Docket #0023 Date Filed: 4/18/2022

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

PLAINTIFF'S RESPONSE AND BRIEF IN OPPOSITION TO RULE 12(b)(6) MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

SUMMARY OF THE ARGUMENT[1]

Defendant Peter Shaper served as a Director and CEO of Speedcast International Limited ("**Speedcast**" or the "**Company**") in the lead up, and during, the Company's chapter 11 bankruptcy (the "**Bankruptcy**"). At all relevant times, Speedcast was hopelessly insolvent, and Shaper and his fellow fiduciaries had a duty to maximize the Company's value for all stakeholders. Instead, Shaper elevated his personal interests above Speedcast, doing everything in his power to ensure the Company would be sold on attractive terms to him and his own private-equity firm, Genesis Park, LLC ("**Genesis Park**") even if it meant a lower recovery. This Court oversaw the Bankruptcy and heard "extensive evidence" that Shaper "repeatedly breached his fiduciary duties[,] . . . put his personal interests ahead of the company's interests[,] and refused to give equal treatment to offers that were made that did not work to his personal benefit." The wrongful actions the Court observed included "refus[ing] to give equal treatment to offers [to acquire the Company] that did not work to [Shaper's] personal benefit" and "mak[ing] threats to the [C]ompany of actions that he would take" if Speedcast entertained such offers and failed to cede to his demands.

In his Motion to Dismiss ("**Motion**"), Shaper asserts that it is implausible that his actions harmed Speedcast or its creditors in any way. He also asserts affirmative defenses. Shaper's Motion should be denied because his extensive efforts to block competitive bidding and chase away other potential buyers demonstrably harmed Speedcast, and because his affirmative defenses

[1] On March 9, 2022, Plaintiff filed a Motion to Remand asking this Court to abstain from exercising subject matter jurisdiction and to remand this action to the 61st Judicial District of Harris County, Texas (the "**State Court**"). *See* Motion to Remand ("**Remand Motion**"), Dkt. No. 20. Plaintiff reserves all rights to arguments raised in the Remand Motion and respectfully submits that it should be granted and any dispositive motions reserved for the appropriate venue in the State Court. As stated in her February 21 Statement Regarding Consent, the Trustee does not consent to entry of final orders or judgment by the Bankruptcy Court. *See* Not. Consent Dkt. No. 13.

are expressly barred by the Joint Chapter 11 Plan (the "**Plan**")[2] and the Class 3 Trust Agreement approved in connection therewith (the "**Trust Agreement**").[3]

BACKGROUND

Shaper and [redacted] became Directors of Speedcast in September 2019. *See* Unredacted Original Petition ("**Pet.**"), Dkt. No. 3, ¶ 3. Thereafter, they led a successful campaign to oust the Company's existing executives. Shaper became Speedcast's CEO in March 2020, and [redacted] took the reigns as COO. *Id.* ¶¶ 4, 36. The men promised to use their positions to transform the struggling Company, but this was disrupted by their underlying objective of securing attractive investment opportunities for themselves and Genesis Park. *Id.* ¶¶ 8, 17. Both men had a significant interest in Genesis Park. *Id.* at ¶ 3.

After a failed equity raise and the onset of the COVID-19 pandemic, Speedcast filed for chapter 11 bankruptcy.[4] As officers and directors of Speedcast, Shaper and [redacted] had a duty to help the Company's Special Restructuring Committee of the Board (the "**SRC**") foster competition in the Bankruptcy process and maximize value for the Estate. *Id.* ¶ 49. Instead, the two men — in consultation with Paul Hobby, Shaper's co-founder and partner at Genesis Park — did everything in their power to seize the opportunity for the benefit of Shaper and Genesis Park, even though it meant Speedcast and its creditors (collectively, the "**Estate**") would suffer.

Less than a week after Speedcast's Bankruptcy filing, Shaper drafted a management incentive plan ("**MIP**") setting forth the benefits that Shaper and [redacted] would seek upon Speedcast's anticipated emergence. *Id.* ¶ 55. As the Bankruptcy unfolded in the summer of 2020,

---

[2] *In re Speedcast*, Order Approving Joint Ch. 11 Plan (Dkt. No. 1397) (Jan. 22, 2021) (the "**Order**") and Ex. A thereto (the "**Plan**").

[3] *See* Order Ex. B Plan Settlement Agreement, Ex. 5 Class 3 Trust Agreement.

[4] *In re: Speedcast Int'l Ltd.*, No. 20-32243 (Bankr. S.D. Tex. 2021).

the men became convinced that a New York-based private equity firm called Centerbridge would grant them the benefits they sought if it took control of Speedcast, including an investment opportunity for Genesis Park. *Id.* ¶ 56. Accordingly, they began a campaign to ensure that no entity other than Centerbridge would have a fair opportunity to invest in Speedcast. They also did everything they could to *lower* Speedcast's valuation, since a lower valuation meant greater upside for them and Genesis Park.

The one entity that most threatened Shaper and [redacted] plan was Black Diamond. As holder of more than 50% of the Company's outstanding secured debt, Black Diamond had a contractual right pursuant to Speedcast's Syndicated Facility Agreement (the "**SFA**") to direct the SFA Agent to "credit bid" for collateral up to the face amount of the Company's pre-petition outstanding debt of approximately $600 million. *Id.* ¶¶ 46, 57. Thus, Shaper and [redacted] stated goal was "to get the entire team behind us so [Black Diamond] has no options" to invest in Speedcast. *Id.* ¶ 61.

Initially, Shaper and [redacted] tried to scare off Black Diamond by proposing an MIP with "egregious" terms. *Id.* ¶¶ 62-65. Though the SRC refused to support the MIP at first, Shaper gained its support after he "blew up" at SRC Chairman Stephe Wilks. *Id.* ¶ 64. Chairman Wilks agreed to let Shaper work with Weil, Gotshal, & Manges LLP ("**Weil**") to prepare a company-promoted MIP. *Id.* ¶ 64. The resulting MIP included terms designed to be "obnoxious" to Black Diamond while Weil provided "the color" of their attempt to scare off Black Diamond with a nod and a wink that Speedcast would work with Centerbridge. *Id.* ¶¶ 66-67.

On August 6, 2020, Centerbridge sent the SRC a draft of a plan of reorganization it would sponsor. *Id.* ¶ 70. Shaper thought Centerbridge's initial valuation of Speedcast was "[m]uch too high," and urged Centerbridge to reduce it. *Id.* ¶ 71. He also got Chairman Wilks to agree that the

valuation needed to be lowered, and worked with the Company's financial advisor, Moelis & Company ("**Moelis**"), to reduce it. *Id.* Shaper's efforts were successful, and on August 12, Speedcast filed an initial "Equity Commitment Plan" from Centerbridge (the "**Initial ECA**") with an extremely low valuation for Speedcast. *Id.* ¶ 74.

