Docket #0006 Date Filed: 2/14/2022

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
SPEEDCAST INTERNATIONAL	§	
LIMITED, et. al.,	§	**CASE NO. 20-32243 (MI)**
	§	
Debtors.	§	**Chapter 11**
	§	
	§	**Jointly Administered**
	§	
CATHERINE E. YOUNGMAN,	§	
in her capacity as Class 3 Trustee for	§	
the Speedcast SFA Lenders' Litigation	§	
Trust,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**ADV. PRO. 22-03019**
PETER SHAPER,	§	
	§	
Defendant.		

DEFENDANT PETER SHAPER'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE ELECTRONICALLY AT https://ecf.txsb.uscourts.gov/ WITHIN TWENTY-ONE DAYS FROM THE DATE THIS MOTION WAS FILED. IF YOU DO NOT HAVE ELECTRONIC FILING PRIVILEGES, YOU MUST FILE A WRITTEN OBJECTION THAT IS ACTUALLY RECEIVED BY THE CLERK WITHIN TWENTY-ONE DAYS FROM THE DATE THIS MOTION WAS FILED. OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. SUMMARY OF MOTION

1. Peter Shaper ("Shaper") respectfully requests that the Court dismiss the Class 3 Trustee's ("Trustee") claims for breach of fiduciary duty and claims for secondary liability based on aiding and abetting, knowing participation, or conspiracy, because the Trustee has failed "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Trustee's case can be distilled into (i) complaints about Shaper's failed attempts to enter into allegedly self-dealing transactions that the Trustee admits were never consummated (or ever close to being consummated) prior to his resignation in August 2020, and (ii) complaints that in the months after Shaper left Speedcast, various non-parties—not Shaper—allegedly preferred one bidder, Centerbridge, at the expense of another, Black Diamond, allegedly to the detriment of the Bankruptcy Estate. But neither category of complaints can be cobbled into a plausible cause of action against Shaper. It is not a breach of fiduciary duty to attempt—and fail—to negotiate a management incentive plan or investment in a Debtor-in-Possession. And Shaper cannot be held liable for the alleged actions of other Speedcast officers or directors in the months after he left the company. The Plaintiff's Original Petition (referred to herein as the "Complaint") against Shaper should be dismissed in its entirety.

II. STANDARD OF REVIEW

2. To survive a Rule 12(b)(6) motion, the Trustee must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *accord Richter v. Carnival Corp.*, 837 Fed. Appx. 260, 261 (5th Cir. 2020). The complaint's factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 555. "[C]onclusory allegations, unwarranted

factual inferences, or legal conclusions" are insufficient. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

3. The court may consider "documents integral to and explicitly relied on in the complaint, that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted or referred to in the complaint." *Russell v. Harris Cnty. Tex.*, 500 F. Supp. 3d 577, 596 (S.D. Tex. 2020) (Rosenthal, J.). Additionally, "[a] court may take judicial notice of relevant facts in the context of a Rule 12(b)(6) motion." *Xtreme Power Plan Trust v. Schindler (In re Xtreme Power Inc.*), 563 B.R. 614, 629 (Bankr. W.D. Tex. 2016); *see also, e.g.*, *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (noting it is "clearly proper in deciding a 12(b)(6) motion, to take judicial notice of matters of public record."). Such relevant facts include "pertinent docket entries and papers within [an] adversary proceeding and the underlying bankruptcy case." *In re Carnegie*, 621 B.R. 392, 398 (Bankr. M.D.N.C. 2020) (citing *Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1141 n. 1 (4th Cir. 1990) (holding that a bankruptcy court may "properly take judicial notice of its own records")).

4. In the Complaint, the Trustee cites and incorporates by reference a variety of documents and testimony that are part of the docket in the underlying bankruptcy proceeding, including but not limited to the transcript of the January 21, 2021 confirmation hearing (Compl. ¶ 96-97), the terms of the various bids and proposals considered by Speedcast (*id.* ¶¶ 73, 85, 90), and the terms of the Third Amended Plan and the Court's Confirmation Order (*id.* ¶¶ 14, n.5, 95). The Court may therefore properly consider these documents as part of this Motion to Dismiss.

5. In deciding a motion to dismiss, courts are not required to accept allegations that contradict the evidence upon which the complaint relies. *See, e.g.*, *United States v. Magnolia*

Health Plan, Inc., 810 Fed. Appx. 237, 241 (5th Cir. 2020); *United States v. St. Luke's Episcopal Hosp*., 355 F.3d 370, 377 (5th Cir. 2004).

III. BACKGROUND ALLEGATIONS[1]

6. Shaper is a Managing Partner of Genesis Park, a Houston-based private equity firm. He previously served for nearly a decade as CEO of CapRock Communications, a global network service provider that was sold to Speedcast in 2017. Compl. ¶ 23.

7. In September 2019, Shaper and [redacted] were recruited to serve as non-executive Directors at Speedcast. *Id*. ¶ 25. At the time they joined the Board, Speedcast was struggling, and its stock had plunged approximately 70% the previous summer. *Id*. As part of their new roles, and in an effort to revive the business, Shaper and [redacted] interviewed dozens of Speedcast's employees, culminating in a December 2019 letter "laying out their findings and calling for an aggressive turnaround of Speedcast." *Id*. ¶ 32.

8. In early 2020, Speedcast's financial condition "continued to worsen." *Id*. ¶ 38. And by February, "the Board determined that the Company needed to raise new capital to continue operating. It planned to sell new equity to raise the necessary funds." *Id*.

9. The Board then asked Shaper and [redacted] to step in, on a temporary basis, to run Speedcast and lead the equity raise. Shaper became the temporary Chief Executive Officer, and [redacted] became the temporary Chief Operating Officer and Executive Vice President, in early March 2020. *Id*. ¶ 36.

10. [redacted]. *Id*. ¶ 42. Neither Shaper nor Genesis Park ever received such equity in Speedcast because the Board "aborted the equity raise in March 2020

[1] Shaper accepts the allegations in the Complaint solely for purposes of this motion to dismiss.

when the developing COVID-19 pandemic froze capital markets." *Id*. ¶ 43. As the Complaint puts it, "[t]he offer to Shaper, [redacted], and Genesis Park was revoked." *Id.*

11. Instead, on March 31, 2020, the Board formed a Special Restructuring Committee ("SRC"), "as a sub-committee of the Board, to make recommendations in connection with the Speedcast's evaluation of strategic alternatives." *Id*. ¶ 44. Pre-petition, the SRC explored various options, including attempting to negotiate with Speedcast's creditors, none of which were successful. *Id*. ¶¶ 44-45.

12. Neither Shaper nor [redacted] were ever part of the SRC. Rather, the Committee was initially comprised of Stephe Wilks (the Chairman of the Board) and Michael Malone, (another Director); as of April 23, 2020, they were joined by three outside members with extensive "restructuring experience" (Carol Flaton, Hooman Yazhari, and David Mack). *Id*. ¶ 44 & n.6.

13. Speedcast also retained a number of experienced, professional advisors to assist in navigating the bankruptcy process, including Michael Healy, a Senior Managing Director of FTI who served as the Chief Restructuring Officer; Moelis & Company, as its financial advisor; and Weil, Gotshal & Manages LLP, as its restructuring counsel. *Id*. ¶ 48.

14. On April 23, 2020, Speedcast filed for Chapter 11 bankruptcy protection in this Court, citing declining revenue, difficulty integrating recent acquisitions and realizing projected synergies, and the COVID-19 pandemic, among other factors. The Company's debt included about $600 million of secured loans. *Id*. ¶ 46.

15. After Speedcast filed the bankruptcy petition, Genesis Park considered organizing investors to submit a bid for the company. *Id*. ¶¶ 51-52. This effort never made it very far: "Genesis Park was unable to find a co-investor for a 'stalking horse' bid and abandoned its efforts." *Id*. ¶ 54.

16. Instead, the two largest secured debt holders, Black Diamond and Centerbridge, emerged as potential acquirers. *Id.* ¶ 57.

17. In early summer 2020, Shaper attempted to negotiate the terms of a Management Inventive Plan ("MIP") with both Black Diamond and Centerbridge for the benefit of Speedcast executives, including but not limited to himself and [redacted]. *Id.* ¶¶ 55, 56. A draft MIP was eventually approved by the SRC. *Id.* ¶¶ 65, 68.

18. On July 16, 2020, Weil Gotshal, on behalf of Speedcast, sent the draft MIP terms "to Speedcast's lenders, including Black Diamond and Centerbridge." *Id.* ¶ 68. [redacted]. *Id.* The Third Amended Bankruptcy Plan confirmed by this Court contemplates the post-Effective Date adoption of a long-term MIP. *See* ECF 1397 (Order Confirming Plan) at 92 (Plan § 5.11).

