IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WILLIAM G. NELSON, IV,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2937-VCS
	)	
E. JAMES EMERSON and KATHLEEN EMERSON,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 8, 2008
Date Decided: May 6, 2008

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STRINE, Vice Chancellor.

I. Introduction

Plaintiff William G. Nelson was the sole secured creditor of Repository Technologies, Inc. ("Repository" or the "Company"). Nelson alleges that for nearly two years Repository was insolvent and not paying the interest owed under a substantial line of credit that he had extended to the Company. When Nelson threatened to enforce his rights as a secured creditor, Repository filed for bankruptcy. Nelson now claims that defendants E. James Emerson and Kathleen Emerson, two of the Repository's directors and its majority stockholders, breached their fiduciary duties to Repository by causing the Company to file for bankruptcy and by paying themselves "excessive" compensation during the time that Repository was insolvent, both before and after the bankruptcy filing. Nelson is particularly displeased at Repository's bankruptcy filing because the Company's plan to reorganize involved using principles of bankruptcy law to attempt to recharacterize Nelson's debt as equity. In Nelson's view, the Emersons breached their fiduciary duties by undertaking that strategy because Repository was only successful in having a portion of Nelson's debt recharacterized, therefore it did not prevail in having enough debt recharacterized to allow the Company to reorganize successfully. Thus, Nelson sees the bankruptcy filing as having served no purpose other than frustrating his ability to collect on the debt owed to him by the Company and extending the length of time that the Emersons remained on the Company's payroll.

The problem with Nelson's claims is that he is seeking a second chance to win the same game. Nelson made the same arguments he raises in this case to the Bankruptcy Court for the Northern District of Illinois when he sought to have Repository's

bankruptcy filing dismissed as being filed in bad faith or, alternatively, due to gross mismanagement of the Company. The Bankruptcy Court, despite dismissing Repository from Bankruptcy because it could not reorganize successfully, explicitly found that "the bankruptcy filing cannot be held to be in bad faith" and that there had not been "any mismanagement of [Repository's] assets and business."[1] Satisfied with the dismissal of Repository's bankruptcy, but unhappy with the Bankruptcy Court's ruling that the bankruptcy had not been brought in bad faith, Nelson appealed to the District Court for the Northern District of Illinois and argued that the Bankruptcy Court's findings on the bad faith issue were dicta. In essence, Nelson was attempting to preserve his ability to present his bad faith argument to another tribunal in the hope that a new court might find the argument more substantial. The District Court rejected Nelson's argument, ruling that the bad faith determination was an essential part of the Bankruptcy Court's holding because Nelson himself had advanced the argument that the bankruptcy filing was made in bad faith.

Undeterred, Nelson filed claims in this court arguing that the Emersons breached their fiduciary duties to Repository by filing the bankruptcy action in bad faith. He contends that the Bankruptcy Court's holdings on the bad faith and gross mismanagement arguments are not preclusive because those findings were not essential to the Bankruptcy Court's final judgment. I reject that contention because the U.S. District Court held that the arguments Nelson made to the Bankruptcy Court and that the Bankruptcy Court explicitly ruled on are part of that Court's holding. Nelson is precluded from arguing

[1] *In re Repository Tech., Inc.* ("*Repository I*"), 363 B.R. 868, 896 (Bankr. N.D. Ill. 2007).

otherwise. Moreover, although Nelson did not appeal the Bankruptcy Court's ruling on his excessive compensation argument by challenging its determination that there had been no mismanagement of Repository's assets, I reject Nelson's argument that Bankruptcy Court's ruling on Nelson's excessive compensation was not essential to its final judgment using the same reasoning as the U.S. District Court.

Nelson also argues that the bad faith standard used in bankruptcy law is not the same as the standards used to determine breaches of fiduciary duty under Delaware law. In making that argument, Nelson misunderstands the applicable Delaware law. It is settled Delaware law that an insolvent company is not required to turn off the lights and liquidate when that company's directors believe that continuing operations will maximize the value of the company. Federal bankruptcy law shares this belief and provides procedures that enable an insolvent company to continue its operations while at the same time balancing the interests of the affected corporate constituencies. Nelson argues that this court should hold Repository's directors liable for taking advantage of the bankruptcy laws despite the fact the Bankruptcy Code has mechanisms to prevent abuse and that the Bankruptcy Court explicitly found that Repository had filed for bankruptcy in good faith. As a prudential matter, this court should generally defer to the Bankruptcy Court and its expertise in addressing the misuse of the bankruptcy laws. But because the parties did not address that issue, my ruling rests on the determination that the Bankruptcy Court's factual findings preclude any liability under Delaware fiduciary duty law. The directors of an insolvent company who, in good faith, undertake a strategy to benefit the company's equity holders cannot be held liable just because the strategy

failed. The Bankruptcy Court has already determined that Repository's bankruptcy filing was a non-frivolous strategy and that it was partially successful. That precludes any finding that the Emersons breached their fiduciary duties by causing the Company to undertake that strategy.

Alternatively, I note that even if Nelson were not precluded from making his fiduciary duty claim, his pleadings fail to state a claim that the Emersons breached their fiduciary duties. Repository's charter contains a § 102(b)(7) clause that exculpates its directors from liability for breaches of their duty of care. Nelson must, therefore, plead facts supporting a viable claim for a breach of the duty of loyalty to survive the Emersons' motion to dismiss. Nelson's assertion that the Emersons caused Repository to pay them excessive compensation while the Company was insolvent does not support a duty of loyalty claim because the complaint neither quantifies the amount of the allegedly excessive compensation nor describes which directors approved that compensation or suggests that those unknown directors were not independent. Likewise, Nelson's contention that the Emersons caused Repository to file for bankruptcy in bad faith for the purpose of frustrating Nelson's efforts to collect the debt owed to him by Repository does not support a duty of loyalty claim. The pled facts merely suggest that the Emersons caused Repository to file a non-frivolous recharacterization claim for the benefit of its equity holders, a business decision that, although not ultimately successful, is protected by the business judgment rule.

