8 Del. C. § 145.</u>**

61. The indemnification rights granted under Section 145(f) of the DGCL "shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested

[13] The Claimants also may be entitled to indemnification under Section 145(c).

directors or otherwise[.]" 8 *Del. C.* § 145(f). Moreover, Delaware courts have recognized that indemnification bylaws and indemnification agreements create contractual rights and should be construed as such. *See In re Cent. Banking Sys.*, 1993 Del. Ch. LEXIS 452, at *7 (Del. Ch. May 11, 1993); DP Cert. of Incorp. § 8.2 ("The rights to indemnification and advancement of expenses conferred by this Section 8.2 shall be contract rights[.]"); DP Bylaws § 8.9 (same).

62. Consistent with Section 145, the DP Certificate of Incorporation, Bylaws, and Indemnity Agreements each provide that directors shall be indemnified to the fullest extent permitted by applicable law for actions arising from their service to the corporation. DP Cert. of Incorp. § 8.2; DP Bylaws § 8.1; DP Indemnity Agreement §§ 3-4. Delaware courts have determined that the words "shall indemnify" in indemnification documents create a mandatory obligation to indemnify an indemnitee under Sections 145(a) and (b). *VonFeldt v. Stifel Fin. Corp.*, 1999 Del. Ch. LEXIS 131, at *10 (Del. Ch. June 11, 1999) ("By using the phrase 'shall indemnify,' the bylaw not only mandates indemnification; it also effectively places the burden on [the company] to demonstrate that the indemnification mandated is not required. By using the mandatory word 'shall' in the indemnification bylaw, [the company] has contractually agreed to indemnify the persons covered."). And the burden to show that directors are not entitled to indemnification rests with the company. *Id.*; *Dore v. Sweports, Ltd.*, 2017 Del. Ch. LEXIS 19, at *51 (Del. Ch. Jan. 31, 2017).

63. The Debtors speculate that "[n]one of the Claimants sought or obtained the [c]ompany's determination that their conduct satisfied the standard required by Section 145." Obj. at ¶ 36. That conclusion ignores that, as permitted by the DGCL, DiamondPeak supplemented the indemnification rights provided by Section 145 both through its Bylaws and separate indemnification agreements.

64. Specifically, the Debtors ignore that the Indemnity Agreement expressly mandates a presumption that Claimants are entitled to indemnification and further provides that:

> "[f]or purposes of any determination of good faith, Indemnitee shall be deemed to have acted in good faith if Indemnitee's action is based . . . on information supplied to Indemnitee by the director, manager, or officers of the Enterprise in the course of their duties, or on the advice of legal counsel for the Enterprise, its Board, any committee of the Board or any director, trustee, general partner, manager or managing member, or on information or records given or reports made to the Enterprise, its Board, any committee of the Board or any director, trustee, general partner, manager or managing member, by an independent certified public accountant or by an appraiser or other expert selected by the Enterprise, its Board, any committee of the Board or any director, trustee, general partner, manager or managing member."

DP Indemnity Agreement § 13(d). Indeed, Claimants specifically allege in the Proofs of Claim that they are entitled to indemnification because each must be presumed and deemed to have acted in good faith pursuant to these subsections of the Indemnity Agreement. POC Addenda ¶¶ 6, 9, Attached to the Vasser Decl. as Ex. 1; Hamamoto POC Addenda ¶¶ 7-8, Attached to the Vasser Decl. as Ex. 2. The Debtors have not, and in fact given the Winston Report, cannot offer, any evidence to rebut the statements made in the Proofs of Claim, and the Court should reject the argument that no determination of good faith has been made.

65. Even if the Debtors were correct that Claimants must establish good faith, the record before the Court makes clear that Claimants easily satisfy this standard. As explained above, with the assistance of Winston's investigation, the Debtors determined that were no material claims or causes of actions against Mr. Hamamoto and other directors. *Supra* at 5. That determination was used as a basis for approval of certain releases in the Plan. Confirmation Brief at ¶ 82; Ninivaggi Decl. at ¶ 19; Confirmation Order, Ex. A at 62-63. The Debtors should be bound by this determination as to all Claimants because the conduct investigated in connection with the third-party releases is the same conduct that animates the claims brought in the Litigations.

66. Moreover, the DP Bylaws and Indemnity Agreement do not require an actual finding by the company that the Claimants acted in good faith prior to asserting their rights to indemnification. Specifically, they provide that:

> "[n]either the failure of the Company . . . to have made a determination prior to the commencement of any action pursuant to this Agreement that indemnification is proper in the circumstances because Indemnitee has met the applicable standard of conduct, nor an actual determination by the Company . . . that Indemnitee has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that Indemnitee has not met the applicable standard of conduct."

DP Indemnity Agreement § 13(a); Bylaws § 8.3. Thus, even if the Debtors are correct that no determination of good faith has been made, that purported deficiency does not make the Claims invalid under Delaware law. *See, e.g.*, 8 *Del. C.* 145(f); *Stifel Fin. Corp.*, 809 A.2d at 559-60 (Section 145 does not require a corporation "to determine the propriety of [an indemnification] request in the first instance.").

B. <u>Claimants Are Entitled to Indemnification for the Settlement Claims</u>

67. The Debtors also seek to disallow the Settlement Claims on the basis that because the Claimants entered into the Settlement Agreement to resolve claims asserted against the Claimants for breaches of the duty of loyalty, the Claimants are not entitled to indemnification under Delaware law. Obj. at ¶¶ 33-36. This argument is also contrary to Delaware law.