The day after Speedcast filed the Initial ECA, Black Diamond sent the SRC a counter bid which provided three to four times more value for prepetition creditors than the Initial ECA. *Id.* ¶ 75. Black Diamond's bid, however, was conditioned on Speedcast holding a competitive process. *Id.* ¶ 75. Shaper then had a "big fight" with SRC members over the bid. *Id.* ¶ 76. The fight culminated in Shaper and [redacted] — with advice from Hobby — simultaneously tendering their resignations while offering to resume their positions if, by August 28, Speedcast adopted a reorganization plan that included management incentives and an "agreement with Genesis Park to invest in the emerged company with acceptable governance." *Id.* ¶ 78. The SRC did not agree to the conditions by August 28, and Shaper's resignation thus became effective. *Id.* ¶ 80. [redacted] however, agreed to resume his position on the condition that Speedcast would not hold a "full blown auction." *Id.* ¶ 80.

The lack of any process to evaluate and select from among competing bids for Speedcast left the SRC completely unable to maximize value and respond to competing bids, even after Shaper's resignation. Shaper's aversion to a fair process, and influence wielded with the SRC to that end, left the SRC flat-footed by a late-August offer from Black Diamond that could have provided over $900 million in value in exchange for the Company. *Id.* ¶ 85. Additional offers from Black Diamond in September 2020 were similarly squandered due to a lack of process. *Id.* ¶ 86.

Furthermore, despite Shaper's resignation, the SRC continued to implement strategies designed to ward off bids from Black Diamond. In October 2020, the SRC adopted selection

criteria which included a provision that this Court recognized was "directed at one and only one bidder in the whole world." *Id.* ¶ 87. The provision stripped Black Diamond of its contractual right to direct the SFA Agent to credit bid by expressing a preference for "all-cash" bids and requiring Black Diamond to "cash-out" secured lenders who did not wish to participate in a credit bid (*i.e.*, Centerbridge). *Id.* Even though all of Black Diamond's subsequent bids offered more value than Centerbridge's proposal, they were deemed "non-compliant" because they did not satisfy this provision. *Id.* ¶ 88. Shaper's plan to block Black Diamond from investing in Speedcast had succeeded.[5]

After a long confirmation hearing, at which this Court heard "extensive evidence" of Shaper's breaches of fiduciary duties, the Court approved the Plan and Plan Settlement Agreement. *See id.* ¶ 97; Order (Dkt. No. 1397) (Jan. 22, 2021). The Plan provided that Centerbridge would acquire the reorganized Speedcast upon its emergence from the Bankruptcy. Pet. ¶ 95. And although the Plan Settlement Agreement released claims against a broad swath of "Released Parties," the Estate's claims against Shaper were not released, and were instead categorized as Class 3 Trust Causes of Action subject to prosecution by the Class 3 Trustee (the "**Trustee**"). Further, this Court ordered that any potential litigation by the Trustee cannot be prejudiced in any way, including by any releases granted, and that the Trustee is free to raise any arguments as to whether any actions by the "Released Parties" were "inconsistent with those parties' applicable duties and obligations" in pursuing the claims against Shaper. *See* Order at 41-43; Plan at 4, 12-13, 15-16, 43-47.

[5] The Trustee believes that additional discovery will reveal, among other things, that Shaper anticipated returning to Speedcast after Centerbridge took ownership. If Shaper's Motion is granted, the Trustee respectfully requests the opportunity to amend its Petition to allege the facts underlying this belief.

Pursuant to this authority, the Trustee commenced this action in the 61st Judicial District of Harris County, Texas on January 7, 2022. In the Petition, the Trustee asserts causes of action under Texas state law against Shaper for: Shaper's breach of fiduciary duty; Shaper's knowing participation in breach of fiduciary duty by [redacted]; Shaper's aiding and abetting breach of fiduciary duty by [redacted]; and Shaper's conspiracy to breach fiduciary duties. *See* Pet. ¶¶ 98-134. The Petition seeks damages and equitable relief, including disgorgement of any improper benefits and salary. *Id.* ¶ 138. The Trustee's Petition included a jury demand. *Id.*

Shaper removed the Petition to this Court pursuant to 28 U.S.C. § 1452(a). *See* Not. Removal, Dkt. No. 1, at 1. Shaper then filed the instant Rule 12(b)(6) motion to dismiss on February 14. *See* Mot. to Dismiss, Dkt. No. 8. On March 9, the Trustee filed a motion to remand under 28 U.S.C. § 1452(b) and 28 U.S.C. § 1334(c). *See* Mot. to Remand, Dkt. No. 20. The Court is set to hear the Trustee's motion to remand on May 9, together with Shaper's motion to dismiss. *See* Scheduling Order, Dkt. No. 16 at 2.

ARGUMENT

To withstand a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570, 127 S.Ct. 1955 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009). The question for the court is not whether the plaintiff is likely to succeed, but only whether there is "more than a sheer possibility that [the] defendant has acted unlawfully." *Id.*; *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). The court must accept all well-pleaded facts in the complaint as true, viewing them in the light most favorable to the plaintiff and resolving all reasonable inferences in the plaintiff's favor. *Sonnier v. State Farm Mut. Auto Ins. Co.*, 509

F.3d 673, 675 (5th Cir. 2007); *Tuchman v. DSC Comms. Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). A Rule 12(b)(6) motion to dismiss cannot be granted based on an affirmative defense unless the "defense appears on the face of the pleadings." *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 726 (5th Cir. 2013) (quotes omitted).

Shaper's Motion to Dismiss should be denied because (1) the Petition states a claim for breach of fiduciary duty; (2) the Petition plausibly alleges Shaper's secondary liability for [redacted] breaches of fiduciary duty; (3) and Shaper's affirmative defenses are barred by the Plan and Trust Agreement and meritless in any event.

I. THE PETITION STATES A CLAIM FOR BREACH OF FIDUCIARY DUTY

Under Texas law, the elements of a claim for breach of fiduciary duty are: "(1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages." *First United Pentecostal v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). Shaper does not dispute that he owed fiduciary duties to the Estate, but argues the Trustee has not plausibly alleged breach, causation, and damages. Mot. to Dismiss ¶ 10. Shaper's arguments are based on an erroneous view of applicable pleading standards and should be rejected.