19. Also during the summer of 2020, Genesis Park had discussions with both Centerbridge and Black Diamond regarding participating in their respective bids for Speedcast. Compl. ¶ 72. While the Complaint alleges that Genesis Park and Centerbridge discussed specific terms in August 2020 (*id.* ¶¶ 70-71), it does not allege that any terms were ever agreed upon, or that Genesis Park ever actually invested or participated in any bid by Centerbridge for Speedcast.

20. On August 12, 2020, Speedcast filed Centerbridge's initial "Equity Commitment Plan" ("Initial ECA"). *Id.* ¶ 73. The next day, August 13, Black Diamond sent the SRC a competing bid for Speedcast. *Id.* ¶ 75. The Trustee alleges that Shaper and [redacted] wanted the SRC to back Centerbridge's Initial ECA over the Black Diamond bid, but the SRC refused to do so. *Id.* ¶ 78.

21. As a result, the Trustee alleges that Shaper and [redacted] tendered their resignations unless the SRC reached a reorganization plan that included a MIP and allowed "Genesis Park to invest in the merged company." *Id.* ¶¶ 78-80. The SRC declined to meet Shaper and [redacted]

demands, and Shaper's resignation became effective on August 28, 2020. *Id.* ¶ 80. [redacted], however, withdrew his resignation. *Id.* The Complaint does not allege that Shaper ever returned to Speedcast or remained involved after his resignation.

22. On August 31, 2020, when Shaper was no longer at Speedcast, Black Diamond made an additional bid for Speedcast that purportedly offered "[redacted]" in exchange for the company. *Id.* ¶ 85. There is no allegation that Shaper had any involvement in the SRC's or Speedcast's consideration of this offer. Rather, the Complaint alleges that the SRC—not Shaper nor [redacted]—"[redacted]" *Id.* ¶ 86. A week later, on September 7, 2020, Black Diamond withdrew its offer. *Id.*

23. [redacted]. *Id.* ¶ 87. The Complaint alleges that the criteria were aimed at "[redacted]r." *Id.* But there is no allegation that Shaper, who had left Speedcast two months earlier, or [redacted], who was not on the SRC, had any involvement in formulating those criteria. *Id.*

24. [redacted]." *Id.* ¶ 88. Again, there is no allegation that Shaper or [redacted] had anything to do with [redacted]—only vague references to Shaper's "influence" continuing to "linger" after he left. *Id.* ¶ 89.

25. On October 10, 2020, Speedcast and Centerbridge entered into an Amended and Restated Equity Commitment Agreement. *Id.* ¶ 90. This was incorporated into Speedcast's Second Amended Joint Chapter 11 Plan (the "Second Amended Plan"), which was filed with the Court on November 25, 2020. *Id.* Again, there is no allegation that Shaper was involved in Speedcast's

negotiation of the Amended and Restated Equity Commitment Agreement or the preparation of the Second Amended Plan.

26. Black Diamond challenged the Second Amended Plan at a confirmation hearing in December 2020. During that contested hearing, this Court provided Black Diamond an opportunity to make a new offer for Speedcast that would not be subject to the SRC's selection criteria. *Id.* ¶ 93. Black Diamond, however, declined to bid. *Id.*

27. After multiple days of hearings, Speedcast, Black Diamond, and Centerbridge reached a settlement ("Settlement Agreement"). ECF 1397, Ex. B. On January 20, 2021, Speedcast filed its Third Amended Plan ("Plan"). *Id*., Ex. A. As part of this Plan, Speedcast and Black Diamond waived any claims they held against SRC members, [redacted], and various professionals related to the bankruptcy process, including claims for breach of fiduciary duty. Compl. ¶ 96.

28. At a confirmation hearing on January 21, 2021, this Court expressed some negative views of Shaper's behavior. *Id.* ¶ 97. But the Court also made a number of oral findings, including that the Settlement Agreement was "manifestly fair" and "does not injure any other creditors." ECF 1407 (1/21/21 Hearing Tr.) at 37:19-23. The Court found that Centerbridge had acted as a "good faith purchaser of the Debtor." *Id*. at 38:1-6. The Court also found that, although Black Diamond may have believed itself to be aggrieved, the handling of the bankruptcy process "did not result in adverse consequences to the estate." *Id*. at 38:13-16.

29. This Court further found that "all of the parties, other than the Debtor, are acting in complete good faith in entering into this settlement," that "the Debtors in proposing the Plan, in litigating the Plan, and in entering into the settlement, have also acted in the utmost good faith," *Id*. at 38:19-24.

30. The Plan was subsequently approved by the Court. The Confirmation Order[2] contained several additional written findings, including that:

- the Debtors, the non-Debtor SFA Loan Parties, the Released Parties, and the Exculpated Parties "have acted in good faith within the meaning of section 1125 of the Bankruptcy Code…. in connection with the development of the Plan, all their respective activities relating to the solicitation of acceptances to the Plan, and their participation in the activities described in section 1125 of the Bankruptcy Code, including the negotiation, execution, deliver, entry into and performance of [the Plan]"; *id.* at § RR.

- the "Debtors have exercised reasonable business judgment in determining to enter into each of the Plan Documents, and the terms and conditions of all such Plan Documents, including the fees, expenses, and other payments set forth therein, have been and continue to be negotiated in good faith and at arm's length, are fair and reasonable, are supported by reasonably equivalent value and fair consideration…"; *id.* § VV.

- the "Debtors, non-Debtor SFA Released Parties, and the Released Parties have been and will be acting in good faith…"; *id.* § XX; and

- "Any payment made or to be made by the Debtors for services or for costs and expenses of the Debtors' and Creditors' Committee's respective professional advisors in connection with the Debtors' Chapter 11 Cases, or in connection with the Plan and incident to the Debtors' Chapter 11 Cases, has been approve by or is subject to the approval of, the Court as reasonable …."; *id.* § BB.

31. Under the Plan, [redacted], as an officer and a director of the Debtor, is considered both a Released Party and an Exculpated Party. All causes of action against [redacted] have been released whether they be "disputed or undisputed, direct or indirect, choate or inchoate, secured or unsecured, assertable directly or derivatively (including any alter ego theories)." *Id.* at pp. 62, 122-23.

32. Shaper was specifically excluded from the definitions of Released and Exculpated Parties. In particular, "SFA Lenders, through the SFA Litigation Trust Agreement, incorporated

[2] Findings of Fact, Conclusions of Law and Order (I) Approving Disclosure Statement on a Final Basis, (II) Confirming Third Amended Join Chapter 11 Plan of Speedcast International Limited and its Debtor Affiliates, (III) Approving Plan Settlement Agreement, and (IV) Granting Related Relief. ECF 1397.

in the Plan, retained the right to pursue claims against Shaper for *his* wrongdoing." Compl. ¶ 96 (emphasis added).

IV. ARGUMENT & AUTHORITIES

33. The Complaint should be dismissed in its entirety. *First*, the Trustee fails to state a claim for breach of fiduciary duty because (1) it does not plausibly allege any damages to the estate; (2) even assuming the existence of damages, it does not plausibly allege that Shaper caused them; and (3) none of Shaper's alleged actions could constitute breaches of fiduciary duties because they consisted solely of discussions or negotiations that were never consummated in any sort of self-dealing transaction. *Second*, all the complained-of actions are alleged to have been taken by, or at least disclosed to and approved by, a disinterested Special Restructuring Committee. *Third*, Shaper cannot be held liable for any alleged breaches of fiduciary duty by [redacted] because (1) the Trustee fails to plead any actual facts in support of its claims for secondary liability, and (2) claims premised on [redacted] underlying breach of *his* fiduciary duties are barred by the Plan and the Confirmation Order under the doctrines of res judicata and/or collateral estoppel.

