**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **IN RE:** | § | |
| | § | |
| **SPEEDCAST INTERNATIONAL** | § | |
| **LIMITED, et. al.,** | § | **CASE NO. 20-32243** |
| | § | |
| **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 REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)**

1. The Trustee sums up her arguments about Defendant Peter Shaper in a single sentence: he is a "railroad switch operator who start[ed] a train down the wrong track" and therefore should be "responsible for harm he sets in motion even if the conductor fails to engage the brakes in time." Dkt. 23 (Plaintiff's Response and Brief in Opposition to Rule 12(b)(6) Motion to Dismiss) ("Resp.") 13. This theory of liability—that Shaper "poisoned the process" (Resp. 8), and that the SRC never "flip[ed] a switch to set the Bankruptcy back on the right track" (Resp. 10)—forms the lynchpin of the Response.



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2. But this theory is dead wrong. First, the Trustee admits that Shaper was *not* the railroad operator. Rather, the Special Restructuring Committee, of which Shaper was never a member, had "formal control" over the bankruptcy process. Resp. 9; *see also* Dkt. 3 (Plaintiff's Original Petition) ("Compl.") ¶¶ 44 n.6, 78, 84, 87-89. Shaper is alleged to be little more than a person in the room who was constantly complaining that he disagreed with the decisions of the SRC, which was the "railroad operator" that actually had control over the bankruptcy decisions. *See* Resp. 15 (quoting as the Complaint's main allegations that Shaper "blew up" at Chairman Wilks, that he had a "big fight" with the SRC members, and that he "convinced Chairman Wilks" to support him). Whining about the direction set by the decision makers is not a breach of fiduciary duty.

3. Second, the actual railroad operator—the SRC—told Shaper to shove off. Again, taking the Complaint as true, when Shaper allegedly asked the SRC to go down the "wrong track," as it were, and threatened to resign if he did not get his way, the SRC showed him the door. Compl. ¶ 80.

4. Third, Speedcast was not a runaway train when Shaper left. While the Complaint attempts to blame Shaper's "lingering influence" for decisions made *after* Shaper left, that influence is not plausibly alleged. For example, he is nowhere alleged to have had any hand in drafting the "selection criteria" of which the Trustee complains in October 2020 (two months after he left) or in rejecting any of the bids from Black Diamond in late August, September, or October (all, again, after he left). Compl. ¶¶ 85-89. The Trustee cannot hold him liable for decisions he neither made nor benefitted from.

## I. The Trustee Has Not Plausibly Alleged a Breach of Fiduciary Duty or Damages.

5. The Complaint alleges that the key decisions in Speedcast's bankruptcy—including what selection criteria to adopt and whether to accept or reject each bid—were made by the five disinterested, highly qualified members of the Special Restructuring Committee ("SRC"), not by Shaper or [redacted]. Compl. ¶¶ 44 n.6, 84-90. The Complaint further alleges that these decisions, and the harms to Speedcast that resulted from them, occurred weeks or months after Shaper resigned. *See, e.g.*, *id.* ¶¶ 86-90. And the Complaint acknowledges that Shaper failed to achieve his purported objectives—the SRC accepted his resignation instead of acquiescing to his alleged demands, and neither Shaper nor Genesis Park ever invested in Speedcast. *See, e.g.*, *id.* ¶¶ 54, 72-73, 78.

6. These facts sharply distinguish the primary case the Trustee relies on, *In re Performance Nutrition, Inc.*, 239 B.R. 93 (Bankr. N.D. Tex. 1999). There, no SRC or equivalent body existed. Unlike Shaper, Defendant Anthony Roth—who was the CEO, President, and Board Chairman of Performance Nutrition, Inc. ("PNI")—was in charge of the bankruptcy process. *Id.* at 100, 102. Because Roth made no attempt to obtain a valuation of PNI or elicit bids, no valuation or bidding process occurred. *Id.* at 102-03. Instead, Roth unilaterally brokered a deal to deliver PNI's assets to another company, Naturade, in exchange for a management position at Naturade with a generous salary, commissions, and stock warrants. *Id.* at 102-04, 109-10. And whereas the Speedcast SRC was well aware of Shaper's ties to Genesis Park, Roth "dealt secretly with Naturade" and "failed to disclose [his] dealings to PNI's board of directors." *Id.* at 110. Critically, in contrast to Shaper's alleged plan, Roth's plan succeeded: Naturade purchased PNI's assets at a Chapter 7 auction for a fraction of their true value, then "within the hour" hired Roth to run a new Naturade division. *Id.* at 106. The bankruptcy process

eventually revealed many other breaches of duty, including that Roth had caused PNI to make payments to his wife's travel agency, reimburse his personal moving expenses, and even cover his health club fees—all of which he had attempted to conceal and omitted from a sworn financial disclosure. *Id.* at 104.