A. The Petition Plausibly Alleges Damages

The essence of Shaper's damages argument is that it is implausible that he caused harm to the Estate because he resigned in August 2020, and the SRC's management after that point is also alleged to have harmed the Estate. *See Id.* ¶¶ 38-40. But there is nothing implausible about the Trustee's allegations that Shaper's damage to the bankruptcy process continued after his resignation. Indeed, the Court recognized this possibility when it expressed concern that the whole process had been "colored by the early summer activity" — that is, Shaper and [redacted] conduct — "where I think people would have gotten the wrong message" about the SRC's willingness and ability to run a fair process. Pet. ¶ 91; Dec. 29, 2020 Confirmation Hr'g Tr. at 150:7-9. Shaper's

actions poisoned the process, and as the Court recognized, the SRC could not remove the poison unless it sent a clear signal that it was now committed to a fair bidding process:

> What gets communicated that says the committee has turned a new leaf? It's really taking charge now, even though it was supposed to have taken charge before? How does — was that communicated to anyone?

Pet. ¶ 89; Dec. 29, 2020 Confirmation Hr'g Tr. at 100:22-25.

Unfortunately, the SRC never sent that signal, so the process was never cured of Shaper's damaging actions. But Shaper cannot deflect responsibility for harm that he set in motion by noting that the SRC did not do enough to prevent the harm. Like a railroad switch operator who starts a train down the wrong track, Shaper is responsible for harm he sets in motion even if the conductor fails to engage the brakes in time.

Shaper acknowledges that the "claims related to [his] 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." Mot. to Dismiss at ¶41. But he nonetheless asserts that those claims were effectively neutered by the Court's findings that the SRC acted in good faith and exercised reasonable business judgment. *Id.* "These findings are irreconcilable," he says, "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." *Id.*

But as explained more fully in Part III.C, *infra*, Shaper can find no refuge in the Court's findings of fact. Paragraph Z(4) of the Order states that the Court's findings of fact and conclusions of law "shall not preclude or impair ***in any way*** (whether pursuant to the doctrines of claim preclusion, res judicata, law of the case, or otherwise) any claims or Causes of Action against Mr. Shaper that are preserved by the Plan and this Confirmation Order." Order at 15 (emph. added).

In attacking the Trustee's allegations that Shaper wasted the Estate by deploying professionals in furtherance of his self-dealing, Shaper applies a standard fitting for a trial on the

merits, but not for a motion to dismiss. Shaper notes that the Trustee has not yet parsed the professional expenses incurred as a result of Shaper's breaches from those incurred in the ordinary course of the bankruptcy. Mot. to Dismiss ¶ 42. But the Trustee need not plead damages at a granular level to overcome a motion to dismiss; all she needs to do is plausibly allege that Shaper harmed the Estate. *See Bennett v. Spear*, 520 U.S. 154, 168, 117 S. Ct. 1154, 1164 (1997) ("[W]hile a plaintiff must 'set forth' by affidavit or other evidence 'specific facts' to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (cite and quotes omitted) (alterations adopted); *Everco Indus., Inc. v. O. E. M. Prod. Co.*, 63 F.R.D. 662, 666 (N.D. Ill. 1974) ("While damages may not be determined by mere speculation or guess, it will be sufficient for a plaintiff or counter-plaintiff in the statement of the claim to merely state the nature of damages and allow the damage issue to be further delineated by pre-trial discovery."). The Trustee's allegations that Shaper worked with Weil to develop a management incentive plan specifically designed to ward off bids from Black Diamond is more than sufficient. Pet. at ¶¶ 64-67. As is the allegation that Shaper worked with Moelis to lower Speedcast's valuation. *Id.* ¶ 71.[6]

B. The Petition Plausibly Alleges Causation

Shaper seeks exoneration based on three arguments: (1) the SRC had formal control "over the process for setting standards and reviewing bids"; (2) bidding by Centerbridge and Black Diamond "continued long after [Shaper] left"; and (3) "the Court gave Black Diamond an

[6] Shaper again seeks shelter in the Court's findings of fact, alleging that "th[e] theory [of damages based on professional expenses] is [] inconsistent with findings this Court has already made." Mot to Dismiss at ¶ 43. But as mentioned, Shaper cannot defend himself with the Court's findings "in any way." Order at 15.

opportunity to match or exceed Centerbridge's bid, and it declined to do so." Mot. to Dismiss ¶ 45. Shaper claims these facts "make[] it implausible that [he] could have caused harm to the Estate." *Id.* ¶ 46. Not so.

While the SRC exercised formal control over the Bankruptcy, the Petition plausibly alleges that Shaper not only used his standing as Director and CEO to manipulate the SRC's exercise of that control, but also directly adversely influenced Speedcast's recovery in several ways:

- When the SRC refused to support the MIP Shaper drafted, he "blew up" at Chairman Wilks. Pet. ¶¶ 63-64. Wilks relented and agreed to let Shaper work with Weil to "prepare a company promoted MIP." *Id.* ¶ 64. The resulting MIP, of course, was designed with terms "egregious" to Black Diamond. *Id.* ¶ 67.

- Shaper urged Centerbridge to reduce its valuation of Speedcast so that Genesis Park could secure a better price. *Id.* ¶ 71. Shaper convinced Chairman Wilks that Speedcast's valuation needed to be lowered. *Id.*

- Shaper negotiated directly with Centerbridge to secure favorable governance rights for Genesis Park under a draft reorganization plan. *Id.* ¶ 72.

- Shaper had a "big fight" with the SRC members during an SRC meeting, which culminated in Shaper threatening to resign if Speedcast did not adopt a reorganization plan with favorable terms to Genesis Park. *Id.* ¶¶ 76, 78.

Shaper cannot plausibly diminish his active role in disrupting the Bankruptcy by arguing that it was the SRC, rather than himself, who had formal decision-making authority.

Nor does Shaper's August 28, 2020 resignation render the Trustee's causation allegations implausible. Shaper took numerous actions between the time he served as Director and CEO and his August resignation that were designed to have him personally profit in a manner that was detrimental to maximizing the overall value of the Estate. Once Shaper resigned, it was not as simple as flipping a switch to set the Bankruptcy back on the right track. Every signal to Black Diamond and other creditors was that Speedcast was not interested in a fair bidding process. *See* p.7-8, *supra*. And by the time the Court decided to give Black Diamond and others "a real, full, fair opportunity" to acquire Speedcast by halting the confirmation hearing, it was too late. *Id.* ¶

92-93. Shaper's efforts had frozen Black Diamond out during a critical window. At this time, Speedcast was suffering from a protracted Bankruptcy, its projections were dwindling, and its professional fees had increased tremendously. As such, Black Diamond was no longer in a position to bid. *Id.* ¶¶ 93-94.

