

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case No. 8:13-bk-01520-CED
Chapter 11

Universal Health Care Group, Inc.,

Jointly Administered with
Case No. 8:13-bk-05952-CED

American Managed Care, LLC,

Debtors.

Soneet Kapila, as Liquidating Agent of
Universal Health Care Group, Inc.,

Plaintiff,

vs. Adv. Pro. No. 8:15-ap-132-CED

Warburg Pincus, LLC,
Warburg Pincus Private Equity IX, L.P.,
and Allen Wise,

Defendants.

**ORDER ON PLAINTIFF'S MOTIONS FOR
PARTIAL SUMMARY JUDGMENT
REGARDING DEFENDANTS'
AFFIRMATIVE DEFENSES
(Doc. Nos. 305, 309)**

THIS PROCEEDING came before the Court to consider (1) *Plaintiff's Motion for Partial Summary Judgment Determining that Plaintiff Sufficiently Alleged Constructive and Actual Fraudulent Transfers* (the "Sufficient Allegations

Motion"),¹ and (2) *Plaintiff's Omnibus Motion for Partial Summary Judgment Regarding Defendants' Affirmative Defenses* (the "Omnibus Motion")² (together, the "Motions"), Defendants' responses,³ and Plaintiff's replies.⁴ The parties agreed to submit the Motions to the Court for resolution on the papers. The Court has carefully considered the pleadings, Motions, responses, and replies, and will grant the Motions in part and deny the Motions in part as set forth in this Order.

A. Background

Universal Health Care Group, Inc. ("Debtor") was a Delaware corporation headquartered in St. Petersburg, Florida. Debtor provided health insurance and managed care products through several wholly owned subsidiaries.

On February 6, 2013, Debtor filed a Chapter 11 petition,⁵ and on April 22, 2013, Plaintiff was appointed as the Chapter 11 Trustee of Debtor's bankruptcy estate.⁶ On August 18, 2015, the Court entered a *Final Order Confirming Chapter 11 Trustee's Liquidating Plan*, and Plaintiff was appointed as the Liquidating Agent for Debtor's Liquidating Estate.⁷

On February 2, 2015, Plaintiff filed a *Complaint and Demand for Jury Trial* against Defendants (the "Original Complaint").⁸ Defendants filed a motion to withdraw the reference under 28 U.S.C. § 157(d) and Fed. R. Bankr. P. 5011,⁹ and Plaintiff filed a limited motion to withdraw the reference.¹⁰

On July 2, 2015, the District Court entered its order denying the motions to withdraw the reference, finding that "the significant benefits of permitting the Bankruptcy Court to preside over all pretrial matters outweigh any potential harms that may arise should [the District Court] ultimately be called upon to preside over a jury trial in the same action."¹¹ The District Court's denial of the

¹ Doc. No. 305.

² Doc. No. 309.

³ Doc. Nos. 343, 344.

⁴ Doc. Nos. 359, 360.

⁵ Main Case, Doc. No. 1.

⁶ Main Case, Doc. No. 235.

⁷ Main Case, Doc. No. 1646.

⁸ Doc. No. 1.

⁹ Doc. No. 6.

¹⁰ Doc. No. 7.

¹¹ U.S. District Court, Middle District of Florida, Case No. 8:15-cv-00636-CEH, Doc. No. 6, p. 5.

motions to withdraw the reference was without prejudice to the parties' right to reassert their positions upon the conclusion of all pretrial matters in the Bankruptcy Court.¹²

Meanwhile, Defendants timely filed motions to dismiss the Original Complaint.¹³ On May 9, 2016, the Court entered an order denying Defendants' motions to dismiss (the "First 12(b)(6) Order").¹⁴ Thereafter, Plaintiff sought and obtained leave of Court to file an amended complaint¹⁵ and, later, a second amended complaint (referred to herein as the "Amended Complaint").¹⁶

In the Amended Complaint, Plaintiff alleges the following:

1. Warburg Pincus, LLC ("Warburg") is a Delaware limited liability company that established and controlled Warburg Pincus Private Equity IX, L.P. ("Warburg IX").¹⁷

2. In 2006, Warburg IX paid \$29 million and Allen Wise ("Wise") paid \$1 million to purchase preferred stock in Debtor on the terms set forth in a stock purchase agreement (the "Stock Purchase Agreement").¹⁸ In addition, Debtor, Warburg IX, and Wise entered into a stockholders' agreement (the "Stockholders' Agreement")¹⁹ that granted Warburg IX and Wise certain controls over Debtor.²⁰

3. In connection with the Stock Purchase Agreement, Warburg IX and Wise received an optional right to elect a redemption obligation that would require Debtor to redeem their stock in August 2011 for the repurchase price of \$50 million.²¹

4. In 2009, a principal of Warburg, Alok Sanghvi ("Sanghvi"), was named as Warburg's primary Director to Debtor's Board.²²

5. In 2009, Warburg valued Warburg IX's investment in Debtor at \$5 million based on what it believed to be a "downward financial performance" of Debtor and Debtor's subsidiaries.²³

6. After Sanghvi's appointment to Debtor's Board, he continued earlier communications with Debtor regarding the early redemption of Warburg IX and Wise's preferred stock, but Debtor did not have sufficient capital to redeem the shares.²⁴

7. In October 2010, Sandip Patel ("Patel"), Debtor's Secretary and General Counsel, advised Sanghvi that a group of banks led by Wells Fargo was considering Debtor's request for financing for the stock redemption.²⁵

8. That "from October 2010 through mid-February 2011, Sanghvi, wearing two hats (one as a Principal of Warburg and the other as a director of [Debtor]), communicated with Patel and Wells Fargo concerning the redemption."²⁶

9. Sanghvi and Patel eventually agreed that Debtor would redeem Warburg IX and Wise's preferred stock for \$33.4 million. This represented most of the \$37.5 million proceeds from the loan that Debtor obtained from Wells Fargo (the "Wells Fargo Loan").²⁷

10. On February 7, 2011, Warburg IX and Wise entered into a stock redemption agreement with Debtor (the "Stock Redemption Agreement"),²⁸ and on February 14, 2011, Debtor authorized and directed wires of \$32,286,667.00 to Warburg IX and \$1,113,333.00 to Wise in

¹² *Id.*

¹³ Doc. Nos. 8, 9, 10.

¹⁴ Doc. No. 73; *In re Universal Health Care Group, Inc.*, 560 B.R. 594 (Bankr. M.D. Fla. 2016).

¹⁵ Doc. Nos. 103 and 107.

¹⁶ Doc. Nos. 228, 237, and 241.

¹⁷ Doc. No. 237, ¶¶ 3, 4.

¹⁸ Doc. No. 237, ¶ 26; Doc. No. 307-3.

¹⁹ Doc. No. 307-5.

²⁰ Doc. No. 237, ¶¶ 30, 31.

²¹ Doc. No. 237, ¶¶ 42d, 44.

²² Doc. No. 237, ¶ 67.

²³ Doc. No. 237, ¶¶ 77, 78.

²⁴ Doc. No. 237, ¶¶ 81, 83.

²⁵ Doc. No. 237, ¶¶ 81, 89.

²⁶ Doc. No. 237, ¶ 90.

²⁷ Doc. No. 237, ¶¶ 98, 99.

²⁸ Doc. No. 307-7.

satisfaction of the stock redemption (the “Stock Redemption Transfers”).²⁹

11. After the Stock Redemption Transfers, Debtor was saddled with the Wells Fargo Loan, was insolvent, and had unreasonably small capital.³⁰

Based on these allegations, Plaintiff asserts 20 claims against Defendants in the Amended Complaint. In Counts I through XVII, Plaintiff states claims to avoid and recover the Stock Redemption Transfers as actual and constructive fraudulent transfers under 11 U.S.C. §§ 548 and 550 and Chapter 726 of the Florida Statutes, the Florida Uniform Fraudulent Transfer Act. In Counts XVIII through XX, Plaintiff states claim for breach of fiduciary duty against Warburg and Warburg IX.