68. The Debtors do not dispute that Section 145(a) applies to the DiamondPeak Action as it is a putative class action. Section 145(a) specifically allows for indemnification for "amounts paid in settlement." 8 *Del. C.* § 145(a). That subsection further provides that "[t]he termination of any action, suit or proceeding by judgment, order, [or] settlement . . . shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation." *Id.* The Indemnity Agreement adopts this language. DP Indemnity Agreement § 13(c). There has been no finding

that Claimants breached the duty of loyalty in the DiamondPeak Action, nor could there be as the action has settled. The Claimants do not admit to any liability or wrongdoing in connection with the action. *See* Settlement Agreement at ¶¶ II, 35, attached to the Vasser Decl. as Ex. 3. And, as set forth above, the Debtors' argument that the Claimants are required to affirmatively establish that they acted in good faith as a prerequisite to indemnification is incorrect.

69. The Debtors cite two out of circuit cases to support the argument that the Claimants are not entitled to indemnification because the "limitation [that a party act in good faith] was designed to hold corporate directors to their duty of loyalty." Obj. at ¶ 34. Neither case provides authority for the Court to disallow a claim for indemnification of amounts paid in settlement under Delaware law based on mere allegations of breach of the duty of loyalty in the complaint underlying the action. *Waltuch v. Conticommodity Services, Inc.* stands for the uncontroversial proposition that a corporation cannot contract around the statutory requirements to indemnify a director for actions that were not in good faith where the director had not prevailed in the action. 88 F.3d 87, 89-95 (2d Cir. 1996). The Debtors also cite *In re FPSDA I, LLC*, 2012 Bankr. LEXIS 5906 (Bankr. E.D.N.Y. Dec. 21, 2012) for the legal proposition that "[t]he initial determination of whether the indemnitee acted in good faith and is otherwise entitled to indemnification is made by the company, and is entitled to great deference from the courts." Obj. at ¶ 34. To the extent relevant, this case is helpful to the Claimants because section 13(d) of the Indemnity Agreement provides that the Claimants are deemed to have acted in good faith, and the Debtors do not dispute this provision. *See Salamone v. Gorman*, 106 A.3d 354, 370 (Del. 2014) ("[w]hen parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement.").

70. At bottom, the Debtors' argument is that this Court should deny indemnification claims where a director settles litigation that merely alleges a claim for breach of the duty of loyalty. Not only is that contrary to Delaware law, but it ignores the practical realities of fiduciary duty litigation in Delaware. Delaware directors routinely are indemnified in the settlement of fiduciary duty claims consistent with the express language of Section 145(a). *See, e.g.*, 8 *Del. C.* § 145(a) (providing for indemnification for "amounts paid in settlement."). The Debtors have not and cannot offer any instance in which a Delaware court required a director who settled fiduciary duty litigation to further litigate their conduct as measured against the statute. Applying the Debtors' construction of 145(a) means that it would be virtually impossible to settle any fiduciary duty litigation because a director would only be entitled to indemnification if the director litigated the fiduciary duty claims to conclusion to establish that he or she acted in good faith. Such a construct directly contradicts the express language in Section 145(a) and renders superfluous Section 145(c). *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1036 (Del. 2012) ("When construing a statute, [courts] must give effect to the whole statute and leave no part superfluous.").

71. Moreover, like the DP Certificate of Incorporation (*see* DP Cert. of Incorp. § 8.1), most companies' certificates of incorporation include an exculpation provision that eliminates a director's liability for monetary damages for breaches of the duty of care. Therefore, to bring a viable suit against directors that will survive summary dismissal, a plaintiff must assert a claim for breach of the duty of loyalty. *See, e.g., Nelson v. Emerson*, 2008 Del. Ch. LEXIS 56, at *43 (Del. Ch. May 6, 2008) (noting that a "complaint must plead a viable claim that the [defendant] breached their duty of loyalty to [company] to survive [a] motion to dismiss because [company's] charter contains a § 102(b)(7) clause that exculpates its directors for breaches of the duty of care."). Thus, the Debtors' argument that the Settlement Claims should be disallowed based on the mere

allegations of a breach of the duty of loyalty is plainly incorrect under Delaware law and practice and cannot serve as a basis to disallow any part of the Claims.

72. Finally, contrary to the Debtor's assertions, the Settlement did not require Board approval as the LMC Indemnity Agreement does not supersede the DP Indemnity Agreement. Obt. at ¶¶ 37-38. As an initial matter, four of the five Claimants are not parties to the LMC Indemnity Agreement. Further, under Delaware law, "a new contract, with reference to the subject matter of a former one, does not destroy its obligation except in so far as the new one is inconsistent therewith, unless the parties intended the new contract to supersede the old one." *Jefferson Island Salt Min. Co. v. Empire Box Corp.*, 23 A.2d 106, 108 (Del. Super. Ct. 1941). A subsequent contract can only supersede a previous contract if it is shown the parties clearly intended for it to do so. *See Moore v. Carrollton Enterprises Ltd. P'ship*, No. 94C-04-024, 1995 WL 108706, at *4 (Del. Super. Ct. Feb. 7, 1995) (finding that the "defendant's argument that the [subsequent] indemnity [contract] supersedes [the previous] agreement [was] unpersuasive" because there was not a showing of intent); *Haft v. Dart Grp. Corp.*, 841 F. Supp. 549, 568 (D. Del. 1993) (same). Section 11 of the LMC Indemnity Agreement, fairly read, was designed to expand rather than limit the Debtors' indemnity obligations: "This Agreement shall be . . . in addition to [indemnity obligations under the DGCL]." LMC Indemnity Agreement § 11. In fact, the DP Indemnity Agreement explicitly states that it shall be binding to the parties' "respective successors and assigns (including any direct or indirect successor by purchase [or] merger . . . ." DP Indemnity Agreement § 19(c).

WHEREFORE, the Claimants respectfully request that the Court issue an Order (1) denying and overruling the Objection in all aspects and (2) granting such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

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