1. The Complaint Fails to State a Claim for Breach of Fiduciary Duty by Shaper.[3]

34. The elements of a claim for breach of fiduciary duty are "(1) the existence of a fiduciary duty; (2) the breach of the duty; (3) causation; and (4) damages." *First United Pentecostal*

[3] This case was brought in Texas, so the Motion relies primarily on Texas law. *Nova Consulting Grp., Inc. v. Eng'g Consulting Servs., Ltd.*, No. Civ. SA03CA305FB, 2005 WL 2708811, *6 (W.D. Tex. June 3, 2005); *Mumblow v. Monroe Broad., Inc.*, 401 F.3d 616, 620 (5th Cir. 2005). Where additive, the Motion also cites Delaware law, which is often relied upon by Texas courts considering breach of fiduciary duty claims in the absence of clear, conflicting Texas law. *See, e.g.*, *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, n.19 (Tex. 2010) (citing Delaware law for the proposition that individual shareholder claims remain state law actions); *In re Schmitz,* 285 S.W.3d 451, 457 (Tex. 2009) (citing Delaware law to hold that a demand-required derivative suit must name the shareholder on whose behalf it is made); *Matter of Estate of Poe*, 591 S.W.3d 607, 641 (Tex. App.—El Paso 2019, pet. granted) (citing Delaware law for proposition that business judgment rule was element of plaintiff's claim). Speedcast, however, was an Australian company. Though Shaper is not suggesting, at this time, that a conflict exists requiring application of Australian law to the arguments made in this Motion, Shaper does not waive his right to make such arguments in the future pursuant to Federal Rule of Civil Procedure 44.1

Church of Beaumont v. Parker, 514 S.W.3d 214, 220 (Tex. 2017). While Shaper admits that he owed Speedcast fiduciary duties, the Complaint does not plausibly allege that he breached them, that Speedcast suffered harm, or that such harm was caused by any of Shaper's alleged actions.

A. The Trustee Does Not Plausibly Allege Any Damages to the Bankruptcy Estate.

35. Injury is an essential element of a breach of fiduciary duty claim. *See, e.g.*, *In re Specialty Select Care Ctr. of San Antonio, LLC*, No. 17-44248-ELM, 2021 WL 3083522, at *19 (Bankr. N.D. Tex. July 21, 2021) (damages are an element of a breach of fiduciary duty claim); *Milligan, Tr. for Westech Capital Corp. v. Salamone*, No. 1:18-CV-327-RP, 2019 WL 1208999, at *8 (W.D. Tex. Mar. 14, 2019) (dismissing breach of fiduciary duty claims because it was "implausible" that complained-of breaches caused damages); *First United Pentecostal Church,* 514 S.W.3d at 220 (listing elements); *Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 752 (Tex. App.—El Paso 2013, no pet.) (same); *Davis v. West*, 317 S.W.3d 301, 311 (Tex. App.—Houston [1st Dist.] 2009, reh'g overruled) (damages are "necessary" element of breach of fiduciary duty claim).

36. As a matter of law, allegations of speculative, conjectural, or remote damages do not suffice to sustain a breach of fiduciary duty claim. *U.S. Bank Nat. Ass'n v. Stanley*, 297 S.W.3d 815, 822 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("There can be no recovery for damages that are speculative or conjectural."); *see also, e.g.*, *Swank v. Cunningham*, 258 S.W.3d 647, 672 (Tex. App.—Eastland 2008, pet. denied); *Lee v. Lee*, 47 S.W.3d 767, 797 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

37. The Trustee alleges that the complained-of conduct (i) decreased the value ultimately recouped by the Bankruptcy Estate and (ii) increased the amount of professional fees incurred by the Debtor by prolonging the bankruptcy process. Compl. ¶¶ 13, 102 (alleging that

Shaper's actions resulted in "a depressed recovery and the incurrence of tens of millions in wasteful professional expenses").[4] Neither of these states a plausible claim for damages.

38. As to the Trustee's first theory of damages (that Shaper depressed Speedcast's recovery), the Complaint acknowledges that the bidding process was controlled by the SRC, not by Shaper, *id.* ¶ 84; that the SRC, not Shaper, allegedly "[redacted] bid from Black Diamond, *id.* ¶ 85; that the [redacted] including an alleged "[redacted]" with no involvement from Shaper, who had left the company months earlier, *id.* ¶ 87; and that the SRC alone failed to [redacted], *id.* ¶ 88. With respect to Shaper, the Complaint includes only vague allegations that his "influence" over the SRC somehow "lingered" long beyond his resignation from Speedcast. *Id.* ¶¶ 83-89. This amounts to a textbook example of allegations that are far too speculative, conjectural, and remote to state a claim for damages.

39. Moreover, this theory relies on an inference that the SRC was so influenced by Shaper and so incompetent that it was incapable of creating a competitive bidding process or evaluating bids, both during and after Shaper's tenure at Speedcast. The Complaint effectively alleges that the SRC was unable to grasp that [redacted] million is more than [redacted] million. *Id.* ¶ 86 ("The SRC failed to conclude that Black Diamond's August 31 offer [for over [redacted] in value] was significantly more valuable than Centerbridge's most recent proposal [for nearly [redacted] in value] or take any steps towards implementing it. Rather, the SRC—[redacted]."). Such an

[4] Instead of alleging damages, a plaintiff may allege that the breach of fiduciary duty resulted in an improper benefit to the defendant. *First United Pentecostal Church*, 514 S.W.3d at 221. The only benefit to Shaper alleged in the Petition is unspecified "use of company assets and personnel." Compl. ¶ 103. The Trustee does not identify which Speedcast assets or personnel were allegedly improperly used by Shaper, nor does it explain how such use led to tangible benefits to Shaper. The Complaint's one-line allegation of improper benefit is not sufficient "to raise a right to relief above the speculative," *Twombly*, 550 U.S. at 555, and cannot save the fiduciary duty claim.

inference is entirely implausible, especially in light of the Complaint's allegation that the SRC was comprised of five highly qualified and experienced individuals—and that neither Shaper nor [redacted] was ever a member. *See id.* ¶ 44 & n.6 (SRC was comprised of the Chairman of the Board, Stephe Wilks; another Director, Michael Malone; and three outside members with extensive "restructuring experience," Carol Flaton, Hooman Yazhari, and David Mack).

40. Indeed, the Complaint concedes the SRC's independence. It admits that the SRC *refused* to comply with the conditions Shaper allegedly demanded to avoid his resignation. *Id.* ¶ 80 ("The SRC did not agree to Shaper and [redacted] conditions by August 28."). And it acknowledges that it was the SRC, not Shaper, that took the actions and made the ultimate decisions about which the Trustee now complains. *Id.* ¶¶ 86-89.

41. This theory is also inconsistent with findings this Court has already made. Although claims related to Shaper's alleged misconduct were expressly carved out of the settlement, and the Court declined to make findings as to whether Shaper's alleged wrongful acts caused damage to the Estate, the Court *did* find that how the bankruptcy process was handled "did not result in adverse consequences to the estate." ECF 1407 (1/21/21 Hearing Tr.) at 38:13-16. The Court also found that the Debtors and Released Parties—including the members of the SRC—acted in good faith in connection with "all their respective activities" and "exercised reasonable business judgment" with respect to the terms of all Plan Documents. ECF 1397 at pp. 22-24. These findings are irreconcilable with the Complaint's allegations that Speedcast received only a fraction of the value it should have as a result of the SRC's staggering incompetence.

42. The Trustee's second attempt to conjure an injury—allegations that Shaper's actions led Speedcast to incur tens of millions in wasteful professional expenses—is equally untenable. The Complaint alleges that the Estate incurred around $100 million in professional

expenses in connection with the bankruptcy proceedings, including approximately $30 million to Weil, $15 million to FTI, $3 million to Moelis, and $20 million to the professional advisors of its creditors, including Centerbridge. *Id.* ¶ 94. Many—if not most—of these fees were incurred long after Shaper left Speedcast. *See id.* ¶ 80. Moreover, the Complaint fails to identify which of these expenses were purportedly "wasteful," and there are no allegations regarding how Shaper's actions needlessly prolonged the bankruptcy process. In any event, a damages theory premised on how long the proceedings might otherwise have taken and what professional fees might have been incurred in that hypothetical scenario would rely on impermissible speculation and guesswork.

43. In addition, this theory is also inconsistent with findings this Court has already made. In confirming the Plan, the Court specifically approved as "reasonable" all payments made to the Debtor's professional advisors in connection with the bankruptcy proceeding. ECF 1397 at 17 (Findings § BB); *see also, e.g.,* ECF 1625, 1610, 1609, 1607 (approving the complained-of professional fees).

44. With no viable theory of damages, the breach of fiduciary duty claim must fail.

B. The Trustee Does Not Plausibly Allege that Any Damages to the Bankruptcy Estate Were Caused by Shaper.

45. Even assuming that the Bankruptcy Estate was, in fact, injured by a depressed recovery or wasteful professional fees—neither of which is adequately alleged—the Complaint does not plausibly allege that Shaper caused those harms. *See First United Pentecostal Church,* 514 S.W.3d at 220 (third element of fiduciary duty claim is causation). Stating a claim for breach of fiduciary duty requires adequate allegations of proximate cause, meaning the breach was (1) the cause-in-fact of the plaintiff's injury and (2) a foreseeable consequence of the breach. *Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018). But the Complaint admits, among other things, that Shaper had no control over the process for setting standards and reviewing bids; substantive bidding by

Centerbridge and Black Diamond continued long after he left; and the Court gave Black Diamond an opportunity to match or exceed Centerbridge's bid, and it declined to do so.