7. Against this backdrop, the Trustee contends that Shaper committed five "standalone" breaches of fiduciary duty during his tenure at Speedcast and sent harmful "signals" to potential investors that lingered long after he resigned. None of these theories amounts to a plausible claim for breach of fiduciary duty.

8. ***First***, the Trustee asserts that Shaper "attempted to orchestrate a low-ball 'stalking horse' bid for Genesis Park to buy Speedcast for less than its value." Resp. at 11. But the Complaint alleges that "Genesis Park was unable to find a co-investor for a 'stalking horse' bid and abandoned its efforts." Compl. ¶ 54. It is not a breach of fiduciary duty to make a "plan[]" that is never realized, *id.* ¶ 51, nor did any such plan cause harm to Speedcast.

9. The Trustee's allegation that Shaper "negotiated" with Centerbridge in an unsuccessful effort to "secure favorable governance rights for Genesis Park" under Speedcast's reorganization plan fails to state a claim for breach of fiduciary duty for the same reasons. Resp. at 10. Likewise, the request for an opportunity to amend the Complaint to allege that "Shaper anticipated returning to Speedcast after Centerbridge took ownership" is futile. *Id.* at 5 n.5. Illicit *motive* is not actionable; the Trustee must allege unlawful *actions* that caused harm to Speedcast. It has not done so.

10. ***Second***, the Trustee claims that Shaper "crafted an MIP designed to enrich himself while scaring off competitive bids from entities like Black Diamond." Resp. at 11; *see also id.* at 10, 14 (same). Again, however, the Complaint alleges only plans and discussions that

went nowhere. The Bankruptcy Plan eventually confirmed by this Court included a different MIP, *see* Bkr. ECF 1397 (Order Confirming Plan) at 92 (Plan § 5.11); that MIP did not enrich or otherwise benefit Shaper, who had resigned from Speedcast months earlier, *see* Compl. ¶ 80; and Black Diamond, undaunted by the MIP Shaper prepared in July 2020, submitted competitive bids in August, September, and October of that year, *see id.* ¶¶ 55, 62-68 (alleging that Shaper drafted and advocated for his MIP in July); *id.* ¶¶ 75, 85-86, 88 (alleging that Black Diamond's subsequent bids "[redacted]"). It is not a breach of fiduciary duty to "design[]" a MIP with favorable terms—especially considering negotiation of *every* MIP involves tension between terms favorable to executives and terms favorable to the company or its creditors. And because the MIP Shaper drafted failed to achieve its alleged objectives, it caused no harm to Speedcast.

11. ***Third***, the Trustee contends that Shaper "used Speedcast's restructuring professionals to carry out his personal agenda." Resp. at 11. Specifically, Shaper worked with Debtors' counsel at Weil, Gotshal & Manges LLP ("Weil") to develop a MIP and with Moelis & Company ("Moelis") on Speedcast's valuation. *Id.* at 9. But the Complaint alleges that the SRC engaged Weil and Moelis to handle precisely those types of tasks. *See* Compl. ¶ 48 (alleging that the SRC engaged Moelis as Speedcast's financial advisor and Weil as its primary restructuring counsel). Shaper, as a Director and CEO of Speedcast, would have been in communication with these professional advisors and involved in their work, including negotiation of a MIP, with or without the alleged illicit motives. The Trustee's assertion that Shaper's alleged conduct increased the professional fees incurred therefore relies on impermissible speculation, including unsupported inferences that Shaper's improper objectives somehow drove up costs—

presumably, an "improper" MIP does not cost more to prepare than a proper one—and that professional advisors at Weil and Moelis were complicit in Shaper's unlawful plans.