II. Factual Background[2]

A. The Path To Bankruptcy

Repository markets, supplies, and maintains customer relationship software pursuant to licensing agreements with its customers. Repository filed for bankruptcy in April 2006, was dismissed from bankruptcy in February 2007, and was later sold to plaintiff William G. Nelson, IV, its only secured creditor, via a secured party sale in March 2007.[3] The events relevant to this lawsuit are those that occurred before the sale of Repository to Nelson. During the relevant time period, there were two primary factions that had an interest in Repository. One faction was comprised of defendants E. James Emerson and his wife Kathleen Emerson. The Emersons were Repository's majority stockholders and served as officers and directors of the Company.[4] The other faction consisted of plaintiff Nelson. Beginning in 1996, Nelson was a minority stockholder in Repository. But Nelson was not a passive minority stockholder. Nelson was a Repository director from 1996 until April 11, 2006, a mere two weeks before

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[2] The facts are drawn from the complaint, the documents it incorporates, and other publicly filed documents, including documents filed in the related federal court proceedings. *See, e.g.*, *West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006) (taking "judicial notice of the federal court decisions and orders" in the context of a motion to dismiss); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *12 (Sept. 1, Del. Ch. 1992) (stating that this court may take judicial notice of publicly filed documents on a motion to dismiss).

[3] *In re Repository Tech., Inc.* ("*Repository II*"), 381 B.R. 852, 862 (N.D. Ill. 2008).

[4] *Repository I*, 363 B.R. at 873 ("Mr. Emerson and Mrs. Emerson own 37.02% and 29.82% of the equity interests in RTI, respectively, for a combined 66.84% of the equity interests."). During the relevant time period, as best as can be gathered from the complaint, Repository's board varied in size from three directors to five directors. Compl. ¶¶ 4-6, 10, 33; *see also Repository I*, 363 B.R. at 872 ("Since 1996, RTI's Board of Directors had between three and five directors and Mr. Nelson had only one seat on the Debtor's Board of Directors while the principal shareholders, [the Emersons], had two seats, so Mr. Nelson was never in control of the Board of Directors.").

Repository filed for bankruptcy. Nelson also served as the Company's Chief Executive Officer from mid-2002 through mid-2004.

Nelson's resignation as director and Repository's bankruptcy filing were related to Nelson's other role at Repository, his status as a secured creditor of the Company since 2002. Nelson, who at the time of bankruptcy had a secured claim against Repository of over $2 million, triggered Repository's voluntary bankruptcy filing by sending Repository a notice of default letter (the "Default Letter") on the same day he resigned from Repository's board. Nelson first became a creditor of Repository in August 2002, when Repository and he executed agreements creating a secured $500,000 line of credit with a 15% interest rate (the "Nelson Line of Credit").[5] By December 31, 2002, Nelson had advanced Repository the full $500,000 under the Nelson Line of Credit. Approximately a year later, in December 2003, the Repository board voted to increase the line of credit to $1,500,000.[6] Thereafter, Nelson advanced funds totaling over $1,740,000 under the Nelson Line of Credit and received interest payments on the outstanding amounts. But the advances — and the Company's interest payments to Nelson — stopped in June 2004 when Nelson announced that he would not advance any more funds under the Nelson Line of Credit.

Nelson alleges that by June 2004, Repository had become insolvent because it stopped paying its debts as they became due, specifically the interest on the Nelson Line

[5] Repository's board, excluding Nelson who abstained, voted unanimously to approve the Nelson Line of Credit.

[6] The board approved the increased in the Nelson Line of Credit by a vote of three to zero, with Nelson and Mrs. Emerson abstaining.

of Credit. Moreover, Repository's June 30, 2004 balance sheet showed assets of $494,451 compared to liabilities of $2,528,453. Whether by coincidence or not, mid-2004 was also when Nelson left his post as Repository's CEO.

Repository, despite its seemingly bleak financial condition, was able to obtain one last inflow of cash from debt financing. In October 2004, Repository obtained $202,461 from West Suburban Bank in return for granting the Bank a promissory note and related security interest in Repository's assets (the "Bank Note"). Repository, although it was not making the required interest payments on the Nelson Line of Credit, stayed current on its obligations under the Bank Note through the time it filed for bankruptcy.

After not receiving interest payments on the Nelson Line of Credit for nearly two years, Nelson forced the issue in the Spring of 2006. The first thing Nelson did was to purchase the Bank Loan, which at that time had a balance of $126,484, on April 10, 2006. This made Nelson Repository's only secured creditor. The following day, Nelson resigned from Repository's board and sent the Default Letter. The Default Letter did not declare an immediate default, but instead requested that the obligations under the Nelson Line of Credit be made current within 15 days or Nelson would consider an act of default to have occurred. The letter put Repository in a difficult situation because it owed over $509,687 in interest payments under the Nelson Line of Credit.

B. Repository Files For Bankruptcy

Repository responded to Nelson's demand that it act upon his Default Letter within 15 days, but not in the manner that he requested. On April 25, 2007, Repository filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the

Northern District of Illinois. Nelson alleges that the bankruptcy filing was "authorized by [Repository's] board at the insistence of Mr. Emerson."[7] Nelson also contends that Repository was "substantially current on all its debts and obligations but for those that ar[o]se under the [Nelson Line of Credit]."[8] Nelson's secured claims against the bankruptcy estate totaled at least $2,377,148.[9] In contrast, the unsecured claims against the estate, excluding approximately $400,000 in unearned maintenance for Repository's future requirements to maintain its customers' software, totaled less than $35,000.[10] Thus, the bankruptcy proceedings were in essence a dispute between Nelson and Repository.

After the bankruptcy was filed, Nelson made the first move by moving to dismiss the bankruptcy case for cause under § 1112(b) of the Bankruptcy Code.[11] Among the reasons Nelson argued that the bankruptcy case should be dismissed were that Repository could not effectuate a plan in Chapter 11, that there was continuing loss to or diminution of the estate during the bankruptcy, that Repository's assets and business had been grossly mismanaged, and that the bankruptcy petition was filed in bad faith.[12] Repository, in turn, filed an adversary action against Nelson in bankruptcy seeking recharacterization of Nelson's loans to equity and equitable subordination of Nelson's

[7] Compl. ¶ 21.
[8] *Id.* ¶ 26.
[9] *Id.* ¶¶ 39, 44 (alleging that Repository owed Nelson principal of not less than $1,665,000 on the Nelson Line of Credit and related accrued interest of $509,687 in addition to $126,484 in principal on the Bank Loan).
[10] *Repository I*, 363 B.R. at 879-80.
[11] 11 U.S.C. § 1112(b); Emersons Op. Br. Ex. A ("Motion To Dismiss Bankruptcy Case").
[12] Motion To Dismiss Bankruptcy Case at 6-11.

loans[13] as well as a recovery from Nelson for breach of fiduciary duty.[14] The Bankruptcy Court consolidated the motion to dismiss the bankruptcy case and the adversary action and held a trial on those issues.