46. As noted above, the Complaint acknowledges that neither Shaper nor [redacted] were ever members of the SRC (Compl. ¶ 44 n.6), and that the SRC, not Shaper or [redacted], made the ultimate decisions regarding the engagement of professional advisors; the bidding process, including the selection criteria and negotiations with Centerbridge and Black Diamond; and the plans and proposals they wanted to consider (*id.* ¶¶ 48, 83-89). That alone makes it implausible that Shaper could have caused harm to the Estate.

47. Even so, the bidding and negotiation process had barely begun at the time Shaper left Speedcast. On August 12, 2020, Speedcast filed the Initial ECA. *Id.* ¶ 73. The next day, on August 13, 2020, Black Diamond sent the SRC its *first,* competing bid for Speedcast. *Id.* ¶ 75. Two weeks later, on August 28, 2020, Shaper's resignation from Speedcast became effective. *Id.* ¶ 80. At that time, both Black Diamond and Centerbridge had each alleged to have made a single bid for Speedcast, neither of which was ultimately accepted.

48. Here are the events that are alleged to have happened **after** Shaper left Speedcast:

a. On August 31, 2020, Black Diamond made a second bid for Speedcast. *Id.* ¶ 85. The Complaint alleges that the Black Diamond offer was superior but admits that it was the SRC that "[redacted]" *Id.* ¶ 86.

b. On September 7, 2020, Black Diamond revoked its August 31 offer and filed an "Emergency Motion for Mediation or, in the Alternative, Appointment of an Examiner Pursuant to 11 U.S.C. § 1104(c)," *Id.*; ECF 666.

c. Black Diamond made numerous "[redacted]" in September 2020 that "[redacted]." Compl. ¶ 86.

d. In October 2020, the SRC "[redacted]" that allegedly included provisions "[redacted]." *Id.* ¶ 87.

e. On October 10, 2020, Speedcast and Centerbridge entered into and filed the Revised ECA. *Id.* ¶ 90.

f. Black Diamond [redacted], which allegedly offered "greater value to Speedcast and its stakeholders than the then-prevailing Centerbridge proposal," but the "SRC deemed" them "non-compliant" *Id.* ¶ 88.

g. On November 25, 2020, the Revised ECA was incorporated into Speedcast's Second Amended Plan and filed with the Court. *Id.* ¶ 90.

h. Black Diamond objected to the Second Amended Plan, and the Court held a multi-day adversarial confirmation hearing. During the hearing, the Court gave Black Diamond "an opportunity to make a new offer for Speedcast that would not be subject to the SRC's arbitrary 'anti-Black Diamond' conditions." *Id.* ¶ 93. Black Diamond declined to do so. *Id.*

i. On January 20, 2021, Speedcast filed its Third Amended Bankruptcy Plan, which was ultimately confirmed by the Court. *Id.* ¶ 95.

49. In short, the material decisions regarding the structure of the bidding process and the evaluation, acceptance, or rejection of the bids that are the subject of the Complaint—including the bids by Black Diamond the Complaint alleges that Speedcast would have been better off accepting—were largely if not entirely made or rejected **after** Shaper left Speedcast. Shaper is not alleged to have taken part in **any** of these decisions. He is not alleged to have taken a single action after he left Speedcast that affected Speedcast or the bankruptcy process in any way, shape, or form. *See generally id.* ¶¶ 83-95.

50. It is simply not plausible that any of Shaper's alleged conduct prior to his resignation on August 28, 2020, even accepted as true, somehow puts the fault on him for the SRC's decisions—months later and in his absence—to adopt selection criteria that Black Diamond found disagreeable, or to reject Black Diamond's bids, or to make any decision that allegedly

prolonged the bankruptcy process, thereby causing Speedcast to incur additional professional fees.[5] Indeed, the Complaint admits when put to the choice, the SRC let Shaper resign. *Id.* ¶ 80.

C. The Trustee Does Not Plausibly Allege that Shaper Breached Any Fiduciary Duty to Speedcast.

51. It is axiomatic that a breach of fiduciary duty claim cannot survive without adequate allegations of breach. *See First United Pentecostal Church,* 514 S.W.3d at 220. The Complaint alleges a range of actions by Shaper that—while perhaps unwise or inappropriate—do not amount to a breach of fiduciary duty as a matter of law.

i. Pursuing or Negotiating, Without Consummating, an Investment Is Not a Breach of Fiduciary Duty.

52. Much of the Complaint is devoted to allegations that Shaper was interested in having Genesis Park, a private equity firm he co-founded and managed, invest in Speedcast, either directly or through involvement in one of the creditor's bids for the company. These allegations cannot constitute a breach of fiduciary duty because no such investment ever came to fruition. Specifically, the Complaint alleges that:

- prior to bankruptcy, Shaper discussed the possibility of a Genesis Park investment with the Speedcast Board of Directors, but no transaction ever occurred (Compl. ¶¶ 42-43);
- early on in the bankruptcy proceeding, Genesis Park considered making a "stalking horse" bid, but no bid was ever made (*id.* ¶¶ 51-54); and
- in August 2020, Shaper negotiated with Centerbridge to potentially involve Genesis Park in the Initial ECA, but once again, no investment was ever consummated, as Shaper was allegedly dissatisfied with the terms Centerbridge had offered Genesis Park, and in any event, Centerbridge's First ECA Bid was not accepted (*id.* ¶¶ 71-73, 78).

[5] It is ironic that the Trustee—whose "Litigation Oversight Committee" consists of two Black Diamond employees (*see* ECF 1397 at 189 (Ex. A to Class 3 Trust Agreement))—is bringing claims alleging that Speedcast wasted professional fees when a large amount of said fees were incurred as a result of adversarial actions taken by Black Diamond, culminating in a multi-day confirmation hearing.

53. Mere attempts to negotiate a self-interested transaction are not actionable as a breach of fiduciary duty. Put another way, a party "cannot claim attempted breach of fiduciary duty because there is no such cause of action." *Santarelli & Gimer v. Atida Karr Enterprises, Inc.*, No. CIV. A. 83-0703, 1987 WL 8720, at *2 (D.D.C. Mar. 13, 1987).

> Defendants' conception of the acts subjecting an officer to liability for breach of fiduciary duties would result in an unwarranted expansion of the fiduciary duty doctrine. The unexecuted requests of an officer, spoken with some uncertain intent, do not in themselves comprise a breach of fiduciary duties. The court here attempts to distinguish between acts that constitute breach and acts more analogous to an "attempted" or "solicited" breach for which this court will not impose or declare liability. In this regard, the court will only subject a fiduciary to liability for those statements or instructions which have some palpable effect on the fiduciary, the corporation, or individuals owed a fiduciary duty.

Niehenke v. Right O Way Transp., Inc., No. CIV.A. 14392, 1996 WL 74724, at *2–3 (Del. Ch. Feb. 13, 1996); *see also, e.g.*, *Phillips v. Spencer*, 390 F. Supp. 3d 136, 176 (D.D.C. 2019) (creation of a "Proposed Business Plan" did not constitute breach of fiduciary duty because proposal never "moved beyond the planning phase," and "the proposed company never transacted any business"); *Jorstad v. State St. Corp.*, 534 F. Supp. 2d 214, 216–17 (D. Mass. 2008) (Under ERISA, "an unsuccessful attempt to persuade someone to divest stock, without more, does not constitute a breach of fiduciary duties."); *Patrick v. Allen*, 355 F. Supp. 2d 704, 714 (S.D.N.Y. 2005) ("Mere attempts by a director to increase his stake in the company as a shareholder are not actionable as a breach of fiduciary duty."); *eBay Domestic Holdings, Inc. v. Newmark*, No. CIV.A. 3705-CC, 2009 WL 3205674, at *2 (Del. Ch. Oct. 2, 2009) (rejecting fiduciary duty claim challenging "proposed-but-untaken actions" because where "no indemnification agreement has been executed and no funds have been expended," "there is no contract or transaction for [the

court] to examine")[6]; *Chrysogelos v. London*, No. CIV. A. 11910, 1992 WL 58516, at *4 (Del. Ch. Mar. 25, 1992) (dismissing fiduciary duty claim because the complaint failed to allege that the agreements officers solicited were actually executed and asserted only "abstract" harm).