C. The Petition Plausibly Alleges Breach

Directors of a debtor-in-possession owe the same fiduciary duties as a trustee in bankruptcy. *Nat'l Convenience Stores, Inc. v. Shields (In re Schepps Food Stores, Inc.)*, 160 B.R. 792, 797-98 (Bankr. S.D. Tex. 1993). The duty of loyalty binds directors to an "extreme measure of candor, unselfishness, and good faith, particularly where there is an interested transaction." *In re Performance Nutrition, Inc.*, 239 B.R. 93, 110 (Bankr. N.D. Tex. 1999) (quotes omitted) (citing *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963)). A director must never allow "his personal interests to prevail over the interests of the corporations." *Id.* "Even where a corporate transaction in which an officer or director is interested turns out to be profitable for the corporation, the form of the transaction will give way to the substance of what has actually occurred." *Id.* A director is also obligated by the duty of care to "minimize[e] operating costs" and "maximiz[e] the value of the corporate assets" *In re Gen. Homes Corp.*, 199 B.R. 148, 151 (S.D. Tex. 1996). The director is liable for loss suffered by the corporation as a result of his negligent mismanagement. *In re Performance Nutrition, Inc.*, 239 B.R. at 111.

The Petition alleges Shaper breached his fiduciary duties by placing his own interests before Speedcast's and incurring needless professional expenses. Pet. ¶ 101. Among other things, Shaper (1) attempted to orchestrate a low-ball "stalking horse" bid for Genesis Park to buy Speedcast for less than its value, *id.* ¶¶ 51-52; (2) crafted an MIP designed to enrich himself while scaring off competitive bids from entities like Black Diamond, *id.* ¶¶ 55, 61-62, 65-66; (3) used Speedcast's restructuring professionals to carry out his personal agenda, *id.* ¶¶ 64-66, 101; (4)

urged Centerbridge to reduce its valuation of Speedcast even though it would result in a lower recovery to Speedcast's creditors, *id.* ¶¶ 71; and (5) leveraged resignation to thwart a competitive bidding process, *id.* ¶¶ 75-76, 78, 80. These allegations are more than sufficient to withstand a motion to dismiss.

In *In re Performance Nutrition, Inc.*, the officer of a debtor-in-possession breached his fiduciary duties in substantially the same way as Shaper. 239 B.R. 93, 112 (Bankr. N.D. Tex. 1999). The officer brought the company into bankruptcy intending for the company's assets to be sold to an entity that had promised him a management position, stock options, and other incentives. The officer made no attempt to sell the company's assets to any other entity or to obtain a valuation of the assets. The Court held that the officer's failure to make "deliberate, exhaustive efforts to find [other] potential bidders and/or buyers" was a breach of the duty of loyalty:

> [The officer] was not acting in the best interest of [the company] when he did not obtain a valuation of [the company]'s assets, when he failed to shop [the company]'s assets in the open [] market in order to locate [other] possible willing buyers, and when he failed to set up a procedure whereby competing bids for [the company]'s assets could be offered and considered.

Id. at 111.

The officer was also held to have breached the duty of care by failing to "diligently market" the company's assets, by using corporate funds for "personal expenses and other unnecessary expenses," and by "squandering corporate assets on the payment of attorneys fees and settlement claims" instead of using the funds to revive the corporation in bankruptcy. *Id.* at 110-111. *In re Performance Nutrition, Inc.* establishes that an officer or director of a debtor-in-possession breaches his fiduciary duties when — in service of his own self-interest — he flouts his obligations to maximize the company's value and reasonably manage its assets.

Shaper advances three general arguments in support of his position that the Petition's allegations do not plausibly allege the *breach* element of a breach of fiduciary duty claim. *First*,

he asserts that the Petition alleges only *attempted* breaches. *Second*, he strips his actions of context and says that, when considered in the abstract, they do not amount to breaches of fiduciary duty. *Third*, he attempts to shift blame onto the SRC. Each argument is without merit.

Shaper says the Petition's allegations do not amount to a breach of fiduciary duty as a matter of law because his ultimate goal — Genesis Park's investment in Speedcast — never came to fruition. Mot. to Dismiss ¶ 52. But the fact that Shaper did not achieve his ultimate goal is immaterial; he committed several standalone breaches of fiduciary duty along the way. It would be a perverse result if a corrupt fiduciary's failure to achieve every aspect of his illegal plan absolved him of liability.

Shaper cites several cases for the proposition that there is no cause of action for attempted breach of fiduciary duty, but those cases are inapposite. *Santarelli & Gimer v. Atida Karr Enterprises, Inc.*, for instance, involved a claim for recovery of unpaid legal fees. 1987 WL 8720, at *2 (D.D.C. Mar. 13, 1987). The defendant counterclaimed that the plaintiff law firm breached its fiduciary duties by misallocating the fees. But since the defendant never paid the fees, the court held it had suffered no damages — "Defendant cannot claim attempted breach of fiduciary duty because there is no such cause of action." *Id.* at *2. Likewise, in *Niehenke v. Right O Way Transportation, Inc.*, the claim was that an officer breached his fiduciary duties by ordering a subordinate to sabotage computer equipment. 1996 WL 74724, at *2 (Del. Ch. Feb. 13, 1996). But since the subordinate did not follow the order, the court held there had been no breach: "[T]he 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." *Id.*

This case is different from *Santarelli* and *Niehenke* in that Shaper achieved several of his illicit goals, including depressing Speedcast's valuation and thwarting a true competitive bidding

process. The Trustee has not pled any "attempted" breaches of fiduciary duty by Shaper. And the claims at issue here easily pass *Niehenke's* "palpable effect" test — Shaper's actions had a direct and substantial effect on the SRC and the Bankruptcy. For example, he successfully leveraged threats against SRC member Carol Flaton to dissuade her from encouraging bidding between Centerbridge and Black Diamond. Pet. ¶ 60. And he developed a strategy — which was then successfully implemented — to freeze Black Diamond out of bidding. *Id.* ¶¶ 61-67. Shaper cannot avoid liability for these actions simply because they were not ultimately as self-enriching as he had intended.