12. In defense of its theory, the Trustee cites pre-*Twombly* and *Iqbal* cases for the proposition that "general factual allegations of injury resulting from the defendant's conduct may suffice." Resp. at 9 (quoting *Bennett v. Spear*, 520 U.S. 154, 168 (1997)). Under controlling Supreme Court authority, a plaintiff may no longer rely on "a wholly conclusory statement of claim" or the mere "possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007) (cleaned up). Instead, a claim must be "stated adequately" and "supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563; *see also Shastry v. U.S. Bank Nat'l Ass'n*, No. 3:16-CV-3335-G-BN, 2018 WL 4627132, at *11 (N.D. Tex. July 27, 2018), *report and recommendation adopted*, No. 3:16-CV-3335-G-BN, 2018 WL 4090426 (N.D. Tex. Aug. 27, 2018) (dismissing Complaint that did not "specify how they were damaged" or "what those damages are").

13. Thus, the Trustee's general theory of injury does *not* suffice. The Trustee bore the burden of alleging specific facts that moved its claim "across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (quoting *Twombly*, 550 U.S. at 570). It has failed to do so. The allegations in the Complaint do not support a plausible claim that Shaper "wasted the Estate" by working with professional advisors engaged by the SRC on the very tasks they had been retained to perform. In any event, the Trustee has not articulated even a general theory of how Shaper's conduct resulted in concrete and non-speculative harm. *E.g., Bennett*, 520 U.S. at 167-68 (discussing allegations that "restrictions on lake levels … adversely affect [petitioners] by substantially reducing the quantity of available irrigation water").

14. ***Fourth***, the Trustee argues that Shaper "urged Centerbridge to reduce its valuation of Speedcast even though it would result in a lower recovery to Speedcast's creditors." Resp. at 11-12; *see also id.* at 10 (same). Critically, the Complaint does not allege that Shaper's urging led Centerbridge to reduce its valuation. To the contrary, it alleges only that Moelis sent Shaper its analysis and that negotiations between Shaper and Centerbridge continued "[o]nce Genesis Park was comfortable with Centerbridge's valuation." Compl. ¶¶ 71-72. Moreover, the Plan adopted months after Shaper's departure from Speedcast included neither the allegedly low valuation nor the provisions favorable to Genesis Park contained in the Initial ECA. *Id.* ¶¶ 74, 95. Shaper's alleged urging was, at most, "wasted words." *Niehenke v. Right O Way Transp., Inc.*, No. 14392, 1996 WL 74724, at *3 (Del. Ch. Feb. 13, 1996). Additionally, the Complaint alleges that Wilks, the disinterested chairman of Speedcast's board, "[redacted]" with Shaper that Centerbridge's "[redacted]" valuation was "[redacted]." *Id.* ¶ 71. Fruitless negotiations—which were disclosed to and endorsed by at least one member of the SRC—cannot amount to a breach of fiduciary duty.

15. ***Fifth***, the Trustee alleges that Shaper "leveraged resignation to thwart a competitive bidding process." Resp. at 12; *see also id.* at 10, 15-16 (same). This theory, in essence, is that Shaper had a tantrum: The Complaint alleges that Shaper "blew up" at Chairman Wilks, got in a "big fight" with the SRC, and quit when he didn't get his way. Compl. ¶¶ 63-64, 76, 78. On its face, the Complaint forecloses any claim that this alleged conduct caused a harm to Speedcast: It alleges that the SRC, despite Shaper's blustering, "[redacted]," "[redacted]," and instead allowed Shaper's resignation to take effect. *Id.* ¶¶ 76, 80. Yet

again, Shaper's machinations failed. His resignation from Speedcast left the SRC free to pursue a proposal it "[redacted]" was "[redacted]." *Id.* ¶ 76.

16. ***Finally***, the Trustee suggests that Shaper permanently tainted the bankruptcy process by sending a "signal to Black Diamond and other creditors that Speedcast was not interested in a fair bidding process." Resp. at 10; *see also id.* at 7-8 (alleging that potential bidders "would have gotten the wrong message about the SRC's willingness and ability to run a fair process," and the SRC did not "remove the poison"). The factual allegations in the Complaint do not support either part of this theory. Contrary to the suggestion that the SRC was captive to Shaper's influence during and long after his time at Speedcast, the Complaint alleges that SRC members "[redacted]," "[redacted]," and rejected his demands. Compl. ¶ 77. Likewise, rather than alleging that Shaper's "signal" deterred Black Diamond from bidding, the Complaint reports that Black Diamond submitted multiple bids before and after Shaper's resignation, including the bids the Trustee contends the SRC should have accepted. *Id.* ¶¶ 75, 85-86, 88.