54. As in these cases, Shaper's alleged actions were, at most, "wasted words" and thus did not breach any fiduciary duty. *Niehenke*, 1996 WL 74724, at *3. As the Trustee admits, none of the contemplated transactions ever happened, and Genesis Park never came close to investing in Speedcast. *See* Compl. ¶¶ 54, 72-73, 78. Shaper's negotiations with Speedcast, the SRC, or Centerbridge regarding a potential investment by Genesis Park, even if misguided, cannot form the basis for a breach of fiduciary duty action because the complained-of investment never actually occurred. *See, e.g.*, *Niehenke*, 1996 WL 74724, at *2 (holding that defendant cannot be "liable for a claimed breach of fiduciary duties if the solicited act was never actually executed").

ii. Proposing a Management Incentive Plan Is Not a Breach of Fiduciary Duty.

55. Nor is it a breach of any fiduciary duty to attempt to negotiate a Management Incentive Plan ("MIP") with the SRC or the Debtor's creditors, or to favor a plan sponsor proposal because it includes a desirable MIP. As the Court well knows, incentive plans for key employees are routinely implemented as part of a bankruptcy plan because they keep management engaged. *See, e.g. In re Trivascular Sales LLC*, No. 20-31840 (SGJ), 2020 WL 5552598, at *14 (Bankr. N.D. Tex. Sept. 16, 2020) (approving a management inventive plan that permitted "equity-based awards exercisable for up to 15% of the New Equity Interests"); *In re PHI, Inc.*, No. 19-30923-HDH11, 2019 WL 3539941, at *58 (Bankr. N.D. Tex. Aug. 2, 2019) (approving plan that allowed up to "10% of New Common Stock" to be reserved for the MIP); *In re AbitibiBowater Inc.*, No.

[6] The Court in *eBay* granted summary judgment to defendants on justiciability grounds, holding that any dispute over a proposed but unexecuted transaction is unripe, and the case was moot because there was no intent to enter the proposed transaction at the time of the litigation. *Id.* at *2.

09-11296 KJC, 2010 WL 4823839, at *13 (Bankr. D. Del. Nov. 22, 2010) ("Based on the record before me, I conclude that the management compensation plans are reasonable and appropriate for this market at this time, and are consistent with the objectives of chapter 11.").

56. MIPs must be negotiated with creditors and approved by the bankruptcy court. Here, the Trustee admits that Black Diamond's August 31, 2020 proposal (later unliterally withdrawn) contained a MIP with "substantially the same terms" as the one the Trustee complains about Centerbridge having accepted. Compl. ¶ 85(v). And a MIP was ultimately implemented as part of the Plan confirmed by this Court on January 22, 2021. *See* ECF 1397 (Order Confirming Plan) at 92 (Plan § 5.11) ("Following the Effective Date New Speedcast Parent shall enter into the Management Incentive Plan…").

57. As it is routine for Debtors to emerge from bankruptcy with a MIP in place, it cannot be a breach of fiduciary duty for a Debtor's officers or directors to attempt to negotiate the terms of that MIP with either a SRC or the potential plan sponsor. If it were, no MIPs could ever be proposed or approved. And by the same logic, an executive would breach his fiduciary duties any time he attempts to negotiate for higher compensation. In any event, there is no allegation that Shaper's preferred version of the MIP was approved or that he ever received any benefit from it; to the contrary, he left the company months before the approval and implementation of any MIP, and so once again, these allegations amount to nothing more than "wasted words."

iii. Favoring A Proposal of One Creditor Over Another, Without More, Is Not a Breach of Fiduciary Duty.

58. Much of the Complaint, while ostensibly brought on behalf of Speedcast, rehashes complaints raised by Black Diamond that Speedcast, Shaper, [redacted], Weil Gotshal, or the SRC preferred Centerbridge during the bankruptcy process.

59. But it is not a breach of fiduciary duty to negotiate with creditors or even to prefer one creditor over another. "[T]he mere fact that directors of an insolvent firm favor certain creditors over others of similar priority does not constitute a breach of fiduciary duty"—not to the creditors, and certainly not to the company. *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 676 (N.D. Tex. 2011) (quoting *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 791–92 (Del.Ch. 2004)) (discussing "a transaction that benefits one creditor to the detriment of another"); *see also, e.g.*, *In re Weinberg*, 410 B.R. 19, 34 n.10 (B.A.P. 9th Cir. 2009), *aff'd*, 407 F. App'x 176 (9th Cir. 2010) (same); *In re Verestar, Inc.*, 343 B.R. 444, 477 (Bankr. S.D.N.Y. 2006) (same); *Asmussen v. Quaker City Corp.*, 18 Del. Ch. 28, 31–32 (1931) ("[A] corporation when insolvent or in contemplation of insolvency may dispose of its assets so as to prefer favorite creditors, although the result may be to leave nothing for others who stand on a footing equally meritorious.") (quoting Corpus Juris, Vol. 14A, p. 895).

60. Moreover, the favoritism challenged here is not Shaper's—as the Complaint admits he did not have decision-making authority—but rather the SRC's. The SRC's alleged favoritism for Centerbridge over Black Diamond is subject to the business judgment rule because "[d]irectors can, as a matter of business judgment, favor certain non-insider creditors over others of similar priority without breaching their fiduciary duties." *Quadrant Structured Products Co., Ltd. v. Vertin*, 115 A.3d 535, 547 (Del. Ch. 2015); *cf. Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019) (noting that bankruptcy courts "generally approve" the debtor's choice to assume or reject executory contracts "under the deferential 'business judgment' rule"). Indeed, this Court specifically found that Speedcast exercised "reasonable business judgment" during the bankruptcy process. ECF 1397 § VV. *See also* Section IV(2), *infra.*

61. Nor is it plausible that Shaper or [redacted] coerced or corrupted the SRC into favoring Centerbridge because it was more receptive to the proposed MIP or to co-investing with Genesis Park. *See* Compl. ¶¶ 68, 72. The Complaint alleges that the SRC was highly critical of Shaper, that Shaper was "unable to convince the SRC" to continue backing the plan he allegedly preferred, and that the SRC ultimately opted to accept Shaper's resign rather than move forward with either the MIP or the proposed co-investment. *Id.* ¶¶ 77, 78, 80.

62. The SRC favored Centerbridge because it was Centerbridge, not Black Diamond, whose proposal represented the highest value for the Estate. Black Diamond was provided an opportunity to improve on the Centerbridge bid ultimately accepted by the SRC and declined to do so. *Id.* ¶ 93. Revealingly, the Complaint does not allege that any bid from Black Diamond was superior to the bid accepted from Centerbridge in October 2020. *Id.* ¶ 88 (alleging only that the Black Diamond bids "offered greater value" than the "*then-prevailing*," but not final, Centerbridge proposal) (emphasis added).

63. Therefore, any allegations that Shaper or [redacted] favored Centerbridge over Black Diamond or encouraged the SRC to act in ways unfair to Black Diamond, cannot sustain the breach of fiduciary duty claim. *See, e.g.*, *id.* ¶ 65 (alleging that Shaper tried to scare "[redacted]"); *id.* at ¶ 67 (that Speedcast previewed their MIP to Centerbridge); *id.* at ¶ 69 (that the SRC pursued "a deal with Centerbridge" rather than Black Diamond); *id.* at ¶ 74 (that Black Diamond "had been given the runaround by Speedcast"); *id.* at ¶ 87 (that the SRC adopted [redacted]).

iv. Shaper Did Not Breach His Fiduciary Duty by Resigning.

64. Finally, Shaper did not breach his fiduciary duties by threatening to resign and then resigning from his positions at Speedcast in August 2020. A director or officer of a corporation

may ordinarily resign at any time. *See, e.g.*, *In re Brentwood Lexford Partners, LLC*, 292 B.R. 255, 273 (Bankr. N.D. Tex. 2003) ("The officers of BLP did not breach their fiduciary duty to BLP and its creditors when they resigned in September 2000, formed Myan, and transferred some property management business to Myan."); *In re Telesport, Inc.*, 22 B.R. 527, 533 (Bankr. E.D. Ark. 1982) ("The law does not prohibit the resignation of a corporate officer which is not otherwise prohibited by explicit contractual provision."); *Grobow v. Perot*, 526 A.2d 914, 927, n.17 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988) ("A director may in good faith deal freely with and dispose of his stock, and is also free to resign."); *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 408 (Del. 1985) (director did not breach his fiduciary duty by simultaneously selling his stock and resigning because "[d]irectors are also free to resign."). Courts have specifically rejected breach of fiduciary claims based on allegations like those here—that defendants "plotted their departure" in order to seek "a better opportunity" for themselves, and even "executed their departure in a manner that made it difficult for" their former employer to continue to operate. *Lazard Debt Recovery GP, LLC. v. Weinstock*, 864 A.2d 955, 965 (Del. Ch. 2004).