On November 21, 2018, Defendants moved to dismiss the Amended Complaint, asserting that Plaintiff’s fraudulent transfer claims “are defeated by his own allegations and exhibits.”³¹ On February 19, 2019, the Court entered an Order Denying Defendants’ Motion to Dismiss (the “Second 12(b)(6) Order”).³² The Court found, first, that many of Defendants’ arguments raised in their motion to dismiss involved disputed issues of law and fact that the Court could not resolve at the motion to dismiss stage of the case, and, second, that the Amended Complaint sufficiently alleges plausible claims for relief.

Thereafter, Defendants answered the Amended Complaint, denied its material allegations, and demanded a trial by jury.³³ In addition, Warburg asserted 26 affirmative defenses, Warburg IX asserted 18 affirmative defenses, and Wise asserted 16 affirmative defenses.

Pending before the Court are Plaintiff’s two motions for partial summary judgment, the Sufficient Allegations Motion and the Affirmative

Defenses Motion, which the Court addresses separately below.

B. Jurisdiction

This adversary proceeding comes before the Court in a somewhat unusual procedural posture as both Plaintiff and Defendants have demanded trial by jury and, as set forth above, the District Court denied the parties’ motions to withdraw the reference for all pretrial purposes.

The parties concur that Plaintiff’s claims against Defendants are not “core proceedings” under 28 U.S.C. § 157(b) (2).³⁴ Because bankruptcy courts are not Article III courts, they lack jurisdiction to enter final orders or judgments in non-core proceedings and are required to submit proposed findings of fact and conclusions of law to the District Court.³⁵ However, because the Court’s rulings on Plaintiff’s motions for partial summary judgment are interlocutory orders that are neither case dispositive nor final in nature, the Court concludes that is not required to submit proposed findings of fact and conclusions of law to the District Court.

C. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), a party “may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought.” Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.³⁶

For issues on which the movant bears the burden of proof, the movant must come forward with credible evidence that, if not controverted at trial, would entitle the movant to a directed verdict. But for issues on which the non-movant bears the burden at trial, the moving party may either show that there is an absence of evidence to support the

²⁹ Doc. No. 237, ¶¶ 104, 107.

³⁰ Doc. No. 237, ¶ 110.

³¹ Doc. Nos. 238, 239.

³² Doc. No. 251.

³³ Doc. Nos. 260, 261, 262.

³⁴ See Doc. No. 6, pp. 7-8; Doc. No. 7, pp. 4-5.

³⁵ *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). See also Local Rule 7001-1(k) (6).

³⁶ Fed. R. Civ. P. 56(a) made applicable to this proceeding by Fed. R. Bankr. P. 7056.

non-moving party's claim or may come forward with affirmative evidence showing that the non-moving party will be unable to prove its claim or defense at trial. If the moving party carries its initial burden, the responsibility moves to the non-moving party to show the existence of a genuine issue of material fact.³⁷

A trustee bears the burden of proof as to each required element of an actually or constructively fraudulent transfer claim, and the defendant/transferee bears the burden of proving its defenses.³⁸

D. The Motions

1. The Sufficient Allegations Motion (Doc. No. 305)

Defendants' Third Affirmative Defense states that the "claims against Defendant[s] are barred, in whole or in part, because the Plaintiff has failed to plead a claim for fraudulent transfer with the requisite particularity." Defendants' Fifth Affirmative Defense states that "Plaintiff fails to allege fraudulent transfer (either constructive fraud or actual fraud) and, in turn, he cannot maintain his claims for avoidance."³⁹

In the Sufficient Allegations Motion, Plaintiff seeks a determination that he has "sufficiently alleged claims for actual and constructive fraudulent transfers against each of the Defendants such that Plaintiff is entitled to maintain his claims to avoid (and recover) those transfers."⁴⁰ Plaintiff contends that Defendants' Third and Fifth Affirmative Defenses only address the sufficiency of Plaintiff's allegations, not any issues of fact, and that the Court has already determined that the Amended Complaint states viable fraudulent transfer claims in the First 12(b)(6) Order and the Second 12(b)(6) Order.⁴¹ Defendants contend that their Third and Fifth Affirmative Defenses are not

actually affirmative defenses at all, but are instead denials of the fraudulent transfer claims and therefore not subject to the summary judgment standard.⁴²

The Court previously adjudicated the sufficiency of Plaintiff's allegations regarding his fraudulent transfer claims and determined that the Amended Complaint states plausible claims for relief under 11 U.S.C. § 548 and Chapter 726 of the Florida Statutes, the Florida Uniform Fraudulent Transfer Act.⁴³ Although the Court does not see a need for an identical summary judgment ruling, *Plaintiff's Motion for Partial Summary Judgment Determining that Plaintiff Sufficiently Alleged Constructive and Actual Fraudulent Transfers* (Doc. No. 305) is **GRANTED** and Defendants' Third and Fifth Affirmative Defenses are deemed denials of Plaintiff's fraudulent transfer claims.

2. The Omnibus Motion (Doc. No. 309)

Plaintiff's Omnibus Motion seeks the entry of a partial summary judgment in his favor with respect to Defendants' six affirmative defenses, Warburg's three separate affirmative defenses, and Wise's separate affirmative defense.

a. Defendants' First Affirmative Defense

Defendants' First Affirmative Defense states that the Amended Complaint "fails to state a claim upon which relief can be granted, because the allegations reveal that the stock redemptions at issue were fair and reasonable and that no conflict of interest existed."⁴⁴

Plaintiff primarily contends that the Court adjudicated this defense when it ruled on Defendants' motions to dismiss.⁴⁵ Defendants respond that their "failure to state a claim" defenses

³⁷ *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).

³⁸ See *In re American Way Service Corporation*, 229 B.R. 496, 525-26 (Bankr. S.D. Fla. 1999).

³⁹ Doc. Nos. 260, 261, 262.

⁴⁰ Doc. No. 305, pp. 1-2.

⁴¹ Doc. Nos. 73 and 251.

⁴² Doc. No. 343(quoted, for example, *Urena v. Allstate Property & Casualty Insurance Company*, 2015 WL 12838322, at *11 (M.D. Fla. Apr. 9, 2015)).

⁴³ Doc. No. 251.

⁴⁴ Doc. Nos. 260, 261, and 262.

⁴⁵ Doc. No. 309, pp. 7-9.

should be treated as denials of Plaintiff's *prima facie* claims.⁴⁶

In the First 12(b)(6) Order, the Court stated that

Where a director is on both sides, a transaction may have to be "entirely fair," meaning that there must be fair dealing and a fair price. Delaware law may allow the setting aside, or assessing damages for, transactions that are not "entirely fair" to corporations and its shareholders.⁴⁷

In the First 12(b)(6) Order, the Court cited to Original Complaint's allegations that Warburg IX and Wise had substantial power over Debtor because of their status as holders of preferred shares in Debtor; the Court concluded that the Original Complaint stated viable claims for Plaintiff's "unfair transaction" claim.

Plaintiff repeats these same allegations in the Amended Complaint in the section titled "Powers, Rights and Preferences Afforded Warburg Equity IX and Wise."⁴⁸ For example, Plaintiff alleges that under the Stockholders' Agreement, Debtor "was required to obtain Board approval for various key actions and such Board approval required the affirmative vote of the Warburg Primary Director."⁴⁹ In the Second 12(b)(6) Order, the Court found that the Amended Complaint sufficiently alleges plausible claims for relief.⁵⁰ Whether the Stock Redemption Transfers at issue were fair and reasonable and whether a conflict of interest existed are issues to be determined by the fact finder.

As the Court ruled in the First 12(b)(6) Order and the Second 12(b)(6) Order, the Original and Amended Complaints sufficiently allege that the Stock Redemption Transfers were not fair and reasonable and that a conflict of interest existed. Although the Court does not see a need for an identical summary judgment ruling, Plaintiff's Omnibus Motion is **GRANTED** as to Defendants'

First Affirmative Defense, and the First Affirmative Defense is deemed a denial of Plaintiff's fraudulent transfer claims.

b. Defendants' Fourth Affirmative Defense

Defendants' Fourth Affirmative Defense states that "Plaintiff has failed to state a claim for avoidance of a fraudulent transfer pursuant to 11 U.S.C. § 548, because [Debtor] did not have any intent to hinder, delay, or defraud its creditors."⁵¹

Plaintiff primarily contends that the Court adjudicated this defense when it ruled on Defendants' motions to dismiss.⁵² Defendants contend that the defense should be treated as a denial of Plaintiff's *prima facie* claim to avoid an actual fraudulent transfer.⁵³

In the Second 12(b)(6) Order, the Court ruled that the Amended Complaint sufficiently alleges plausible claims for relief, and that the disputed issues of fact or law include whether Debtor made the Stock Redemption Transfers with the actual intent to defraud creditors.⁵⁴ Although the Court does not see a need for an identical summary judgment ruling, Plaintiff's Omnibus Motion is **GRANTED** as to Defendants' Fourth Affirmative Defense, and the Fourth Affirmative Defense is deemed a denial of Plaintiff's fraudulent transfer claims.

c. Defendants' Seventh Affirmative Defense

Defendants' Seventh Affirmative Defense states that "Plaintiff's claims are barred by the doctrine of judicial estoppel, so that he is judicially estopped from taking positions in this proceeding that are inconsistent with positions he has taken in this or a related proceeding."⁵⁵

Plaintiff primarily contends that the defense is vague, conclusory, and lacks facts showing a

⁴⁶ Doc. No. 344, pp. 9-11.

⁴⁷ Doc. No. 73, pp. 14-15.

⁴⁸ Doc. No. 237, pp. 9-11.

⁴⁹ Doc. No. 237, ¶¶ 41-42.

⁵⁰ Doc. No. 251.

⁵¹ Doc. Nos. 260, 261, and 262.

⁵² Doc. No. 309, p. 9.

⁵³ Doc. No. 344, pp. 9-11.

⁵⁴ Doc. No. 251.

⁵⁵ Doc. Nos. 260, 261, and 262.

plausible basis for the defense.⁵⁶ In their response, Defendants attempt to provide an example of Plaintiff's inconsistent positions with respect to the damages that he seeks against them. According to Defendants, Plaintiff seeks a judgment against them for all of Debtor's operating losses from June 1, 2011 to December 31, 2012—an amount that exceeds \$146 million. Defendants point out that in other adversary proceedings in this case, Plaintiff has alleged that other individuals or entities, such as Debtor's former CEO and accountants, were responsible for Debtor's operating losses during that time period.⁵⁷

In his reply, Plaintiff asserts that Defendants' example of alleged inconsistent positions does not satisfy the requirements for judicial estoppel because (1) the positions are not clearly inconsistent, (2) Defendants did not show that Plaintiff succeeded in persuading the Court to accept the allegedly inconsistent positions, (3) Defendants did not show that Plaintiff would derive an unfair advantage from the positions, and (4) Defendants did not show that Plaintiff's use of the inconsistent positions was a mockery.⁵⁸

The Court finds that a plaintiff's claim to recover damages from multiple sources under alternative legal theories does not, without more, invoke the doctrine of judicial estoppel. In their response to the Omnibus Motion, Defendants have not provided the Court with any evidence to support the elements of judicial estoppel and have failed to meet their burden in opposing Plaintiff's motion for partial summary judgment on this issue. Accordingly, Plaintiff's Omnibus Motion is **GRANTED** as to Defendants' Seventh Affirmative Defense, and Plaintiff is not judicially estopped from asserting his claims in the Amended Complaint.

d. Defendants' Eighth Affirmative Defense

Defendants' Eighth Affirmative Defense states that "Plaintiff fails to plead adequately any damages suffered as a result of the alleged breaches of fiduciary duty."⁵⁹

Plaintiff primarily contends that this defense has already been adjudicated in the First 12(b)(6) Order and Second 12(b)(6) Order, and that the Amended Complaint addresses Plaintiff's calculation of damages.⁶⁰ Defendants assert that the defense should be treated as a denial of Plaintiff's *prima facie* claims.⁶¹

In the Second 12(b)(6) Order, the Court ruled that the Amended Complaint sufficiently alleges plausible claims for relief. Although the Court does not see a need for an identical summary judgment ruling, Plaintiff's Omnibus Motion is **GRANTED** as to Defendants' Eighth Affirmative Defense, and the Eighth Affirmative Defense is deemed a denial of Plaintiff's breach of fiduciary duty claims.

e. Defendants' Eleventh Affirmative Defense

Defendants' Eleventh Affirmative Defense states it is "a common and well-known practice for institutional investors to prepare internal valuations, and institutional investors routinely do not share their internal valuations outside of their organization, including without limitation the companies in which they have invested."⁶²

Plaintiff primarily contends that this defense disregards additional facts in this case, including that Defendants withheld their internal stock valuations from Debtor *at the same time that* their representative on Debtor's board was negotiating the redemption of the stock.⁶³ Consequently, Plaintiff asserts that this defense does not protect Defendants from liability because "Delaware law

⁵⁶ Doc. No. 309, pp. 10-11.

⁵⁷ Doc. No. 344, pp. 11-14.

⁵⁸ Doc. No. 360, pp. 3-7 (citing, *inter alia*, *Jaffe v. Bank of America, N.A.*, 395 F. App'x 583, 587 (11th Cir. 2010), and *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297, 1307, n. 16 (11th Cir. 2005)).

⁵⁹ Doc. Nos. 260, 261, and 262.

⁶⁰ Doc. No. 309, pp. 11-12.

⁶¹ Doc. No. 344, pp. 9-11.

⁶² Doc. Nos. 260, 261, and 262.

⁶³ Doc. No. 309, pp. 12-14.

includes cases setting aside, or assessing damages for, self-interested or conflicted transactions not ‘entirely fair’ to corporations and/or shareholders.”⁶⁴

In response, Defendants contend that their expert, former Delaware Supreme Court Chief Justice E. Norman Veasey, testified at deposition that a designated director does not have a duty to share internal valuations of the designated investor, and that Delaware law provides that a company’s share valuation prepared as part of a capital impairment test is not required to be disclosed. For these reasons, Defendants contend that Plaintiff’s request for summary judgment is premature and based on an erroneous legal theory.⁶⁵

The Court finds that whether Defendants’ designated director on Debtor’s board had a duty to disclose internal valuations to Debtor is an issue to be determined by the fact finder. Plaintiff’s Omnibus Motion is **DENIED** as to Defendants’ Eleventh Affirmative Defense.

f. Warburg’s Twenty-Sixth Affirmative Defense and Warburg IX and Wise’s Sixteenth Affirmative Defense

Warburg’s Twenty-Sixth Affirmative Defense and Warburg IX and Wise’s Sixteenth Affirmative Defense (Defendants’ “Debtor’s Superior Knowledge Affirmative Defense”) state that Debtor’s “designated representative was an experienced attorney with more knowledge of the applicable law and facts than [Defendants’] designated representative.”⁶⁶

Plaintiff contends that the defense is “vague, conclusory, and fail[s] to describe how it applies to the facts of this case.”⁶⁷ In their response, Defendants explain that the “designated representative” referred to in their defense is Patel, Debtor’s Secretary and General Counsel, and that he is an attorney with extensive negotiating

experience and a wealth of knowledge of Debtor’s financial status during his “redemption-negotiations with both Wells Fargo and Sanghvi.”⁶⁸ Plaintiff replies that Defendants have offered no evidence that Patel had more knowledge of the law or facts than the other participants in the negotiation, and “even if that were true, that means nothing.”⁶⁹

To the extent that Defendants’ Debtor’s Superior Knowledge Affirmative Defense raises the issue of which side of the bargaining table was more experienced and knowledgeable, the Court concurs with Plaintiff. Further, this issue is not relevant to whether the Stock Redemption Transfers were fraudulent as to Debtor’s creditors. Accordingly, the Omnibus Motion is **GRANTED** with respect to Plaintiff’s fraudulent transfer claims. But to the extent that Defendants wish to present evidence on the issue of whether Debtor was ably and knowledgeably represented by Patel in their defense of Plaintiff’s breach of fiduciary duty claims, this is an issue to be determined by the fact finder, and the Omnibus Motion is **DENIED**.

g. Warburg’s Thirteenth Affirmative Defense

Warburg’s Thirteenth Affirmative Defense states that “Plaintiff’s vicarious claim against Warburg fails to state a claim upon which relief can be granted because as a representative of a minority shareholder in [Debtor], Sanghvi owed no duty under the facts alleged.”⁷⁰

Plaintiff contends that this defense has already been litigated because Defendants alleged in their prior motion to dismiss that Sanghvi owed no duty to Debtor, and the Court found that Plaintiff sufficiently alleged claims for relief.⁷¹ Defendants assert that the defense should be treated as a denial of Plaintiff’s vicarious liability claims.⁷² In the Second 12(b)(6) Order, the Court ruled that the Amended Complaint sufficiently alleges plausible

⁶⁴ Doc. No. 309, p. 13 (quoting First 12(b)(6) Order, Doc. No. 73, p. 14, n. 26 (citing *Weinberger v. UP, Inc.*, 457 A.2d 701 (Del. 1983))).

⁶⁵ Doc. No. 344, pp. 17-19.

⁶⁶ Doc. Nos. 260, 261, and 262.

⁶⁷ Doc. No. 309, pp. 18-19.

⁶⁸ Doc. No. 344, p. 25.

⁶⁹ See Doc. No. 360, p. 10.

⁷⁰ Doc. No. 261.

⁷¹ Doc. No. 309, p. 14 (quoting Second 12(b)(6) Order, Doc. No. 251, p. 2).

⁷² Doc. No. 344, pp. 9-10.

claims for relief, and that a disputed issue is whether Sanghvi owed a fiduciary duty to Debtor. Although the Court does not see a need for an identical summary judgment ruling, Plaintiff's Omnibus Motion is **GRANTED** as to Warburg's Thirteenth Affirmative Defense, and Warburg's Thirteenth Affirmative Defense is deemed a denial of Plaintiff's vicarious liability claims against Warburg.

h. Warburg's Fifteenth Affirmative Defense

Warburg's Fifteenth Affirmative Defense states that "Plaintiff's vicarious claim against Warburg is barred by [Debtor's] Amended Certificate of Incorporation, Article VI(f), and Delaware Code Annotated title 8 § 102(b) (7)."⁷³

Plaintiff contends that his vicarious liability claims against Warburg are not barred because Debtor's Amended Certificate of Incorporation specifically provides that a director's (Sanghvi's) liability is not limited with respect to (1) a director's breach of the duty of loyalty, (2) acts not in good faith, (3) acts related to an unlawful stock redemption, and (4) transactions in which the director derived an improper personal benefit.⁷⁴

Defendants respond that Plaintiff also alleges Sanghvi's breach of the duty of care, which is covered by the Amended Certificate of Incorporation's limitation on liability.⁷⁵

Among other allegations, the Amended Complaint alleges claims arising from Sanghvi's breach of the duty of loyalty, acts not in good faith, acts related to the stock redemption, or acts in which he gained a personal benefit.⁷⁶ For example, the Amended Complaint alleges that Sanghvi "wearing two hats" as a principal of Warburg and as a director of Debtor, participated in negotiations concerning the stock redemption.⁷⁷

The Court concludes that Plaintiff's vicarious liability claims against Warburg are not barred by

Debtor's Amended Certificate of Incorporation or Delaware law. Plaintiff's Omnibus Motion is **GRANTED** as to Warburg's Fifteenth Affirmative Defense and Warburg's Fifteenth Affirmative Defense is deemed a denial of Plaintiff's vicarious liability claims against Warburg.

i. Warburg's Nineteenth Affirmative Defense

Warburg's Nineteenth Affirmative Defense states

Count XVIII is barred, in whole or in part, because of Sanghvi's reliance in good faith upon the records of [Debtor] and upon the information, opinions, reports or statements presented to [Debtor] by any of its officers or employees, or committees of the board of directors, or by any other person as to matters Sanghvi reasonably believed are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation. Del. Code Ann. tit. 8 § 141(e).⁷⁸

Plaintiff contends that the defense is "vague, conclusory, and fails to describe how it applies to the facts of this case."⁷⁹

In response, Defendants assert that, in making his decisions, Sanghvi relied on the vote of Debtor's board members to enter the Stock Redemption Agreement, the solvency certificate issued by Debtor's CFO, and Debtor's financial statements and projections, including audited financial statements from Ernst & Young.⁸⁰

Whether Sanghvi relied on authoritative sources within Debtor in making his decisions on the stock redemptions is an issue to be determined by the fact finder. Plaintiff's Omnibus Motion is **DENIED** as to Warburg's Nineteenth Affirmative Defense.

⁷³ Doc. No. 261.

⁷⁴ Doc. No. 309, pp. 16-17.

⁷⁵ Doc. No. 344, p. 23.

⁷⁶ Doc. No. 237, ¶¶ 206-226.

⁷⁷ Doc. No. 237, ¶ 90.

⁷⁸ Doc. No. 261.

⁷⁹ Doc. No. 309, pp. 17-18.

⁸⁰ Doc. No. 344, pp. 24-25.

j. Wise's Fourteenth Affirmative Defense

Wise's Fourteenth Affirmative Defense states that "Wise's investment in [Debtor] is distinct from Warburg IX's investment and must be treated separately."⁸¹

Plaintiff contends that Wise's investment was negotiated and treated in tandem with Warburg's investment.⁸² To support the contention, Plaintiff cites (1) the First 12(b)(6) Order, in which the Court stated that Plaintiff "adequately and plausibly alleged that redemption of Wise's Preferred Stock was an integral part of a single transaction, negotiated by Sanghvi, for the mutual benefit of Equity IX and Wise;"⁸³ and (2) Wise's deposition testimony that he was "basically following along with Warburg and doing whatever they decided was going to happen."⁸⁴

In response, Defendants assert (1) that expert testimony is required to distinguish the economic benefits to Debtor of the redemption of Wise's stock, (2) that Debtor's corporate records distinguish Wise's interest, (3) that the Wells Fargo Loan was taken to redeem Warburg's shares, not Wise's shares, and (4) that the redemption of Wise's shares for \$1.1 million did not cause Debtor's insolvency.⁸⁵

Whether Wise's investment is distinct from Warburg IX's investment is an issue to be determined by the fact finder. Plaintiff's Omnibus Motion is **DENIED** as to Wise's Fourteenth Affirmative Defense.

DATED: April 1, 2021.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge

⁸¹ Doc. No. 260.

⁸² Doc. No. 309, p. 15.

⁸³ Doc. No. 73, p. 17; Doc. No. 309, p. 15.

⁸⁴ Doc. No. 309, p. 16.

⁸⁵ Doc. No. 344, pp. 20-21.