17. In sum, all of the alleged bad behavior was for nothing. Shaper's plans and negotiations did not lead to a role for Genesis Park in Speedcast's reorganization plan. The MIP he designed and valuation he desired were not adopted, despite alleged assistance from Weil and Moelis. And his alleged angry outbursts resulted only in his departure from Speedcast. As alleged in the Complaint, none of this conduct deterred Black Diamond from bidding, plausibly increased professional fees, or caused any other harm to Speedcast.

18. The Trustee acknowledges a party "cannot claim attempted breach of fiduciary duty because there is no such cause of action." Resp. at 13 (quoting *Santarelli & Gimer v. Atida Karr Enterprises, Inc.*, No. CIV. A. 83-0703, 1987 WL 8720, at *2 (D.D.C. Mar. 13, 1987)).

Rather, the breach must have a "palpable effect" on the corporation. *Id.* (quoting *Niehenke*, 1996 WL 74724, at *2). While the Trustee attempts to distinguish these cases on the facts, it does not and cannot dispute the propositions of law for which Shaper cited them. Allegations concerning what Shaper intended, planned, designed, or attempted do not state a claim.

## II. The Trustee Has Not Plausibly Alleged that Shaper Was the But-for or Proximate Cause of Any Damage to Speedcast.

19. Even if the Trustee had adequately alleged breach and damages (and it has not), Shaper was neither the but-for cause nor the proximate cause of the alleged injuries. It is clear that he could not be a but-for cause because the hypothetical but-for world—a world in which Shaper was not present—is alleged on the face of the Complaint. After August 28, 2020, Shaper was no longer at Speedcast; there was no alleged involvement by Genesis Park; and there was no alleged upside being negotiated for Shaper in any MIP. Yet despite the removal of all Shaper's alleged self-interest, the SRC, independently, allegedly decided to favor Centerbridge, undervalue Speedcast, and play hardball with Black Diamond. Compl. ¶¶ 83-90. This outcome cannot be blamed on Shaper. He was not there.

20. And Shaper cannot be the proximate cause, either, because the Trustee of which the Trustee complains—such as the alleged acceptance of a too-low bid or favoritism for Centerbridge over Black Diamond—were ultimately made by the SRC and Speedcast after Shaper left. By way of example, in *Immobiliere Jeuness Establissement v. Amegy National Bank*, the plaintiff sued Amegy Bank and the former President of another bank for aiding and abetting a breach of fiduciary duty and other claims, alleging that the defendants knowingly loaned funds to an individual who improperly used a partnership's assets as collateral for non-partnership purposes. 525 S.W.3d 875, 879-881 (Tex. App.—Houston [14th Dist.] 2017, no pet.). The Court held these claims failed for lack of causation because the loans were paid off by

a subsequent refinancing, and thereafter neither Amegy nor the President were alleged to have had "any role in or awareness of the decision to use partnership funds." *Id.* at 881. In so ruling, the Court rejected the Trustee's railroad theory: Amegy making the first improper loan (i.e. starting a train down the wrong track) was not enough to prove an unbroken chain of causation, and it could not continue to be on the hook for decisions made after its involvement in a project ceased (i.e. the failure to engage the brakes). *Id.* at 881. The same is true here.

**III. Shaper's Actions Are Protected Because They Were Approved by the SRC.**

21. The Trustee alleges that the Texas Business Organizations Code's codification of the business judgment rule does not protect Shaper because the Complaint alleges that "Shaper acted with self-interest." Resp. at 22. But this misses the point. Section 24.418 is titled "Transactions Involving Interested Directors and Officers." Tex. Bus. Org. Code § 21.418. It does not apply to non-interested transactions. And it provides that "neither the corporation nor any of the corporation's shareholders will have a cause of action" against a self-interested director for a self-interested transaction if (1) "the material facts as to the relationship or interest . . . are disclosed to or known" and (2) a "committee of the board of directors…..in good faith authorizes the contract or transaction." *Id.* at 21.418(b)(1)(A); *see also Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 WL 4930041, at *5 (Tex. App.—Austin Aug. 20, 2020, no pet.) (failure to contest that transaction was "consented to" and that "material facts were disclosed" requires dismissal of claim challenging interested transaction).