65. Barring a contrary contractual provision, an officer or director is an at-will employee and is free to resign at any time and for any reason, including a self-interested one. *See id.* This is true as a matter of corporate law and as a matter of statute in Texas, Delaware, and Australia. *See* Tex. Bus. Org. Code § 21.4091 ("Except as otherwise provided by the certificate of formation or bylaws, a director of a corporate may resign at any time by providing written notice to the corporation."); Del. C. 8 § 141(b) ("Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation."); Australia Corporations Act 2001 at § 203A ("A director of a company may resign as a director of the company by giving written notice

of resignation to the company…."). Shaper is not alleged to have been subject to any contract in this case. He therefore had the right to resign from Speedcast at any time.

66. Certain courts have created a limited exception to this otherwise absolute right: a director may not be shielded from liability if he resigns "knowing a transaction that will be dangerous to the corporation is about to occur but taking no steps to prevent it or make his objection know." *Xerox Corp. v. Genmoora Corp.,* 888 F. 2d 345, 355 & n.60 (5th Cir. 1989). This narrow exception applies "only when the harm to the company is rather severe and foreseeable." Byron F. Egan, *Fiduciary Duties of Corporate Directors and Officers in Texas*, Tex. J. Bus. L. 45, 318–19 (2009). And this exception cannot possibly apply here. There is no allegation that Shaper was aware of an imminent harm to Speedcast or that his resignation allowed severe harm to occur. Just the opposite: the Complaint alleges that Shaper resigned because he was unable to convince the SRC to consummate an allegedly unfavorable transaction. Compl. ¶ 78 ("Unable to convince the SRC to continue backing the Initial ECA, Shaper and [redacted] followed through on their threat [to resign]."); *id.* ¶ 80 ("The SRC did not agree to Shaper and [redacted] conditions by August 28. At the end of the day on August 28, Shaper's resignation became effective.").

67. Given the Trustee's allegations regarding Shaper's motives and conduct, it can only have been a boon to Speedcast for Shaper to have stepped down. Indeed, some Courts suggest a fiduciary in Shaper's position—with allegedly conflicting loyalties—has not only a right but an obligation to resign. *See Rosencrans v. Fry*, 91 A.2d 162, 166 (N.J. Ch. Div. 1952), *aff'd*, 95 A.2d 905 (1953) ("[A] trustee may not place himself in a position where it would be for his own benefit to violate his duty as trustee, and that a trustee who without fault finds himself in a position where his interest conflicts with that of the beneficiary should resign the trust."). Under any applicable

law, it was not a breach of fiduciary duty for Shaper to walk away from Speedcast and leave the company in the SRC's capable hands.

2. The Claims Against Shaper Must Be Dismissed Because the SRC Either Carried Out or Approved All Complained-of Transactions.

68. As an independent reason to dismiss all the claims against Shaper, the Complaint also fails to state a claim for breach of fiduciary duty by Shaper (or for aiding or participating in [redacted] alleged breaches) because, fundamentally, all of the alleged actions and transactions were taken and approved *not* by Shaper or [redacted] but by the admittedly *disinterested* SRC.

69. Under Texas law, when a decision is approved by a majority of disinterested directors, "neither the corporation nor any of the corporation's shareholders will have a cause of action" against an interested director that *benefitted* from such a transaction. Texas Bus. Org. Code § 21.418; *see also, e.g.*, *In re Kilgore Meadowbrook Country Club, Inc.*, 315 B.R. 412, 421 n.23 (Bankr. E.D. Tex. 2004) (under prior version of the statute, noting how officers or directors "may conduct transactions with the corporation without violating their fiduciary duties to that corporation"); *Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 WL 4930041, at *9 (Tex. App.—Austin Aug. 20, 2020, no pet.) (a transaction that was unanimously approved could not be the basis for a breach of fiduciary duty claim absent a showing of fraud or ultra vires conduct); *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *8 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet.) (an amended lease approved by disinterested directors was not a proper basis for a breach of fiduciary duty action). And here, there is no allegation that Shaper ultimately benefitted from any of the complained-of conduct.

70. Likewise, under Delaware law, if a company's board has delegated authority to a committee of disinterested directors, then the "judicial analysis focuses on the committee," not on any allegedly interested directors. *Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 WL

1437308, at *33 (Del. Ch. Apr. 14, 2017). If a disinterested committee approves the complained-of action, it is subject to the deference of the business judgment rule, and the plaintiff has the burden of pleading that the committee either was not disinterested or was acting in bad faith. *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

71. Courts can and do grant motions to dismiss breach of fiduciary duty claims that purport to challenge transactions that are subject to the business judgment rule. *See, e.g.*, *In re Sols. Liquidation LLC*, 608 B.R. 384, 402–04 (Bankr. D. Del. 2019); *In re AgFeed USA, LLC*, 558 B.R. 116, 128–29 (Bankr. D. Del. 2016); *Egleston ex rel. Chesapeake Energy Corp. v. McClendon*, 318 P.3d 210, 215 (Okla. Civ. App. 2013); *Krim v. ProNet, Inc.*, 744 A.2d 523, 527 (Del. Ch. 1999) (all applying the business judgment rule on a motion to dismiss).

72. Here, **all** of the supposedly tortious actions taken by Shaper or [redacted] are alleged to have been disclosed to and approved by the SRC. For example, the Complaint alleges that an "over market MIP" Shaper negotiated was "backed by the SRC" (Compl. ¶ 65); that the "[redacted]" (*id.* ¶ 70); that the SRC approved and filed the initial "Equity Commitment Plan" Shaper had negotiated with Centerbridge (*id.* ¶ 73); that the SRC allowed Shaper's resignation to become effective (*id.* ¶ 80); that the SRC repeatedly and independently rejected Black Diamond's offers and thwarted their efforts to bid (*id.* ¶¶ 84-89); and so on and so forth.

73. The Trustee does not attempt to show that the members of the SRC were interested—to the contrary, the Complaint alleges that the SRC was comprised of disinterested directors. *Id.* ¶ 44 & n.6. The SRC's actions are therefore protected by the business judgment rule and cannot provide the basis for a breach of fiduciary duty claim.

74. To overcome the presumed applicability of the business judgment rule, the Trustee bears the burden of pleading facts sufficient to show that the SRC acted in bad faith. *See Matter of Estate of Poe*, 591 S.W.3d 607, 641 (Tex. App.—El Paso 2019, pet. granted) ("To best give effect to the policy rationale underpinning the business judgment rule, we conclude that it was part of Richard's case to disprove the business judgment rule."); *Alidina v. Internet.com Corp.*, No. CIV. A. 17235-NC, 2002 WL 31584292, at *4 (Del. Ch. Nov. 6, 2002) (holding the presumption may be rebutted only in "rare cases where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith") (internal quotations/citation omitted). The Trustee has not pled any allegations to overcome this presumption. Nothing in the Complaint suggests bad faith by the SRC.

75. Even if there were some doubt as to the SRC's independence or good faith, this Court has specifically found the SRC acted in "good faith … in connection with the development of the Plan, all their respective activities relating to the solicitation of and acceptances of the Plan, and their participation in the activities described in section 1125 of the Bankruptcy Code" and, further, that the SRC exercised "reasonable business judgment" in entering into "each of the Plan Documents." ECF 1397 (Order Confirming Plan) at 22, 23 (§ VV).

3. The Trustee Does Not Plausibly Allege that Shaper Is Secondarily Liable for the Actions of [redacted].

76. In addition to alleging that Shaper breached his own fiduciary duties, the Complaint alleges that Shaper aided and abetted, knowingly participated, or conspired with co-executive and co-director (and remaining CEO of Speedcast) [redacted], to breach *his* fiduciary duties. These derivative claims should likewise be dismissed.