Next, Shaper isolates several of his actions from their contexts and notes that, considered in the abstract, the actions do not constitute breaches of fiduciary duty. For instance, he says his negotiation of the MIP could not have been a breach because "it is routine for Debtors to emerge from bankruptcy with a MIP in place." Mot. to Dismiss ¶ 57. But whether a given action constitutes a breach of fiduciary duty is not determined by stripping the action from its motivation and consequences and asking whether, in the abstract, the action is legal. *See Sapienza v. Trahan*, 2019 WL 1246540, at *11 (W.D. La. Mar. 18, 2019) (considering the "totality of the circumstances" in assessing whether breach of fiduciary duty has occurred). Shaper's breach does not consist of negotiating a MIP; it consists of designing a MIP meant to cripple Speedcast's ability to attract competitive bids and maximize the Company's value.

Shaper also says he cannot have breached his fiduciary duties because he was permitted to favor one creditor's proposal over another. Mot. to Dismiss ¶ 59. In other words, Shaper's argument is that he was allowed to suppress competitive bidding in an effort to steer the bankruptcy toward a self-dealing purchase. This argument is squarely at odds with the well-established duty of a director to place the company's interests before his own. Unsurprisingly, none of the cases

Shaper cites actually support this position. For instance, *Kaye v. Lone Star Fund V (U.S.), L.P.*, holds that "a transaction that benefits one creditor to the detriment of another, but does not diminish the value of the company as a whole, does not give rise to a claim for breach of fiduciary duty." 453 B.R. 645, 676 (N.D. Tex. 2011) (emph. added). Here, the Trustee alleges that Shaper's actions did, in fact, diminish Speedcast's value. See Pet. ¶¶ 71, 74-76, 83-89, 94, 101-102, 104, 110-111, 118, 122, 131-132.

Next, Shaper argues that his threat to resign, and his actual resignation, cannot constitute breaches of fiduciary duty because "[a] director or officer of a corporation may ordinarily resign at any time." Mot. to Dismiss ¶ 64. But just because an at-will officer is not bound to remain employed does not mean he can leverage the threat of resignation to force his company into a transaction that is good for the officer and bad for the company. "[U]nder Texas law, courts weigh the substance of the officers' conduct more heavily than the form of the device used." *In re Gen. Homes Corp.*, 199 B.R. 148, 151 (S.D. Tex. 1996). And it is axiomatic that legal means may not be used to accomplish an illegal objective. *See State of Ga. v. Penn. R. Co.*, 324 U.S. 439, 459, 65 S.Ct. 716, 727 (1945).

Once again, none of the cases Shaper cites supports his position. Shaper argues that courts have rejected fiduciary breach claims "based on allegations like those here," and cites *Lazard Debt Recovery GP, LLC. v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004). But *Lazard* bears no resemblance to the allegations at issue in this case. In *Lazard*, two partners of an investment fund were alleged to have breached their fiduciary duties to the remaining partners by leaving without prior notice. *Id.* at 965. In rejecting the claim, the court found that:

> [T]he complaint does not allege that there was anything special about February 28, 2002 that made Weinstock and Herenstein's departure that particular day a breach of fiduciary duty. It is not alleged that some particular investment opportunity was then pending that was lost or that turned bad as a result of their hasty departure.

> Rather, it is the mere fact that they left their jobs without giving prior notice that eventuated the damage that the plaintiffs claim to have suffered. . . . [N]othing in the complaint indicates that they departed in the middle of a particularly important trading day or that the same harm would not have eventuated had Weinstock and Herenstein given, say, two weeks' notice.

Id. at 966-68. In short, the plaintiffs were trying to turn an ordinary resignation into a claim for breach of fiduciary duty. The court observed that such a cause of action would lead to a strange result:

> [U]nder the plaintiffs' theory, if Weinstock or Herenstein decided on a Sunday evening that the fast-paced world of investment management was no longer for them and that a permanent home in the Bahamas sounded much more appealing, they would breach their fiduciary duties if they simply showed up on Monday and gave two weeks' notice—even though no contract prevented them from doing so.

Id. at 968.

In stark contrast to the partners in *Lazard*, who departed on an ordinary day simply for "greener pastures," Shaper tendered his resignation in the midst of bankruptcy as a clear threat to induce the SRC to adopt a reorganization plan that would essentially ratify his self-dealing. Pet. ¶ 78. As this Court has already recognized, Shaper was impermissibly leveraging resignation as a ransom letter to "demand things for [his] personal benefit at the expense of the corporation." *Id.* ¶ 82. Under these facts, Shaper cannot escape liability for this breach of fiduciary duty by simply relying on the notion that he was an at-will employee.

Shaper's strategy to scapegoat the SRC is also, once again, unavailing. Shaper persists that since the SRC had formal decision-making authority over the Bankruptcy, his actions could not have amounted to a breach of fiduciary duty. *See* Mot. to Dismiss ¶¶ 60-61. But as explained *supra* at p.10, the Petition plausibly alleges not only that Shaper manipulated the SRC into serving his agenda, but also that he exerted a direct influence on the Bankruptcy. Shaper cannot avoid liability for his breaches of fiduciary duty simply because he was not a member of the SRC.

Finally, Shaper alleges that the SRC "favored Centerbridge because it was Centerbridge, not Black Diamond, whose proposal represented the highest value for the Estate." *Id.* ¶ 62. But it is the allegations in the Petition, not the allegations in Shaper's Motion, that must be taken as true. *See Ferguson v. Dunn*, 2017 WL 3033337, at *4, n.6 (E.D. Tex. May 19, 2017), *report and recommendation adopted,* 2017 WL 3020929 (E.D. Tex. July 17, 2017); *Ne. Series of Lockton Companies, LLC v. Bachrach*, 2012 WL 3041639, at *2 (N.D. Ill. July 24, 2012) (motion to dismiss cannot contradict allegations in complaint "because this raises an issue of fact that cannot be determined at the motion to dismiss stage"). For the purpose of ruling on Shaper's Motion to Dismiss, the Court must accept as true that Black Diamond's bids presented more value to Speedcast and its creditors. *See* Pet. ¶¶ 85-86, 88.

II. THE PETITION PLAUSIBLY ALLEGES SHAPER'S SECONDARY LIABILITY

A. The Petition States a Claim for Knowing Participation and Aiding and Abetting

A defendant can be liable for a third party's breach of fiduciary duty when he knowingly participates in the breach. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). The elements of a claim for knowing participation in a breach of fiduciary duty are (1) the existence of a fiduciary relationship; (2) the defendant knew of the fiduciary relationship; and (3) the defendant was aware that it was participating in the breach of that fiduciary relationship. *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007).

A defendant is liable for aiding and abetting a breach of fiduciary duty when (1) the primary tort-feasor committed a breach of fiduciary duty; (2) the defendant knew of the breach of fiduciary

duty; and (3) the defendant substantially assisted or encouraged the breach of fiduciary duty. *See In re Houston Reg'l Sports Network, L.P.*, 547 B.R. 717, 759 (Bankr. S.D. Tex. 2016).[7]

Shaper argues the Petition fails to state a claim for knowing participation in a breach of fiduciary duty and aiding and abetting a breach of fiduciary duty because the allegations are insufficient as to [redacted] breaches of fiduciary duties and Shaper's knowing participation in those breaches. Mot. to Dismiss ¶ 79. Shaper is wrong on both counts.

The petition clearly alleges independent breaches of fiduciary duties by [redacted]. Among other things, it alleges that [redacted] (1) negotiated a MIP designed to benefit himself to the detriment of the Estate, Pet. ¶ 66; (2) leveraged resignation to induce the SRC to suppress competitive bidding, *id.* ¶¶ 78-80; and (3) used Speedcast's restructuring professionals to further his personal agenda, *id.* ¶¶ 65. And the Petition further alleges Shaper "knowingly participated in" and substantially assisted [redacted] breaches by, among other things, leveraging his resignation together with [redacted] and working with [redacted] to add terms to the MIP that would discourage

[7] This Court has routinely held that Texas law recognizes a cause of action for aiding and abetting breach of fiduciary duty. *See In re Houston Reg'l Sports Network, L.P.*, 547 B.R. at 759; *In re Today's Destiny, Inc.,* 388 B.R. 737, 750 (Bankr. S.D. Tex. 2008). Shaper asks the Court to revisit these holdings in the light of two Texas court of appeals' decisions questioning the existence of a common law cause of action for aiding and abetting. *See 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, pet. denied), *reh'g denied,* (Dec. 28, 2018). But the majority of Texas intermediate courts recognize aiding and abetting, and there is no reason for the Court to depart from its previous holdings. *See, e.g.*, *Baylor Scott & White v. Project Rose MSO, LLC*, 633 S.W.3d 263, 284 (Tex.App.—Tyler 2021, pet. filed); *Sw. Tex. Pathology Assocs., L.L.P. v. Roosth*, 27 S.W.3d 204, 208 (Tex.App.—San Antonio 2000, pet. dism'd); *Hendricks v. Thornton*, 973 S.W.2d 348, 372 (Tex.App.—Beaumont 1998, pet. denied); *Toles v. Toles*, 113 S.W.3d 899, 917 (Tex.App.—Dallas 2003, no pet.), *abrogated on other grounds by Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015); *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex.App.—Dallas 2011, no pet.); *Petrobras Am., Inc. v. Astra Oil Trading NV*, 633 S.W.3d 606, 621-22 (Tex.App.—Houston [14th Dist.] 2020, pet. granted). To the extent Shaper contends that questions of Texas state law need to be revisited, this is among many reasons why the Trustee's pending Remand Motion should be granted.

competitive bids from Black Diamond. *Id.* ¶ 65-66, 78-80. Finally, the Petition plausibly alleges that [redacted] primary breaches — and Shaper's substantial assistance — harmed the Estate. *See id.* ¶ 118(h) ("[redacted] breaches of his fiduciary duties proximately caused injury to Speedcast and its creditors, including resulting in a depressed recovery and the incurrence of tens of millions in wasteful professional expenses.").

These allegations are sufficient, and none of the cases Shaper cites show otherwise. In *Continuing Creditors' Committee of Star Telecommunications, Inc. v. Edgecomb*, for instance, the court held the complaint failed to state a claim against a corporate officer because the officer was mentioned only twice in the entire complaint, and only to say that he "assisted" in a challenged transaction. 385 F. Supp. 2d 449, 466 (D. Del. 2004). [redacted] name, by contrast, is mentioned 113 times in the Trustee's Petition. The two other cases Shaper cites are summary judgment cases that do not support Shaper's position in any way.[8]

B. The Petition States a Claim for Civil Conspiracy

The elements of a civil conspiracy claim 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.

[8] In *First United Pentecostal Church of Beaumont v. Parker*, the Supreme Court held that the plaintiff had not pleaded aiding and abetting at all under fair-notice pleading requirements when the words "aiding and abetting" did not appear in the complaint. 514 S.W.3d at 224. Even assuming the claim was pleaded, the Court held that the claim had been properly dismissed on summary judgment because there was "no evidence" the defendant "assisted or encouraged" the primary breach. *Id.* at 225. In *Immobiliere Jeuness Establissement v. Amegy Bank National Association*, the court affirmed entry of summary judgment against plaintiff's aiding and abetting claims because the alleged harm was "simply too attenuated from the alleged aiding and abetting conduct and insufficiently foreseeable for liability to follow." 525 S.W.3d 875, 883 (Tex.App.—Houston [14th Dist.] 2017, no pet.). These cases shed no light on the requisite specificity for pleading an aiding and abetting claim, and certainly do not support Shaper's contention that the Petition fails to meet that standard.

Shaper argues the Petition does not adequately allege a meeting of the minds to breach [redacted] fiduciary duties or favor acquisition by Centerbridge over Black Diamond. Mot. to Dismiss ¶ 85. Shaper is mistaken. The Petition alleges:

> Defendant and Co-Conspirators had a meeting of the minds and agreed to exert power and influence in the bidding process for the Company to favor acquisition by Centerbridge over Black Diamond or any other competing bidders for the Company, which was a violation of Shaper's and [redacted] fiduciary duties to the Estate. [Pet. ¶ 128].

The Petition further alleges:

> Defendant and Co-Conspirators engaged in a conspiracy to harm the Estate and to benefit themselves at the Estate's expense. Defendant and Co-Conspirators had a meeting of the minds and took one or more overt acts toward accomplishing their wrongful goals, which include, but are not limited to, breach of fiduciary duties and knowing participation in breach of fiduciary duties. [*Id.* ¶ 132].

"Proof of a civil conspiracy may be, and usually must be made by circumstantial evidence[.]" *Echols v. Austron, Inc.*, 529 S.W.2d 840, 844 (Tex.App.—Austin 1975, writ ref'd n.r.e.). In determining whether circumstantial evidence is sufficient to show a conspiracy, courts ask whether the circumstances are equally consistent with conspiracy as with independent, legal actions. *See id.; Murex, LLC v. GRC Fuels, Inc.*, 2016 WL 4207994, at *10 (N.D. Tex. Aug. 10, 2016).

Here, the allegations throughout the Petition leave no doubt that Shaper, [redacted], Genesis Park, and Hobby were acting together to achieve an agreed illegal purpose. For instance, when Shaper learned that the SRC was attempting to "bump [Speedcast's] valuation up," he told [redacted] "we may need to figure out a way to nudge this." Pet. ¶ 60. Shaper and [redacted] also conferred on strategy to freeze Black Diamond out of the bidding:

> "[W]hile … we don't personally have any problem telling BD," Shaper explained to [redacted], "if we side with one party, then we are biased and off the restructuring committee and possibly the board when decisions come up. They require us to stay neutral."

Id. ¶ 61. And while negotiating the MIP, [redacted] texted Shaper:

> "Let's think about what else we can throw into this term sheet. Seems like now is the time to ask for whatever we want!" Shaper responded: "Yes. Can even throw in some egregious items that might scare one player off?"

Id. ¶ 65. Shaper and [redacted] then worked together to draft a MIP that "increased both of their salaries and the amount of equity they would receive in a reorganized entity." *Id.* ¶ 66. And of course, the two wound up tendering simultaneous resignations with identical conditions. *Id.* ¶ 78. These allegations leave no room for an inference that Shaper and [redacted] were acting independently. *Cf. Murex, LLC.*, 2016 WL 4207994 at *10 (dismissing civil conspiracy claim because "Murex's factual allegations lead to the equal inference of independent commercial actors doing business together through an arms-length relationship"). Their alleged communications reflect explicit agreements, and they unmistakably acted in concert with respect to the MIP and resignations.

The Petition also adequately alleges a meeting of the minds between Shaper and Hobby:

> Shaper and Hobby agreed that finding an opportunity for Genesis Park to invest was a condition for Shaper to remain at the Company. Hobby emphasized this in an email to Shaper encouraging him to become Speedcast's CEO: "you are the right guy – you want to – good current comp at the time you need it…all that assuming there is a security we can invest in!"

Pet. ¶ 37.

Nonetheless, Shaper says the Petition fails to state a conspiracy claim because "there are no allegations regarding the terms of any agreement between [the co-conspirators], when such an agreement was formed, or what the specific purposes of such an agreement were." Mot. to Dismiss ¶ 85. However, all three cases Shaper cites involved claims for conspiracy to defraud and were thus subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Furthermore, the allegations in each case were equally consistent with independent action as with conspiracy. In *Murex*, the allegations were of "independent actions" only. *Murex, LLC*, 2016 WL

4207994, at *10. In *Schroeder*, the plaintiff alleged merely that the defendants "worked toward a common goal," while conceding that they did not "develop a uniform plan." *Schroeder v. Wildenthal*, 2011 WL 6029727, at *7 (N.D. Tex. Nov. 30, 2011), *aff'd,* 515 F. App'x 294 (5th Cir. 2013). And in *Adam Offshore Ltd. v. OSA International, LLC*, the court held the allegations "lack the particularity required by Rule 9(b)" when the complaint merely recited the elements of conspiracy without alleging how the defendants "engaged in the conspiracy, including what actions they took in furtherance of the conspiracy." 2011 WL 4625371, at *7-8 (S.D. Tex. Sept. 30, 2011).

The Petition here, by contrast, alleges specific communications between Shaper, [redacted], and Hobby showing a meeting of the minds, as well as concerted actions unmistakably carrying out the conspiracy. This is more than sufficient to withstand a motion to dismiss.

III. SHAPER'S AFFIRMATIVE DEFENSES ARE BARRED AND MERITLESS

A. Neither Section 21.418 Nor the Business Judgment Rule Apply

Shaper argues that every alleged wrongdoing was either carried out or approved by the SRC, and that the Trustee's claims are therefore barred either by the business judgment rule or Texas Business Organization Code § 21.418. Mot. to Dismiss ¶¶ 68-73. Shaper mischaracterizes the allegations in the Petition and does not explain how these affirmative defenses apply.

As an initial matter, the Petition alleges independent wrongdoing on the part of Shaper. It was Shaper, and not the SRC, who crafted a MIP meant to depress Speedcast's valuation and deter competitive bidding; it was Shaper who ransomed the SRC with his conditional resignation; and it was Shaper's pursuit of his personal agenda that caused professional restructuring fees to skyrocket. *Id.* ¶¶ 55, 61-66, 75-76, 78, 80, 101. The business judgment rule does not apply to these actions since Shaper acted with self-interest. *See In re Performance Nutrition, Inc.*, 239 B.R. at 111 ("Because Roth acted with self-interest, he may not enjoy the protection of the business

judgment rule."); *In re Gen. Homes Corp.*, 199 B.R. 148, 151 (S.D. Tex. 1996). Further, the business judgment rule may "be wholly inapplicable in a case where the corporation is insolvent." *In re Performance Nutrition, Inc.*, 239 B.R. at 111 (citing *Unsecured Creditors Comm. v. General Homes Corp. (In re General Homes Corp.)*, 199 B.R. 148, 151-52 (S.D. Tex. 1996)).

Nor were Shaper's actions somehow cleansed by any of the SRC's actions, including the fact that the SRC was pressured into backing the MIP or that it "allowed Shaper's resignation to become effective." Mot. to Dismiss ¶ 72. Shaper simply cites § 21.418 without explaining how it is applicable. Since Shaper's contemplated deal between Speedcast and Genesis Park never came to fruition, there was no "transaction between a corporation and . . . an entity or other organization in which one or more directors or officers . . . of the corporation . . . is a managerial official [or] has a financial interest." § 21.418(a). Nor does the Petition allege that any of the statutory conditions necessary to cleanse a self-dealing transaction were satisfied—it does not allege that Speedcast's board of directors or shareholders knowingly authorized Shaper to pursue a self-interested transaction, nor that the transaction was "fair to the corporation." § 24.418(b); *see Miller*, 726 F.3d at 726 (a Rule 12(b)(6) motion to dismiss cannot be granted based on an affirmative defense unless the "defense appears on the face of the pleadings" (quotes omitted)). Thus, § 21.418 is inapplicable.

B. Shaper's Res Judicata Defense Is Barred

Shaper argues that "[a]ll claims predicated on [redacted] alleged breaches of duties must be dismissed" because "the issue of [redacted] conduct was previously litigated in, and resolved by, this Court in the bankruptcy proceeding." Mot. to Dismiss ¶ 87. Shaper relies on the doctrines of res judicata, collateral estoppel, and the rule against collateral attacks. None applies here.

As part of the Plan, the Debtors released the "Released Parties"[9] from "any and all claims, interests, obligations, suits, judgments, damages, demands, debts, rights, and causes of action, losses, remedies, or liabilities whatsoever[.]" Plan at 63-64. But Shaper was expressly carved out from the "Released Parties." *See id.* at 12-13. Further, the Plan expressly preserved "any and all Claims and Causes of Actions by or on behalf of any Debtor or Debtor's Estate against Peter J. Shaper of any nature or kind whatsoever . . . including Claims and Causes of Action based upon . . . breach of fiduciary duty[.]" *Id.* at 4, 12-13. These causes of action were defined as the "Class 3 Trust Causes of Action." *Id.* at 4.

At the Plan Confirmation Hearing, Shaper's counsel objected to the carveout of Shaper from the release. *See* Jan. 21, 2021 Confirmation Hr'g Tr. at 11:23-12:16. In response, the Court noted that:

---

[9] The "Released Parties" are:

> (i) the Debtors; (ii) the Reorganized Debtors; (iii) the Debtors' non-Debtor affiliates; (iv) the DIP Lenders; (v) the Prepetition Lenders who vote in favor of the Plan; (vi) the Creditors' Committee; (vii) each of the Creditors' Committee's current and former members (solely in their capacity as members of the Creditors' Committee); (viii) the DIP Agent; (ix) the Disbursing Agent; (x) the Initial Plan Sponsor; (xi) Centerbridge; (xii) Black Diamond; (xiii) Black Diamond Commercial Finance, L.L.C., in its capacity as Syndicated Facility Agent, and any successor thereto in such capacity; (xiv) with respect to each of the foregoing, where any of the foregoing is an investment manager or advisor for a beneficial holder, such beneficial holder; (xv) with respect to each of the foregoing Persons in clauses (i) through (xiv), each of their affiliates, predecessors, successors, assigns, direct and indirect subsidiaries, affiliated investment funds or investment vehicles, managed accounts, funds and other entities, investment advisors, sub-advisors and managers with discretionary authority; and (xvi) with respect to each of the foregoing Persons in clauses (i) through (xv), including, for the avoidance of doubt, the Creditors' Committee, each of their respective current and former officers and directors, principals, equity holders, members, partners, managers, employees, subcontractors, agents, financial advisors, attorneys, accountants, investment bankers, investment managers, investment advisors, consultants, representatives, and other professionals, and such Person's respective heirs, executors, estates, servants, and nominees; *provided*, that notwithstanding anything to the contrary herein, "Released Parties" shall not include any Non-Released Party.

Plan at 15-16.

> there was extensive evidence throughout the case that Mr. Shaper, while serving as a fiduciary to the Debtor and to the Debtor's predecessor, the entity, repeatedly breached his fiduciary duties and put his personal interests ahead of the company's interests and refused to give equal treatment to offers that were made that did not work to his personal benefit and made threats to the company of actions that he would take.

Id. at 17:18-25. In the light of that evidence, the Court thought "it would be manifestly unfair to grant relief that would take away the right to bring a cause of action against Mr. Shaper[.]" *Id.* at 36:23-25.

Having lost his objection at the hearing, Shaper now tries to collaterally attack the ruling by arguing that the causes of action here — at least the ones premised on [redacted] primary breaches — are precluded by res judicata, collateral estoppel, and the rule against collateral attacks. In essence, he argues that the claims were already adjudicated as part of the plan confirmation. In the alternative, he argues that either Black Diamond or the Debtors *could* have litigated the claims in the Bankruptcy, and that the Trustee is therefore barred from bringing them now.

Shaper's arguments, however, were anticipated and expressly barred in the Order. Paragraph Z(4) provides that the Court's findings of fact and conclusions of law "shall not preclude or impair ***in any way*** (whether pursuant to the doctrines of claim preclusion, res judicata, law of the case, or otherwise) any claims or Causes of Action against Mr. Shaper that are preserved by the Plan and this Confirmation Order." Order at 15. (emph. added). The Court was clear that this also applied to secondary liability claims against Shaper based on the primary torts of Released Parties like [redacted]:

> [T]he Class 3 Trustee and the Class 3 Trust (as assignee of the Class 3 Trust Assets) reserve their rights, if any, solely for purposes of any subsequent litigation against Peter Shaper as to (i) ***whether certain actions taken by such Released Parties prior to the parties' entry into the Settlement Agreement*** (and the related amendments and modifications to the Plan) ***were inconsistent with those parties' applicable duties and obligations***[.]

Id. at 16 (emph. added). "For the avoidance of doubt," the Court added, "***all findings of fact and conclusions of law*** in this Confirmation Order concerning the Debtors' and their directors', officers', representatives', and other agents' good faith, fair dealing, honesty, adherence to their fiduciary duties, compliance with other legal duties, and similar matters shall be read to exclude Peter Shaper[.]" *Id.* (emph. added).

The Court-approved Trust Agreement likewise provides that:

> Unless any Class 3 Trust Causes of Action against a Person are expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or a Bankruptcy Court order, including the Confirmation Order, the Class 3 Trustee expressly reserves all Class 3 Trust Causes of Action, for later adjudication, and, therefore, ***no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise) or laches, shall apply to such Class 3 Trust Causes of Action upon, after, or as a consequence of the Confirmation Order.***

Trust Agreement at 7 (emph. added).

Shaper ignores these provisions and attempts to establish preclusion anyway by cherry-picking from the Order and confirmation hearing transcript. He does not even attempt to explain why the Order and Trust Agreement do not bar his defenses. Thus, Shaper's preclusion defenses must fail.

CONCLUSION

For these reasons, Shaper's 12(b)(6) Motion to Dismiss should be denied.

Date: April 18, 2022

Respectfully submitted,

ZAIGER LLC

Jeffrey H. Zaiger
Judd A. Linden
2187 Atlantic Street, 9th Floor
Stamford, CT 06902
Telephone: (203) 347-7180
jzaiger@zaigerllc.com
jlinden@zaigerllc.com

Pro Hac Vice Applications Forthcoming

YETTER COLMAN LLP

/s/ Bryce L. Callahan
Bryce L. Callahan
Attorney-In-Charge
State Bar No. 24055248
Susanna R. Allen
State Bar No. 24126616
811 Main Street, Suite 4100
Houston, Texas 77002
(713) 632-8000
bcallahan@yettercoleman.com
sallen@yettercoleman.com

ATTORNEYS FOR PLAINTIFF SPEEDCAST SFA LENDERS' LITIGATION TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2022, a true and correct copy of the foregoing was served upon all counsel of record via the Court's ECF system.

/s/ Bryce L. Callahan
Bryce L. Callahan