1. Nelson's Claims In This Court And His Arguments To The Bankruptcy Court

In describing the arguments Nelson made to the Bankruptcy Court to support his motion to dismiss the bankruptcy case, I will juxtapose the claims he makes in this action because the comparison between the two is critical to the proper resolution of this motion to dismiss. To support his assertion that Repository had been grossly mismanaged, Nelson argued to the Bankruptcy Court that "during the entirety of the time period in which [Repository's] financial difficulties [had] become apparent . . . [Repository's] officers, [the Emersons], [had] chosen to divert [Repository's] assets to their own pockets by richly compensating themselves and members of their immediate family through inflated compensation and commission structures."[15] Here and now, Nelson contends

[13] Recharacterization of loans from debt to equity and equitable subordination are two distinct doctrines that can have a similar practical effect on a party's indebtedness. *See* Emersons Op. Br. Ex. D ("Bankruptcy Court Findings & Conclusions") at 1. Recharacterization of debt to equity looks at whether a debt is really an equity contribution disguised as a debt. *See, e.g.*, *In re Outboard Marine Corp. v. Quantum Indus. Partners, LDC*, 2003 WL 21697357, at *2-5 (N.D. Ill. July 22, 2003). Equitable subordination is a doctrine that, based on a creditor's inequitable conduct and its effect on other creditors, allows that creditor's debt to be subordinated to other claims in bankruptcy or allows the creditor's liens to be transferred to the bankruptcy estate. 11 U.S.C. § 510; *see also In re Lifschultz Fast Freight*, 132 F.3d 339, 343-45 (7th Cir. 1997).

[14] Bankruptcy Court Findings & Conclusions at 1. The alleged breaches of fiduciary duty related to Nelson's acquisition of the Bank Loan and his sending of the Default Letter. *Repository I*, 363 B.R. at 891-92.

[15] Motion To Dismiss Bankruptcy Case ¶ 24; *see also* Emersons Op. Br. Ex. A ("Nelson Brief To Bankruptcy Court") at 4-5.

that the Emersons breached their fiduciary duties by "authorizing exorbitant salaries and benefits for themselves when the company was insolvent."[16]

To support his assertion that the bankruptcy was filed in bad faith, Nelson argued that Repository filed for bankruptcy "with the sole purpose of preventing Mr. Nelson from potentially exercising his state court rights" and that "evidence of self-dealing and mismanagement suggest a filing other than in good faith."[17] Here, Nelson asserts that the Emersons breached their fiduciary duties by "causing [Repository] to file for bankruptcy in order to frustrate the efforts of [Repository's] creditors, as well as to maintain their control over [Repository] and to continue the flow of excessive salaries and benefits for their personal gain."[18] Moreover, Nelson argued to the Bankruptcy Court that the bankruptcy filing was in bad faith because it risked damaging Repository's "single most valuable asset," its customers who were creditors due to their ongoing maintenance contracts with Repository.[19] In this action, Nelson also points to the bankruptcy filing as having a detrimental effect on Repository's "reputation among customers in the software community."[20]

2. The Bankruptcy Court's Findings

After a full trial, the Bankruptcy Court granted Nelson's motion to dismiss the bankruptcy case on February 13, 2007. But it did so only on the basis that Repository

[16] Compl. ¶ 62, *see also id.* ¶¶ 63-65.
[17] Motion To Dismiss Bankruptcy Case ¶¶ 47, 48; *see also* Nelson Brief To Bankruptcy Court at 12-13.
[18] Compl. ¶ 62.
[19] Motion To Dismiss Bankruptcy Case ¶ 43; *see also* Nelson Brief To Bankruptcy Court at 13.
[20] Compl. ¶ 63.

could not effectuate a plan in Chapter 11 because the Court decided that it would only recharacterize $240,000 of the Nelson Line of Credit to equity rather than a larger portion of the Nelson debt.[21] The Bankruptcy Court found against Nelson on his other arguments. The Court explicitly stated:

> Other grounds were argued in favor of dismissal, but they were not established. Nelson has not shown:
>
> a. continuing loss to or diminution of the estate during the bankruptcy;
> b. *any mismanagement of Debtor's assets and business*; or
> c. *the filing of a bankruptcy case and petition in bad faith*.
>
> Present management has kept the Debtor's business stable and operations have shown progress and efficient operation. The filing of this bankruptcy was a rational reaction to Nelson's action, and was partially successful. Therefore, *the bankruptcy filing cannot be held to be in bad faith*.[22]

In other words, the Bankruptcy Court specifically found that Nelson failed to establish the very same arguments that Nelson now repeats in this action.

3. The Bankruptcy Court's Decision Is Affirmed On Appeal

Both parties appealed the Bankruptcy Court decision to the U.S. District Court for the Northern District of Illinois. The District Court affirmed the Bankruptcy Court's decision in full.[23] The only argument made on appeal that is directly relevant to this action is Nelson's contention that the District Court should strike the language indicating the bankruptcy was a "rational reaction to Nelson's actions" and that the "bankruptcy

[21] *Repository I*, 363 B.R. at 882, 895. The $240,000 represents the amount advanced under the Nelson Line of Credit in excess of the $1,500,000 limit approved by Repository's board. *Id.* at 882. The Bankruptcy Court also found that Nelson had not breached his fiduciary duty to Repository. *Id.* at 894.
[22] *Repository I*, 363 B.R. at 896 (emphasis added).
[23] *Repository II*, 381 B.R. at 874.

filing [could] not be held to be in bad faith."[24] The District Court rejected Nelson's contention and stated that the "language [was] part of the Bankruptcy Court's holding because Nelson based his dismissal motion on [Repository's] bad faith."[25] The District Court further observed that "Nelson's argument that the Bankruptcy Court's language is dictum is defeated by his own motion requesting a finding of bad faith in support of dismissing RTI's bankruptcy case."[26]

C. The Events After Repository Was Dismissed From Bankruptcy

Immediately after the bankruptcy case was dismissed, Nelson sought relief from the U.S. District Court for the Northern District of Illinois in the form of an order precluding Repository from dissipating its assets. The District Court granted Nelson's request for a temporary restraining order. Repository, however, frustrated at least one of Nelson's goals in seeking the order because it transferred $100,000 to its bankruptcy counsel "just minutes before the Court issued [the] temporary restraining order."[27]

In March 2007, the month after Repository was dismissed from bankruptcy, the District Court appointed a receiver for Repository. That same month Nelson purchased all of Repository's assets, including its claims against the Emersons, in a transaction that was approved by the receiver.[28]

[24] *Id.* at 873.
[25] *Id.*
[26] *Id.*
[27] Compl. ¶ 55.
[28] *Repository II*, 381 B.R. at 862.

D. Nelson Files A Complaint In This Court In An Attempt To Relitigate The Arguments Denied By The Bankruptcy Court

On May 1, 2007, Nelson filed a complaint in this court seeking recovery on behalf of Repository (and as the holder of Repository's claims) against the Emersons for their alleged breach of fiduciary duties to Repository.[29] As discussed above, Nelson's complaint alleges that the Emersons breached their fiduciary duties to Repository by paying themselves excessive compensation while Repository was insolvent and by filing for bankruptcy. The alleged facts and related arguments are essentially the same as those Nelson made in the Bankruptcy Court.

III. Procedural Framework

The Emersons have moved to dismiss Nelson's complaint pursuant to Court of Chancery Rule 12(b)(6). In addressing a motion to dismiss, I must assume the truthfulness of all well-pled facts in the complaint and draw all reasonable inferences in the light most favorable to Nelson, the nonmoving party.[30] I need not, however, accept as true conclusory allegations that are unsupported by facts contained in the complaint.[31] After evaluating the complaint in this manner, I must dismiss any claim that Nelson

[29] Nelson, as a creditor, also filed a direct action against the Emersons alleging breaches of their fiduciary duties. Nelson agrees that this claim should be dismissed in light of a recent decision by the Delaware Supreme Court holding that creditors cannot bring direct actions for breaches of fiduciary duties. *See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007).

[30] *E.g.*, *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

[31] *E.g.*, *Hughes*, 897 A.2d at 168 (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).

would not be entitled to recover upon under any reasonable set of facts properly supported by the complaint.[32]

IV. Legal Analysis

The Emersons have moved to dismiss Nelson's bad faith bankruptcy filing and excessive compensation claims on the grounds that those claims are barred by the doctrine of collateral estoppel,[33] also known as issue preclusion, and that those claims fail to state a claim upon which relief can be granted.

A. Collateral Estoppel

The doctrine of collateral estoppel "precludes a party to a second suit involving a different claim or cause of action from the first from relitigating an issue necessarily decided in a first action involving a party to the first case."[34] "[T]he preclusive effect of a foreign judgment is measured by [the] standards [used by] the rendering forum."[35] The Emersons base their collateral estoppel claim on the findings and conclusions of the U.S. Bankruptcy Court for the Northern District of Illinois and the U.S. District Court for the Northern District of Illinois, and therefore the collateral estoppel standard of the U.S. Court of Appeals for the Seventh Circuit applies.[36] The Seventh Circuit requires that a party establish four elements before a court may invoke collateral estoppel: "(1) the issue

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[32] *E.g.*, *Hughes*, 897 A.2d at 168 (quoting *Savor*, 812 A.2d at 896-97).

[33] The Emersons do not assert that Nelson is barred from bringing his claims by the doctrine of claim preclusion because the Emersons were not named parties in the bankruptcy case. Tr. of Oral Arg. (Feb. 5, 2008) at 4-5. Candidly, this ruling would rest more comfortably on the doctrine of claim preclusion given the identity of interests between Repository and the Emersons as equity holders. Judicial, litigative, and business efficiency are all best served by a rule that requires litigants in bankruptcy to press as many of their claims as they are able during the bankruptcy proceeding itself. The elimination of rear view issues is a key part of the bankruptcy process for all concerned, and needless claim splitting is economically wasteful and taxes scarce societal dispute resolution resources.

sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must [have been] fully represented in the prior action."[37]

Here, the parties' dispute over the application of collateral estoppel involves two of the four elements. Nelson argues that collateral estoppel does not apply because the only issue essential to the District Court judgment was that Repository could not effectively reorganize and that the rest of its findings are dicta. Nelson also argues that the bad faith filing issue in this case is not the same issue determined by the Bankruptcy Court because the legal standards are different.

1. The Essential To The Judgment Element

a. The Bad Faith Filing Claim

Nelson argues that collateral estoppel does not bar its bad faith filing claim because the Bankruptcy Court's finding on the bad faith filing issue was dicta and therefore collateral estoppel does not apply because the court's determination on that issue was not essential to the court's final judgment. According to Nelson, the Bankruptcy Court's final judgment was based on Repository's inability to effectuate a valid plan under Chapter 11 and nothing else in the decision is entitled to preclusive

[34] *One Virginia Ave. Condo. Ass'n of Owners v. Reed*, 2005 WL 1924195, at *10 (Del. Ch. Aug. 8, 2005).
[35] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991).
[36] The Emersons note that there is a possibility that Delaware law on collateral estoppel might apply, but acknowledge that the difference between the Delaware and Seventh Circuit standard for collateral estoppel is not material in this case. Emersons Rep. Br. at 1.
[37] *See, e.g.*, *Universal Guar. Life Ins. Co. v. Coughlin*, 481 F.3d 458, 462 (7th Cir. 2007) (internal quotation and citation omitted).

effect. But the U.S. District Court ruling on appeal collaterally estops that argument because it rejected that same argument when Nelson made it on appeal.[38] Although one might have thought that Nelson would drop this argument after the District Court issued its ruling, Nelson continued to make this argument at oral argument after the District Court had issued its ruling.[39] The District Court ruling was plainly correct on its merits. Nelson himself pled the issue of bad faith, and a Bankruptcy Court ruling in his favor could have not only provided an independent basis for dismissing Repository's bankruptcy case, but also could have resulted in a fee recovery by Nelson and served as collateral estoppel.[40] That collateral estoppel effect might have been beneficial to Nelson in an action such as this fiduciary duty action against the Emersons or in the federal court action Nelson brought against Repository's bankruptcy counsel that alleges counsel harmed Nelson by conspiring with Emersons to breach their fiduciary duties and cause Repository to breach its loan contract with Nelson.[41] More important, the Bankruptcy

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[38] *Repository II*, 381 B.R. at 873.

[39] Tr. Of Oral Arg. (Feb. 5, 2008) at 38. The colloquy at oral argument went as follows:

> THE COURT: [Y]ou are going to now say that the finding of bad faith was not essential to the judgment?
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> [Counsel for Nelson]: That's correct. My reason for that is that the judgment of the Court is a dismissal of the case. The fact that those issues were lost by Mr. Nelson were not essential to the judgment of the Court. The judgment of the Court stands upon -- upon a dismissal because of the inability to reorganize . . . .

Id.

[40] *Id.* at 38-39 (Nelson's counsel acknowledging upon questioning that a successful bad faith ruling could have potentially resulted in some type of attorney fee relief for Nelson, whether it was the shifting of the fees for Nelson's counsel to Repository or an order affirmatively prohibiting the Company from paying its own counsel, and that such a ruling would have been eligible for collateral estoppel effect).

[41] *See* Letter from Joelle E. Polesky to Vice Chancellor Leo E. Strine, Jr. (Feb. 8, 2008) Ex. E ¶¶ 27, 32 (first amended complaint in the District Court action by Nelson against Repository's counsel). I say might because to use collateral estoppel offensively against Repository's counsel

Court judge, knowing that Nelson had reserved the right to seek "other and further relief as [the Bankruptcy Court] deems just and equitable,"[42] had to decide the bad faith issue because two common types of such further relief, fee shifting and an order requiring the debtor's counsel to disgorge its fees, could have been premised on a finding that the bankruptcy filing and recharacterization action were frivolous and filed in bad faith.[43] The Bankruptcy Court therefore had to address this issue, which Nelson himself put in contention. Thus, Nelson is collaterally estopped from raising that issue here.

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or the Emersons, they would have had to have had the interests fairly represented by Repository on the issue. *See* 18A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4448 (2008); *see also id.* § 4460 (stating that "[m]any of the decisions that extend preclusion through corporate relationships involve controlling owners" and that "[t]he easiest cases are those in which a controlling owner has in fact participated extensively in directing litigation by or against the corporation"). Given their role in the filing, that requirement might well have been satisfied.

[42] Motion To Dismiss Bankruptcy Case at 15.

[43] Nelson argued that the bankruptcy filing was made in bad faith and presented evidence at trial on that argument, but did not convince the Bankruptcy Court. *See* Motion to Dismiss Bankruptcy Case ¶ 39 (quoting the statement in *In re James Wilson Associates*, 965 F.2d 160, 170 (7th Cir. 1992), that "[t]he clearest case of bad faith is where the debtor enters Chapter 11 knowing that there is no chance to reorganize [its] business and hoping merely to stave off the evil day when the creditors take control of [its] property."). Had Nelson established that the bankruptcy was filed in bad faith, Nelson would likely have filed a Rule 9011 motion for sanctions in an attempt to have his fees shifted to Repository and have Repository's counsel disgorge the interim fee awards it had received. Fed. R. Bankr. P. 9011; *see In re McCormick Road Associates*, 127 B.R. 410, 413 (N.D. Ill. 1991) (suggesting the use of Rule 9011 in response to bankruptcy petitions filed in subjective bad faith); *see also Matter of Volpert*, 110 F.3d 494, 501 n.11 (7th Cir. 1997) ("Under Rule 9011, a bankruptcy court may sanction parties who file documents in bad faith or for an 'improper purpose, such as to harass or to cause unnecessary delay or . . . cost.'") (quoting Fed. R. Bankr. P. 9011(b)(1)); *Matter of Taxman Clothing Co.*, 49 F.3d 310, 312 (7th Cir. 1995) (stating "all interim awards of attorney's fees [to the debtor's counsel] in bankruptcy cases are tentative" and can be undone by a later order of the court); *In re Charter Tech. Inc.*, 160 B.R. 925, 931-32 (Bankr. W.D. Pa. 1993) (finding that debtor's counsel had forgotten who he was representing and became "hostile to the [d]ebtor corporation and its creditors" and ordering, as sanctions pursuant to Rule 9011, "that [the debtor's counsel's] retainer be disgorged, that he be allowed no fees in the within bankruptcy proceeding and that any fees to be collected by him shall be collected from his real client, [the debtor's president and principal stockholder]").

b. The Excessive Compensation Claim

Equally undeterred by his loss before the District Court, Nelson argues that the Bankruptcy Court's determination on excessive compensation was dicta and not essential to the Bankruptcy Court's judgment.[44] Nelson did not make that same argument on appeal to the District Court, so (somewhat counterintuitively) he is not collaterally estopped from making that argument here.[45] But the reasoning that the District Court used in finding that the Bankruptcy Court's bad faith filing was not dicta results in the conclusion that the excessive compensation determination was essential to the Bankruptcy Court's holding — Nelson cannot later argue that the Bankruptcy Court's ruling on an argument he made in support of his own motion for relief to the Bankruptcy Court is dicta.[46] Nelson's motion and brief in the Bankruptcy Court argued that the Emersons' pre- and post-petition compensation was evidence of gross mismanagement and that that mismanagement was in turn evidence of bad faith.[47] Like his other bad faith

[44] The parties also spar over the effect of the Bankruptcy Court's approval of the payment of salaries and commissions during the pendency of the bankruptcy. The Emersons assert that Nelson is collaterally estopped from making his excessive compensation claim on the basis of those approvals. Nelson counters by arguing that the approvals of compensation payments during bankruptcy were not final judgments entitled to preclusive effect and that the issue is not the same as the issue presented in this case because the issue presented here also involves compensation paid after Repository became insolvent but before it filed for bankruptcy. I see no need to address the issue of the effect of the approvals because I find that the Bankruptcy Court's ruling that there was no mismanagement of Repository's assets is the final word on that subject.

[45] There is, however, a strong argument that Nelson should not be able to collaterally attack that ruling in this court after failing to challenge it using the appeal process.

[46] *Repository II*, 381 B.R. at 873.

[47] *See* Motion To Dismiss Bankruptcy Case ¶¶ 24, 48; *see also* Nelson Brief To Bankruptcy Court at 4-5, 12-13. The fact that Nelson's motion and his brief included these arguments as the primary support for his assertion of gross mismanagement defeats Nelson's dubious argument that it is not clear that the mismanagement ruling addressed the Emersons' pre-petition compensation.

argument, a finding in his favor on this could have resulted in fee shifting and would have been eligible for collateral estoppel effect.[48]

2. The Same Issue Element

Nelson also argues that collateral estoppel does not bar its bad faith filing claim because the issue in this action is different from the issue considered by the Bankruptcy Court when it determined that Repository's "bankruptcy filing [could] not be held to be in bad faith."[49] Nelson argues that the issue in this action is different because a different legal standard applies.[50]

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[48] Although Nelson does not specifically advance the argument, his not essential to the judgment contention is much stronger with respect to the pre-petition compensation because it is arguable that the "gross mismanagement of the estate" statutory basis for dismissing a bankruptcy filing only applies to post-petition conduct. *See* 11 U.S.C. § 1112(b)(4)(B); *In re Rey*, 2006 WL 2457435, at *5 n.3 (Bankr. N.D. Ill. Aug. 21, 2006) (noting that § 1112(b)(4)(B) "refers to 'gross mismanagement of the estate,' arguably rendering pre-petition mismanagement irrelevant."). I do not find that argument persuasive, however, because Nelson specifically argued the pre-petition compensation to the Bankruptcy Court in support of his gross mismanagement contention and the Bankruptcy Court chose to explicitly rule that Nelson had not shown "any mismanagement of [Repository's] assets" rather than ruling that only post-petition conduct was relevant and confining its finding that there had been no mismanagement to post-petition conduct. In other words, I conclude that the Bankruptcy Court deliberately ruled on Nelson's own pre-petition excessive compensation claim after reviewing Nelson's arguments on that specific issue and the related evidence.

[49] *Repository I*, 363 B.R. at 896.

[50] Nelson has made a meal out of another issue. After the Bankruptcy Court dismissed the bankruptcy petition, Nelson moved for a temporary restraining order to keep Repository from dissipating its assets. Shortly before the hearing on his motion, Repository paid its bankruptcy counsel $100,000 for its work on the dismissed case. Nelson now says that this payment was a material fact that the Bankruptcy Court did not consider when determining whether Repository's filing was made in bad faith. I reject the argument that this later-arising fact undermines the preclusive effect of the Bankruptcy Court's ruling on the bad faith issue for several reasons. First, I refuse to assume that the Emersons exist out of chronological time. Their decision to have Repository pay its counsel after the dismissal of the bankruptcy case has no logical bearing on whether the earlier decision to file for bankruptcy was made in good faith, and is certainly not material enough to undermine the preclusive effect of the Bankruptcy Court's ruling. *See Illinois Bell Tel. Co. v. Haines & Co., Inc.*, 713 F. Supp. 1122, 1124 (N.D. Ill. 1989) ("Issues actually litigated in a prior action have preclusive effect if the controlling facts remain unchanged in the

Nelson's different legal standard argument is that the legal standard that the Bankruptcy Court used in making its determination that the bankruptcy filing was not in bad faith differs from the Delaware relevant standard for evaluating whether that filing constituted a breach of fiduciary duty.[51] The Emersons reply by arguing that it does not

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later action. That some minor, subsidiary facts are different will not bar the application of collateral estoppel."); *see also Ramallo Bros. Printing, Inc. v. El Día, Inc.*, 490 F.3d 86, 90 (1st Cir. 2007) ("While we acknowledge that changed circumstances may defeat collateral estoppel, collateral estoppel remains appropriate where the changed circumstances are not material."); 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4417 (2008) ("The possibility that new facts may surround continuation of the same basic conduct should not defeat preclusion unless it is shown that the new facts are relevant under the legal rules that control the outcome."). Nor is deciding to pay counsel who filed what a Bankruptcy Court found were non-frivolous claims an eyebrow raising act. Nelson has not pled an independent claim based on this act, and at most that payment would seem to at most give rise to some sort of cause of action on Nelson's behalf based on a failure by Repository to honor his rights as a creditor. In fact, Nelson is seeking to pursue such relief in U.S. District Court right now, having sued Repository's Bankruptcy Counsel for a return of its fees and other relief based on the theory that counsel had conspired with the Emersons to breach their fiduciary duties and cause Repository to breach its loan contract with Nelson. Letter from Joelle E. Polesky to Vice Chancellor Leo E. Strine, Jr. (Feb. 8, 2008) Ex. E ¶¶ 27, 32. Moreover, Nelson, who gained access to Repository's books and records rapidly after the Bankruptcy Action, failed to avail himself of options to present this supposedly troubling fact to either the Bankruptcy Court, through a Rule 60(b) motion, or to the U.S. District Court to which he addressed his application for a temporary restraining order and to which he appealed the Bankruptcy Court order. *See* Fed. R. Bankr. P. 9024 (making Rule 60(b) applicable in bankruptcy cases with three exceptions not relevant here); Fed. R. Civ. P. 60(b)(2) (allowing a motion for relief from a final judgment on the basis of newly discovered evidence). I acknowledge it is unusual to suggest that Nelson should have moved pursuant to Rule 60(b) in a situation where he achieved his primary goal of having Repository dismissed from bankruptcy, but Nelson's conduct in appealing the bad faith ruling indicates that he wanted that ruling overturned so he could monetarily benefit from a ruling on that issue in his favor. If, as Nelson now argues, the $100,000 payment was a material fact that would have affected the bankruptcy court's bad faith ruling, he should have addressed that argument to the Bankruptcy Court rather than bringing a second action in state court on the same issue.

[51] Although not raised by the parties, there is a plausible argument that state law claims that allege that a bankruptcy filing was made in bad faith, such as those for breach of fiduciary duty or abuse of process, are preempted. *See Casden v. Burns*, 504 F. Supp.2d 272, 282 (N.D. Ohio 2007) ("Because it is distinctly the province of bankruptcy law to determine liability for improper actions relating to bankruptcy filings, [the plaintiff's claim that the decision to file for bankruptcy was a breach of fiduciary duty] is preempted."); *Gonzales v. Parks*, 830 F.2d 1033, 1035-36 (9th Cir. 1987) ("Implicit in the Parkses' appeal is the notion that state courts have

matter that the legal standard is different because "the identical factual issue is presented — did the Emersons cause RTI to file for bankruptcy in bad faith?"[52] The critical question, however, is whether the Bankruptcy Court's factual findings would have a different effect under Delaware fiduciary duty law than under bankruptcy law.[53] The answer to that question is that the Bankruptcy Court's finding that the bankruptcy filing was not made in bad faith, that is, it was a non-frivolous attempt to reorganize the Company by recharacterizing Nelson's debt as equity, precludes a finding that the Company's directors violated their fiduciary duties by filing for bankruptcy.

It is settled Delaware law that "[e]ven when the company is insolvent, the board may pursue, in good faith, strategies to maximize the value of the firm."[54] Filing a

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subject matter jurisdiction to hear a claim that the filing of a bankruptcy petition constitutes an abuse of process. We disagree with that assumption. Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating."). *But see Davis v. Yageo Corp.*, 481 F.3d 661, 678 (9th Cir. 2007) ("Plaintiffs' breach of fiduciary duty claims are not preempted by federal bankruptcy law because these claims concern conduct that occurred prior to bankruptcy. The cases upon which defendants rely hold only that state law causes of action for abuse of process and malicious prosecution involving conduct that occurred during bankruptcy are preempted."); *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 393 (3rd Cir. 2002) ("Despite the broad scope of remedies available in the Code and the general exclusivity of the federal courts in bankruptcy, we have held that a state claim for malicious abuse of process was not preempted."). *See generally* Brian Bix, *Considering the State Law Consequences of an Allegedly Improper Bankruptcy Filing*, 67 AM. BANKR. L.J. 325 (1993).

[52] Emerson Rep. Br. at 4.

[53] 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4417 (2008) ("[C]areful examination of the controlling legal principles may show that the standards are the same, or that the fact findings have the same effect under either standard, so that the same issue is presented by both systems of law.").

[54] *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 204 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007).

Chapter 11 bankruptcy petition is a federally-sanctioned strategy for maximizing the value of an insolvent company.[55] Here, after a full trial, the Bankruptcy Court determined that Repository used that strategy in good faith.[56] Directors of a Delaware corporation do not commit a breach of fiduciary duty against the corporation if they, in good faith, seek to benefit the equity holders by bringing a bankruptcy, in order to recharacterize certain debt as equity.[57] So long as that action is not frivolous, such an

[55] *See, e.g.*, *Trenwick*, 906 A.2d at 204 ("Chapter 11 of the Bankruptcy Code expresses a societal recognition that an insolvent corporation's creditors (and society as a whole) may benefit if the corporation continues to conduct operations in the hope of turning things around."); *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 793 n.66 (Del. Ch. 2004) ("[I]n most instances when a firm is insolvent but believes itself to have a prospect for viability, the firm will seek out the protections of the Bankruptcy Code and attempt to restructure its affairs through the well-articulated body of federal law specifically designed for that purpose."); *see also Trenwick*, 906 A.2d at 204 n.103 (citing numerous federal decisions explaining the purpose of federal bankruptcy protection and the discretion afforded to directors in deciding whether to take advantage of the bankruptcy process).

[56] Nelson's argument that good faith in bankruptcy law only considers objective factors whereas good faith in Delaware fiduciary duty law considers subjective intent is misguided. The very decision that Nelson cites to support that proposition explains that in determining whether the debtor filed for bankruptcy in bad faith a court "may consider any factors which evidence an *intent* to abuse the judicial process and the purposes of the reorganization provisions." *In re McCormick Road Associates*, 127 B.R. at 413 (quoting *In re Phoenix Piccadilly Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988) (emphasis added); *see also id.* at 415 ("[O]nce a court has properly found that the debtor has failed to satisfy the court's objective good faith inquiry — i.e., whether reorganization is the proper course of action in a particular debtor's case — it may properly dismiss the debtor's petition without considering the debtor's subjective good faith. In other words, a finding of subjective bad faith — i.e., intentional abuse of the bankruptcy laws — is not a necessary prerequisite to dismissal for bad faith filing.") (internal quotation and citations omitted). Moreover, the use of objective factors as a proxy for subjective intent makes sense. *See Production Resources*, 863 A.2d at 793 n.85 ("Because it is impossible for non-divine judges to peer into the hearts and souls of directors, this court has recognized the importance of considering relevant circumstantial facts that bear on scienter, which include the substance and effects of the defendants' conduct."). The reality is that Nelson received a trial on, among other issues, whether Repository's bankruptcy filing was made in subjective bad faith. That he failed to prevail on that contention does not mean his argument was not fairly considered.

[57] *See Gheewalla*, 930 A.2d at 103 (explaining that its rationale for not recognizing direct fiduciary duty claims by creditors was that "[d]irectors of insolvent corporations must retain the

exercise of business judgment to advance the interests of the equity holders is not a breach of fiduciary duty simply because the directors do not achieve ultimate success.[58]

B. Failure To State A Claim

The Emersons, in the alternative, have moved to dismiss the breach of fiduciary duties claim for the failure to state a claim upon which relief can be granted. Although I have dismissed Nelson's claims on the basis of collateral estoppel, I address the Rule 12(b) arguments briefly. Before beginning the analysis, I note that the complaint must plead a viable claim that the Emersons breached their duty of loyalty to Repository to survive the Emersons' motion to dismiss because Repository's charter contains a § 102(b)(7) clause that exculpates its directors for breaches of the duty of care.

1. The Bad Faith Bankruptcy Filing Claim

Nelson asserts that the complaint pleads a viable claim that the Emersons breached their fiduciary duty of loyalty by filing for bankruptcy for the purpose of frustrating Nelson's efforts to collect on his secured claims against the Company.[59] As discussed

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freedom to engage in vigorous, good faith negotiations with individual creditors for the benefit of the corporation") (citing *Production Resources*, 863 A.2d. at 797).

[58] *See id.* ("Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation.").

[59] Nelson argues that in *Production Resources Group, L.L.C. v. NCT Group, Inc.* this Court recognized that facts demonstrating that directors acted to frustrate a creditor's collection efforts could suggest self-interest and bad faith and thus support a claim for breach of the duty of loyalty by a creditor. 863 A.2d at 799-800. Nelson ignores the explicitly tentative tact taken by *Production Resources* to this issue. *Production Resources* questioned whether a direct claim for breach of fiduciary duty could be brought by a particular creditor but determined that it was unnecessary and improvident to decide that question prematurely at the dismissal stage because venerable Delaware case law was confusing on whether a creditor could bring a direct claim and the plaintiff had asserted viable derivative claims that would allow the case to survive the defendant's motion to dismiss. *Id.* at 800-01; *see also id.* at 798 (citing *Asmussen v. Quaker City*

previously, the directors of a Delaware corporation do not commit a breach of fiduciary duty if they have the corporation file a non-frivolous claim, seeking to recharacterize certain debt to equity in order to protect the interests of the company's equity holders. In such a circumstance, the non-frivolous, good faith nature of the lawsuit makes filing that lawsuit a decision that is protected by the business judgment rule. To hold that this sort of decision is a basis for director liability if the company loses in Bankruptcy Court would discourage directors from exercising their business judgment by subjecting them to a judicially invented English Rule that makes them personally liable for the winner's costs and damages simply because of an adverse judgment.

2. The Excessive Compensation Claim

To state a claim for excessive compensation, a plaintiff "must either plead facts from which it may reasonably be inferred that the board or the relevant committee that awarded the compensation lacked independence (e.g., was dominated or controlled by the

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Corp., 156 A. 180, 181 (Del. Ch. 1931), for the general rule that directors of insolvent corporations may appropriately prefer particular creditors and *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. South Broad St. Theatre Co.*, 174 A. 112, 115-16 (Del. Ch. 1934), for the exception that the board's preference of one creditor over another could be a breach of fiduciary duty if motivated by self-interest). Fortunately, the Delaware Supreme Court soon clarified this area of our law, by holding that creditors may not bring direct claims against directors for breach of fiduciary duty but must rely on statutory, contractual, and other nonfiduciary claims available to creditors. *Gheewalla*, 930 A.2d at 103 ("[I]ndividual *creditors* of an *insolvent* corporation have *no right to assert direct* claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation or any *other* direct nonfiduciary claim, as discussed earlier in this opinion, that may be available for individual creditors.") *see also id*, 930 A.2d at 99 ("[C]reditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights."). As to an insolvent corporation, a creditor may prosecute a derivative suit but only to advance fiduciary duty claims belonging to the corporation itself. *Id.* at 101-02.

individual receiving the compensation), in which event proof of such allegations would cast upon the officer the burden to prove that the compensation paid was objectively reasonable in the circumstances or plead facts from which it may reasonably be inferred that the board, while independent, nevertheless lacked good faith (i.e., lacked an actual intention to advance corporate welfare) in making the award."[60]

Nelson falls woefully short of the mark. In two key areas, Nelson's complaint is devoid of any pled facts, as opposed to mere conclusory accusation. First, the complaint does not state who approved the Emersons' compensation. Second, the complaint does describe the specifics of the compensation, including the amount of the compensation. This is not at all excused by any lack of information on his part. For one thing, Nelson has had access to all of Repository's books and records since March 2007 when he purchased the Company. More important, Nelson was a Repository director at all relevant times until two weeks before the bankruptcy filing. His complaint fails to indicate *any* dissent on his part to the compensation of the Emersons.

First, the complaint does not provide any factual support for Nelson's allegation that Repository's board was controlled and dominated by the Emersons.[61] The complaint does not state who was on Repository's board at the time of the alleged excessive compensation or describe who — e.g., the board or the board compensation committee — approved or acquiesced to the Emersons' compensation. This failure is particularly problematic because, as discussed, Nelson himself was on Repository's board at all

[60] *Gagliardi v. TriFoods Intern., Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996).
[61] Compl. ¶ 11.

relevant times until two weeks before the bankruptcy filing.[62] Moreover, the simple assertion that the Emersons controlled the board is questionable because the complaint itself acknowledges that in December 2003, albeit at a time before the alleged excessive compensation was paid, the Repository board had five members, only two of whom were the Emersons.[63] Thus, no inference of pure numerical control of the board by the Emersons can reasonably be made.

Second and even more fatally to Nelson's claim, his complaint provides *no* information about the amount or specific instances of the alleged excessive compensation.[64] By no facts, I mean *none* that quantify what compensation the Emersons received and when, much less any that support an inference that the non-pled amounts exceeded what was rational and proper. As explained above, Nelson has no excuse for the lack information about the alleged excessive compensation. Therefore, "[i]n the absence of [pled] facts casting a legitimate shadow over the exercise of business judgment reflected in compensation decisions," this claim must be dismissed."[65]

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[62] *Id.* ¶ 4.
[63] *Id.* ¶ 33.
[64] *See id.* ¶ 2 (alleging that the Emersons enriched "themselves and members of their family through the payment of exorbitant salaries, benefits and expenses); *id.* ¶ 13 (alleging that "Mrs. Emerson received excessive commissions in that commissions were paid for customer service, rather than sales activities); *id.* ¶ 14 (alleging that the Emersons "both dined frequently at [Repository's] expense, charging meals to the company American Express Card"); *id.* ¶ 20 (alleging that the "continued payment of excessive salaries and commissions further diminished [Repository's] cash reserves"). Nelson's contention that amounts and specifics are not necessary because the payment of "*any* compensation during insolvency was exorbitant" is absurd and illustrates why conclusory pleading that compensation is "excessive" has been held to be not sufficient to state a claim. Nelson Ans. Br. at 18 n.9 (emphasis in original).
[65] *Gagliardi*, 683 A.2d at 1051.

V. Conclusion

For the foregoing reasons, the Emersons' motion to dismiss is granted because Nelson is collaterally estopped from relitigating his fiduciary duty claim and Nelson's complaint fails to state a viable claim for breach of fiduciary duty. IT IS SO ORDERED.