A. The Complaint Does Not State a Claim for Aiding and Abetting or Knowing Participation.

77. Liability for either aiding and abetting or knowing participation requires showing that Shaper took affirmative actions with the intent of assisting [redacted] in breaching his fiduciary duties, that [redacted] did in fact breach those duties, and that Shaper's participation was a "substantial factor" in causing the harm that resulted. *Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 882 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (listing elements as "(1) the primary actor committed a tort; (2) the defendant had knowledge that the primary actor's conduct constituted a tort; (3) defendant had intent to assist the primary actor; (4) defendant gave the primary actor assistance or encouragement; and (5) defendant's conduct was a substantial factor in causing the tort").[7] In bringing such derivative claims, a plaintiff must establish causation twice over—"once as an element of proof required for the underlying tort and once in establishing that the defendant's conduct have been a substantial factor in causing the underlying tort." *Id.*

78. The Trustee's failure to plead with adequately specificity (a) how [redacted] breached his fiduciary duties and (b) the specific actions that Shaper took to (i) knowingly participate in that breach and (ii) cause the alleged damages requires dismissal. *See Continuing Creditors' Comm. of Star Telecomms. Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 466 (D. Del. 2004) (dismissing breach of fiduciary duty claim where complaint alleged only that defendant was CFO, "assisted with" challenged asset sale, and was part of a "team" that carried out wrongful conduct); *First United*

[7] Defendant Shaper recognizes that this Court has previously recognized a cause of action for aiding and abetting breach of fiduciary duties under Texas law. *In re Houston Reg'l Sports Network, L.P.*, 547 B.R. 717, 758 (Bankr. S.D. Tex. 2016). Respectfully, Shaper suggests that the Court should consider revisiting this issue, as more recent Texas authority has recognized that "a common-law cause of action for aiding and abetting does not exist in Texas." *Hampton v. Equity Tr. Co.*, 607 S.W.3d 1, 5 (Tex. App.—Austin 2020, Pet. denied); *Solis v. S.V.Z.*, 566 S.W.3d 82, 87, 103 (Tex. App.—Houston [14th Dist.] 2018, Compl. filed), *reh'g denied*, (Dec. 28, 2018) ("[T]he aiding and abetting claim … must fail because it does not exist under our common law and because no reasons have been given for its recognition in this case[.]"). The Texas Supreme Court "has not expressly decided whether Texas recognizes a cause of action for aiding and abetting." *First United Pentecostal Church*, 514 S.W.3d at 224.

Pentecostal Church, 514 S.W.3d at 225 (holding claim for knowing participation in breach of fiduciary duty failed where facts did not suggest defendant "assisted or encouraged" another to steal funds); *Immobiliere Jeuness,* 525 S.W.3d at 882–83 (holding claims of aiding and abetting breach of fiduciary duty were properly dismissed where defendant's conduct "was not the proximate cause of the alleged damages," as he did not have actual role in "intervening diversion of assets").

79. Under *Twombly,* the Complaint does not adequately plead either [redacted] specific actions that allegedly breached his duties or Shaper's specific actions to knowingly participate in, or aid and abet, such a breach. Nor does it adequately allege causation or harm to the Bankruptcy Estate (or a benefit to [redacted]). Therefore, such claims must be dismissed.

80. *First*, the pre-August 28, 2020 allegations regarding [redacted] are materially identical to those against Shaper—that [redacted] pursued negotiations for a MIP (Compl. ¶ 66); favored Centerbridge over Black Diamond and lobbied the SRC to do the same (*id*. ¶ 69); and threatened to resign when he did not get his way (*id*. ¶¶ 78-79). All of these claims fail for the same reasons that they fail against Shaper—and more so for the allegations concerning [redacted] resignation since the Complaint alleges [redacted] did not ultimately resign. *Id*. ¶ 80. These claims additionally fail because they do not adequately allege any non-speculative harm to the Bankruptcy Estate or any benefit to [redacted] because of the alleged breaches. *See* Section IV(1)(A), *supra*.

81. *Second,* as to conduct after Shaper's August 28, 2020 resignation, the Complaint does not allege a single action taken by [redacted] that could even hypothetically breach his fiduciary duties. Every action in that time period is alleged to have been taken by the SRC. *See, e.g.*, Compl. ¶ 84 ("[redacted]"); *id.* ¶ 86 ("[redacted]"); *id.* ¶

89 [redacted].").

82. *Third*, even if the Complaint alleged post-August 28, 2020 actions by [redacted] that breached his fiduciary duties, it does not allege that Shaper knowingly participated in or aided and abetted those actions. The Complaint alleges only that Shaper's "influence lingered" after he left—not that he knowingly participated in any of [redacted] actions, gave [redacted] any assistance or encouragement in the alleged breaches, or was a "substantial factor in causing the tort." *Id.* ¶ 89. Without any allegations identifying Shaper's role in the alleged misconduct, the Complaint does not support the derivative liability claims it purports to bring. *See, e.g.*, *Immobiliere Jeuness*, 525 S.W.3d 875 at 882–83 (dismissing claim for aiding and abetting because alleged wrongs did not "proximately cause actual damages," and aider and abettor did not have a "role" in "intervening diversion of assets" that caused the harm).

B. The Complaint Does Not State a Claim for Civil Conspiracy.

83. Civil conspiracy is "merely a theory of vicarious tort liability derivative of an underlying wrong." *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 140 (Tex. 2019). The elements are:

> (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result.

First United Pentecostal Church, 514 S.W.3d at 222. Because conspiracy is a derivative tort, not a stand-alone tort, to the extent the Court finds that the breach of fiduciary duty claims against [redacted] fail as a matter of law for any reason, Shaper cannot be held liable for conspiring to breach those fiduciary duties. *Cooper v. Trent*, 551 S.W.3d 325, 335 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

84. Furthermore, general allegations that the defendant acted as a co-conspirator are insufficient. *Id*. Rather, "civil conspiracy requires specific intent' to agree 'to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.'" *Salazar v. HEB Grocery Co.*, No. 04-16-00734-CV, at *5 (Tex. App.—San Antonio Apr. 4, 2018, pet. denied) (quoting *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996)). This "inherently requires a meeting of the minds on the object or course of action." *First United Pentecostal Church*, 514 S.W.3d at 222. "Merely proving a joint 'intent to engage in the conduct that resulted in the injury' is not sufficient to establish a cause of action for conspiracy." *Juhl*, 936 S.W.2d at 644.

85. The Trustee has failed to allege any meeting of the minds by Shaper, [redacted], or additional non-party Paul Hobby to breach [redacted] fiduciary duties or to "[redacted]." Compl. ¶¶ 127-128. The allegations that Shaper attempted to negotiate a MIP or negotiated with Centerbridge regarding the terms of a potential investment by Genesis Park do not establish a specific agreement among Shaper, [redacted], and Hobby. There are no allegations regarding the terms of any agreement between them, when such an agreement was formed, or what the specific purposes of such an agreement were. *See Murex, LLC v. GRC Fuels, Inc*., No. 3:15-CV-3789-B, 2016 WL 4207994, at *10 (N.D. Tex. Aug. 10, 2016) (granting motion to dismiss where plaintiff "fail[ed] to specify … precisely what the interaction was or what actions were decided upon, or when any meeting of the minds occurred between those parties"); *Schroeder v. Wildenthal*, 3:11-CV-0525-B, 2011 WL 6029727, at *7 (N.D. Tex. Nov. 30, 2011), *aff'd*, 515 Fed. Appx. 294 (5th Cir. 2013) (holding plaintiff's "failure to specify how the disparate acts … amount to a conspiracy, or when anything resembling a 'meeting of the minds' occurred, is fatal to the claim of conspiracy"); *Adams Offshore Ltd. v. OSA Intern*., LLC, CIV.A. H-09-0465, 2011 WL 4625371, at *8 (S.D. Tex. Sept. 30, 2011) (dismissing claim for conspiracy where there was

"no allegation as to how [the defendants] engaged in the conspiracy, including what actions they took in furtherance of the conspiracy"). Indeed, it is hard to understand how there could have been a conspiracy between Shaper and [redacted] when Shaper left Speedcast in August 2020, without a MIP or a co-investment by Genesis Park, but [redacted] did not. Compl. ¶ 80.

86. The Conspiracy is also implausible on its face as all the complained-of actions are alleged to have been approved by the SRC, the members of which are *not* alleged to have been part of the conspiracy. *See* Compl. ¶¶ 126-134. Further, the Trustee does not allege any overt acts by Shaper or [redacted] in furtherance of the conspiracy (or otherwise) after August 28, 2020, so no damages could have been proximately caused by the conspiracy. *See* Section IV(3)(A), *supra*.