22. Shaper's interest in Genesis Park and in any MIP are both alleged to have been disclosed. Compl. ¶¶ 40-43, 51-52, 55, 62-68, 71. 73, 78. Indeed, Shaper is alleged to have discussed his desire for an investment by Genesis Park or the enactment of a MIP and its proposed terms with virtually everyone—including the Chairman, the SRC, Weil, and both

Centerbridge and Black Diamond. *Id.* The SRC is alleged to have been disinterested, comprised of "outside members with restructuring experience." Compl. ¶ 44, n.6. The SRC is not alleged to have been a co-conspirator of Shaper, and in any event, was found to have acted in good faith by this Court, a finding the Trustee does not challenge. Bkr. ECF 1397 (Order) at 16, 22-24 (§§ AA, RR, VV, XX)**.** Most important, all of Shaper's alleged efforts to negotiate deals for Genesis Park or a MIP are alleged to have been approved or authorized by the SRC. *E.g.*, Compl. ¶¶ 64-65 (discussing an "over market MIP backed by the SRC"), ¶¶ 69-70 (alleging the SRC was "convinc[ed . . . to pursue a deal with Centerbridge" and "[redacted]"). That the SRC is alleged to have continued to reject Black Diamond's offers after Shaper resigned shows this was no accident. *E.g.,* Compl. ¶ 84-89. Thus, all the elements of Section 24.418 are met.

23. The Trustee's only response is that this statute does not apply because the complained-of transactions "never came to fruition." Resp. at 23. We are truly through the looking glass now. First, it cannot both be true that Shaper's actions so poisoned the well that he should be held liable for the actions of the SRC months after he left (Resp. at 8) *and* that nothing he did was sufficiently final to invoke the protection of the statute.

24. Second, the statute does not define "transaction" to require that a contract be completed rather than just proposed. Indeed, the definition of "transaction" encompasses both completed agreements and merely proposed activities. *See* Black's Law Dictionary (11th ed.) (defining transaction broadly as, among other things, "[t]he act or instance of conducting business or other dealings" or "any activity involving two or more persons"); Tex. Bus. Comm. Code § 322.002 (defining "transaction" as it applies to electronic transactions and signatures as "an action or set of actions occurring between two or more persons relating to the conduct of

business, commercial, or governmental affairs"). Under these definitions, Shaper's dealings regarding Genesis Park and the MIP were "transactions" even if not consummated.

25. Third, even under the Trustee's definition of "transaction"—one was ultimately consummated: the Third Amended Plan. The Trustee's complaints that the Plan was tainted by Shaper's prior conduct and therefore did not represent fair value to Speedcast (Compl. ¶¶ 91-94) therefore must fail—because once again, the Plan was formally approved by both the SRC (and ultimately, the Court).

## IV. The Trustee's Reservation of Rights Does Not Abrogate the Plan's Factual Findings

26. The Trustee does not dispute that [redacted] and the SRC were "Released Parties"; that the Court specifically found them to have acted in "good faith"; that the Court found them to have exercised "reasonable business judgment"; or that the Court previously approved the professional fees incurred by Speedcast as reasonable. Motion to Dismiss Pursuant to Rule 12(b)(6) ("Mot.") (Dkt. 8) at ¶ 89; Bkr. ECF 1407 (1/21/21 Hearing Tr.) at 37-40; Bkr. ECF 1397 (Order) at 16-17, 22-24 §§ AA, BB, RR, VV, XX). Rather, the Trustee claims that because it purported to "reserve [its] rights, ***if any***," to bring claims against Shaper on the basis of conduct by "Released Parties prior to the parties' entry into the Settlement Agreement," it is free to argue here that that the SRC, [redacted], (and even Weil, Resp. 9-10) were in on the game, but it is just Shaper that should be punished for it. Bkr. ECF 1397, § 4 (emphasis added); Resp. 25-26.

27. This is a failure to join issue. The fact that the Plan left open the possibility that the Trustee could bring claims, ***if any***, complaining of the SRC, [redacted], or Weil's conduct ***does not*** affect the underlying factual findings. Put another way, whether a *claim* has been released is a different inquiry from the factual question of whether, for example, the SRC acted in good faith

or exercised reasonable business judgment. There are presumably claims the Trustee could bring against Shaper that do not require findings that the Released Parties acted in bad faith or failed to exercise reasonable business judgment. But the secondary liability claims asserted in the Complaint raise factual questions of whether [redacted] acted in good faith (duty of loyalty) or exercised reasonable business judgment (duty of care). *See* Mot. ¶ 87. Though the claims against Shaper were not released, these factual questions—did [redacted] exercise reasonable business judgment and act in good faith—have been litigated and adjudicated by this Court.

## V. The Trustee Has Failed to State a Claim for Knowing Participation or Aiding and Abetting.

28. Additionally, the Trustee has failed to state a claim that Shaper knowingly participated in or aided and abetted any breach of fiduciary duty by [redacted]. The Trustee's Response identifies three alleged breaches of fiduciary duty by [redacted]: (1) that he participated in the negotiation of a MIP that was never implemented (Compl. ¶ 66); (2) that he threatened to resign from Speedcast but then rescinded his resignation and became CEO of Speedcast (Compl. ¶ 78-80); and (3) that he used Weil to further his personal agenda (Compl. ¶ 67). Resp. 18. These claims fail for the same reasons they fail against Shaper—they do not adequately allege breach, causation, or damages resulting from [redacted] conduct. *See* Section I, *supra.*

29. Notably, none of the three alleged breaches by [redacted] post-date Shaper's resignation. The Trustee does not appear to challenge Shaper's contention (Mot. ¶¶ 81-82) that the Complaint does not adequately allege that Shaper participated in, or aided and abetted, any actions by [redacted] after August 28, 2020, much less that he provided "substantial assistance" in any post-August 28, 2020 breaches. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). At the very least, all secondary liability claims against Shaper based upon post-August 28, 2020 conduct should be dismissed.

## VI. The Trustee Has Failed to State a Claim for Conspiracy.

30. Beyond conclusory allegations that Hobby and [redacted] "engaged in a conspiracy," "took one or more overt acts," or "had a meeting of the minds"—all of which are insufficient to allege a conspiracy under *Twombly*, itself a conspiracy case—the Trustee cites only sparse allegations to show a purported conspiracy. Resp. at 19; *Twombly*, 550 U.S. at 555. ("[P]laintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citation omitted).

31. A conspiracy requires a "specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means" which "inherently requires a meeting of the minds on the object or course of action." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). Merely jointly engaging "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. Rather, the unlawful aim has to be known and agreed "at the inception of the combination or agreement." *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995).

32. The Complaint states only that the purpose of the conspiracy was to create "a bidding process that refused to give equal treatment to offers" or which "favor[ed] acquisition by Centerbridge over Black Diamond." Compl. ¶¶ 127-28. This is not unlawful by itself (Mot. at 19), and it is implausibly the product of a conspiracy because the alleged favoritism for Centerbridge continued for months after Shaper left. Compl. ¶¶ 84-89. Even if unlawful, the specific actions the Complaint alleges—i.e., that Shaper and [redacted] had discussions regarding appearing "neutral" in bankruptcy wrangling between Black Diamond and Centerbridge or jointly prepared a MIP (Resp. 21)—do not suffice to establish an *intent* to cause injury—i.e., the

undervaluing of Speedcast—nor do they show that an unlawful intent existed "at the inception of the combination or agreement." *Triplex Commc'ns, Inc.*, 900 S.W.2d at 719.

33. Hobby's only alleged contributions—encouragement that Shaper was the "right guy" for Speedcast and optimism that there might be a "security we can invest in"—hardly give rise to a plausible conspiracy to favor Centerbridge, much less to do so unlawfully or by intentionally reducing the value of Speedcast. Resp. 21 (citing Compl. ¶ 37). The conspiracy claims should be dismissed.

## VII. Conclusion

34. For the foregoing reasons, Shaper respectfully requests that the Court grant his motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim.

Dated: May 2, 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/ Ross MacDonald*
Ross MacDonald