C. The Complaint's Allegations Regarding [redacted] Are Barred by the Confirmation of the Bankruptcy Plan.

87. Finally, the Trustee is barred from bringing claims against Shaper for [redacted] alleged breaches of fiduciary duties because the issue of [redacted] conduct was previously litigated in, and resolved by, this Court in the bankruptcy proceeding. In particular, the Court's previous findings that [redacted] acted with the utmost good faith and exercised reasonable business judgment in the bankruptcy proceeding bars the Trustee's current claims that he breached his duties of care or loyalty. *See*, *e.g., In re Xtreme Power Inc.*, 563 B.R. at 637 ("The duty of good faith exists as a subset of the larger duty of loyalty."); *Matter of Estate of Poe*, 591 S.W.3d at 639 ("[T]he duty of loyalty requires that that a director act in good faith and not allow his or her personal interests to prevail over the interests of the corporation."); *Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001) ("If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule operates to provide substantive protection for the directors and for the decisions that they have made."). All claims predicated on [redacted] alleged breaches of duties must be dismissed.

i. Relevant Prior Findings and Rulings of the Bankruptcy Court

88. In the underlying bankruptcy proceeding, Black Diamond made many of the same allegations that the Trustee makes here—namely, that:

- the Plans proposed by the SRC and Centerbridge undervalued the Bankruptcy Estate (*see* ECF 1047 at Objection I ("The Plan Impairs the Syndicated Facility Claims"));[8]
- Shaper and [redacted] breached their duties to the Debtor-in-Possession and were not entitled to releases (*id.* at Objection IV(C) ("The Debtors Have Not and Cannot Justify Their Release of Mr. Shaper and Mr. [redacted]"));
- the bidding process was structured unfairly as to Black Diamond (*id.* at Objection II(A) ("The Plan Effects a Sale of the Prepetition Collateral Without Affording the Prepetition Secured Parties the Right to Credit Bid")); and
- the Plan had not been proposed in "Good Faith" (*id.* at Objection VIII).

89. After multiple days of hotly contested hearings, the Court entered a Confirmation Order approving a Third Amended Bankruptcy Plan. The Court specifically found that:

- [redacted], as an officer and director of the Debtor, acted in the "utmost good faith" in "proposing the Plan, in litigating the Plan, and in entering into the settlement" (ECF 1407 (1/21/21 Hearing Tr.) at 38:19-24);
- the Debtors, including [redacted], proposed and negotiated the Plan in good faith (ECF 1397 (Order Confirming Plan) § AA);
- the Debtors, including [redacted], acted in good faith within the meaning of "Section 1125(e) of the Bankruptcy Code" as well as "in compliance with … any applicable non-bankruptcy law, rule or regulation" in connection with "the development of the Plan, all their respective activities relating to the solicitation of acceptances to the Plan and their participation in the activities described in Section 1125 of the Bankruptcy Code" (*id.* § RR);
- the Debtors—again including [redacted]—"exercised reasonable business judgment in determining to enter into each of the Plan Documents, and the terms and conditions of all such Plan Documents, including the fees, expenses, and other payments set forth herein" (*id.* § VV); and
- the Debtors—again including [redacted]—"have been and will be acting in good faith" if they "consummate the Plan" (*id.* § XX).

[8] Defendant Shaper only has access to the public version of this Motion. *See* ECF 1098. But even with the redactions, the substance of the Motion appears directly on point.

ii. The Trustee's Claims Are Barred by the Doctrine of Res Judicata.

90. Res judicata bars parties—and those in privity with them—from re-litigating claims that were subject to a previous final judgment on the merits. *Southmark Properties v. Charles House Corp*., 742 F.2d 862, 869 (5th Cir. 1984) (finding that stockholder who had "strong and direct pecuniary interest in the outcome of the reorganization proceedings" was bound and barred by res judicata from bringing claims inconsistent with the reorganization orders). The doctrine "bars all claims that were or *could had been* advanced in support of the cause of action on the occasion of its former adjudication, ... not merely those that were adjudicated." *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990) (emphasis original).

91. The Trustee's secondary liability claims are barred because they could have been, and were in fact, litigated in the underlying bankruptcy proceeding: the Court issued findings of fact that [redacted] acted in good faith and exercised reasonable business judgment, and the Trustee's secondary claims against Shaper now depend on finding that—to the contrary—[redacted] was not operating in good faith or exercising reasonable business judgment but was instead breaching his fiduciary duties. *Hotel Corp. of S. v. Rampart 920, Inc.*, 46 B.R. 758, 771 (E.D. La. 1985), *aff'd*, 781 F.2d 901 (5th Cir. 1986) (barring litigation of securities fraud claim because it contravened bankruptcy court's findings of good faith); *In re Pub. Serv. Co. of New Hampshire,* 148 B.R. 702, 720 (Bankr. D.N.H. 1992), *aff'd*, 848 F. Supp. 318 (D.R.I. 1994), *aff'd*, 43 F.3d 763 (1st Cir. 1995) (similar); *Nelson v. Emerson*, 2008 WL 1961150, at *7-*8 (Del. Ch. May 6, 2008) (barring creditor from bringing breach of fiduciary duty claim alleging directors paid themselves excessive compensation while Debtor was insolvent because it contravened the bankruptcy court's findings that defendants acted in good faith and had not mismanaged assets or business); *cf. In re Schepps Food Stores,* 160 B.R. 792, 799 (S.D. Tex. 1993) (claims by shareholders were barred because

creditors and equity holders had remedies for alleged breaches of fiduciary duty by director of Debtor-in-Possession that they did not utilize during confirmation process).

92. Furthermore, there is privity. First, the Trustee is in privity with Black Diamond, the holder of the beneficial interests of the Class 3 Trust. ECF 1397 at 85 (Plan § 4.3) (Centerbridge "disclaims and waives" any beneficial interest in the Trust, leaving Black Diamond in exclusive control). *See Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987) (participation in bankruptcy proceedings—even if not formally named as a party—is sufficient); *Southmark*, 742 F.2d at 869 (equity owner that "exercised substantial control over the litigation" was bound by reorganization orders); *Geary v. Tex. Commerce Bank*, 967 S.W.2d 836, 839 (Tex. 1998) (non-party co-obligor on debt could rely on res judicata effect of bankruptcy order confirming Chapter 11 plan). The Trustee is also subject to the control of Black Diamond: the only members of the Trustee's Litigation Oversight Committee are officers at Black Diamond. ECF 1397 at 189 (Ex. A to Class 3 Trust Agreement, listing Samuel Goldfarb and Ethan Auerbach as the two members of the Committee). Second, the Trustee is in is privity with the Debtor, as the Trustee stands in the shoes of the Debtor for purposes of bringing any causes of action against Shaper. *Cf. In re Collins*, 489 B.R. 917, 924 (Bankr. S.D. Ga. 2012) (Chapter 7 trustee was in privity with Debtor-in-Possession for purposes of adversarial proceeding).[9]

iii. The Trustee's Claims Are an Impermissible Collateral Attack on the Confirmation Order.

93. Additionally, the Confirmation Order is a considered a final judgment. *See Browning v. Prostok,* 165 S.W.3d 336, 346 (Tex. 2005). Attempting to avoid "the binding force

[9] If there were no privity, the Trustee's claims would still be barred under the doctrine of collateral estoppel, also known as claim preclusion, which does not does not require the same or similar parties to have participated in the prior proceeding. Rather, the elements are that (a) the issue at stake is identical; (b) the issue was litigated in the prior proceeding; and (c) the determination of the issue in the prior proceeding was necessary to the judgment. *United States v. MONKEY*, 725 F.2d 1007, 1010 (5th Cir. 1984).

of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief which the judgment currently stands against" constitutes an impermissible collateral attack. *Id.* at 346. The Trustee's claims against Shaper asserting liability for [redacted] alleged breaches of fiduciary duties—and the allegation that the Bankruptcy Estate was harmed because it would have received a larger recovery absent those breaches—represents just such a collateral attack on the Bankruptcy Court's findings regarding [redacted] good faith and exercise of reasonable business judgment.

V. CONCLUSION

94. For the reasons discussed above, Shaper respectfully requests that the Court (a) grant his motion pursuant to Rule 12(b)(6) and dismiss the Original Petition for failure to state a claim; and (b) grant any other and further relief to which he may otherwise be entitled.

Dated: February 14, 2022

Respectfully submitted,

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Certificate of Service

I hereby certify that copy of the foregoing has been served on all counsel of record on this date, in accordance with the Federal Rules of Civil Procedure.

/s/ Ayesha Najam
Ayesha Najam

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
SPEEDCAST INTERNATIONAL	§	
LIMITED, et. al.,	§	**CASE NO. 20-32243 (MI)**
	§	
Debtors.	§	**Chapter 11**
	§	
	§	**Jointly Administered**
	§	
CATHERINE E. YOUNGMAN, in her capacity as Class 3 Trustee for the Speedcast SFA Lenders' Litigation Trust,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**ADV. PRO. 22-03019**
PETER SHAPER,	§	
	§	
Defendant.		

ORDER

Pending before the Court is Defendant Peter Shaper's Motion to Dismiss Pursuant to Rule 12(b)(6) (the "Motion"). The Court, having considered Defendant's Motion, Plaintiff's Opposition thereto, and the Defendant's Reply in support, if any, finds that the Plaintiff has failed to state a claim in the Original Petition and that the Motion should be **GRANTED**.

All of Plaintiff's claims are hereby dismissed with prejudice, without leave to amend.

It is so ORDERED.

_____
Date

_____
THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE