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November 8, 2022

VIA ECF

The Honorable Robert W. Lehrburger
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl St, Courtroom 18D
New York, NY 10007

Re: *Tang Capital Partners, LP v. BRC Inc.*, No. 22 Civ. 3476 (S.D.N.Y.) (RWL)

Dear Judge Lehrburger:

On behalf of Plaintiff Tang Capital Partners, LP ("Tang Capital"), and pursuant to Local Civil Rule 37.2 and Rule II.D of the Court's Individual Practices, we respectfully submit this request for a pre-motion discovery conference.

The parties have now spent months debating whom Defendant BRC, Inc. ("BRC") will use as custodians for the collection and review of responsive electronically stored information ("ESI") and have reached an impasse. BRC's refusal to search two of its top executives' email boxes and files for responsive documents, for a total of six BRC ESI custodians, is spurious, particularly in light of BRC's demands for the use of *seven* Tang Capital custodians, including Tang Capital's own founder and President and its CFO, all of which Tang Capital is willing to provide. Without ESI custodians set, search terms have not been finalized, and to date BRC has produced no documents in response to Tang Capital's August 3, 2022 Requests for Production. No depositions have been scheduled or held.

This pace of progress is too slow. At our Initial Pretrial Conference, BRC's counsel agreed that discovery would *not* be stayed pending resolution of BRC's motion to dismiss. But BRC's delay tactics regarding custodians and other aspects of ESI discovery suggest its intent to avoid substantive discovery until after the Court rules on BRC's motion to dismiss and threaten the Court's December 16, 2022 fact discovery deadline. Tang Capital respectfully requests a ruling that BRC use all six requested custodians for its searches; that Tang Capital use the seven custodians BRC has requested; and that discovery proceed.

Procedural Background. On July 14, 2022, the Court held an Initial Case Management Conference (the "Hearing") (ECF No. 27) and issued a Civil Case Management Plan and Scheduling Order (ECF No. 26). At the Hearing, the parties expressly agreed, and the Court then ordered, that discovery was *not* stayed pending the briefing and resolution of BRC's motion to dismiss. *See* Hearing Tr. 11:3–8; 13:15–14:6; ECF No. 26. The current fact discovery deadline is December 16, 2022. ECF No. 26.

The parties' dispute regarding the identity of BRC's ESI custodians. Since the Hearing, the parties have met and conferred by phone five times (Sept. 9, Sept. 21, Sept. 29, Oct. 12, and Oct. 25) and exchanged numerous emails regarding the identity of custodians whose documents should be collected and reviewed in discovery. From the beginning, Tang Capital included BRC's three co-founders, **Evan Hafer, Tom Davin,** and **Matthew Best**, who are also BRC's co-CEOs and Chief Branding Officer, as requested BRC custodians, on the basis that these top executives of BRC were likely to have participated in discussions regarding BRC's warrants and its decision to disallow the exercise of the warrants, the conduct at the center of this action, and that a review of these documents may shed light on how, when and why BRC made this decision. Tang Capital stressed that BRC's warrants were important to BRC's capital structure, and that, during the key days at issue in this action, BRC's public stock price was hovering around important levels that, if sustained, would trigger large "earn-out" payments to these top executives. It seems highly likely these individuals considered how warrant exercise and the resulting issuance of large amounts of BRC stock would affect the company's public stock price. BRC, in response, argued that documents surrounding the facts and motivation for an alleged breach of contract are immaterial and irrelevant.

Over multiple meet-and-confer calls, the same pattern repeated: BRC would ask for Tang Capital to explain why it believed Mr. Hafer, Mr. Best, and Mr. Davin would be appropriate custodians, Tang Capital would explain its view, only for BRC to object. Meanwhile, BRC has taken unduly long amounts of time to answer simple questions and to provide industry standard search term hit reports (which in all events are of limited use until custodians are set), and sent responsive emails on Friday nights. Mostly recently, BRC's offered to use Mr. Davin as a custodian (alongside three other requested BRC custodians, for a total of four BRC ESI custodians), but only if Tang Capital would withdraw its request for Mr. Hafer and Mr. Best. To date, BRC has not produced any documents in response to Tang Capital's August 3, 2022 Request for Production.

Mr. Hafer, Mr. Best, and Mr. Davin are all necessary ESI custodians. FRCP 26(b)(1) provides that "[p]arties may obtain discovery . . . that is relevant to any party's claim or defense and proportional to the needs of the case." Proportionality is determined by weighing the following factors: (1) the importance of the issues at stake; (2) the amount in controversy; (3) the parties' access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *See, e.g.*, *Henkels & McCoy Group, Inc., et. al v. Verizon Sourcing LLC*, No. 21 Civ. 9576 (S.D.N.Y.) (RWL), ECF No. 44 (ordering defendant to produce documents from additional custodians).

The proposed but rejected custodians are all positioned to possess unique knowledge and information regarding BRC's unlawful refusal to honor the governing warrant agreement. Each of these individuals was a co-founder of BRC in 2014 and has since served as its top executives. Each would have been present when BRC conducted its "de-SPAC"

business combination with SilverBox and used a Form S-4 to register BRC's offering of three groups of groups of securities (common stock, warrants, and common stock underlying warrants) that BRC planned to issue in the de-SPAC merger. Each stood to gain large "earn-out" payments keyed to the price level of BRC's public stock, which, during the critical days in this case, was hovering around a level at which each would earn large "earn-out" payments. Each surely had some understanding of the mechanics of the warrants.

Collecting documents from these three custodians is proportional to the needs of the case. (1) The central issue in this case concerns the propriety of BRC's refusal to honor the governing warrant agreement.[1] (2) Plaintiff suffered substantial financial damages. (3) Plaintiff cannot access the custodians' ESI without this collection and production of relevant documents. (4) BRC has hired a sophisticated law firm and has not disputed that it has already collected these custodians' documents and could easily apply search terms to them with minimal additional cost and effort.[2] (5) Discovery on this key issue is relevant to the case and likely to affect BRC's prospects on summary judgment and at trial. (6) The burden on BRC to include these custodians would be minimal.

Indeed Tang Capital's request here is less burdensome than what BRC itself has demanded of Tang Capital. While BRC has resisted custodians, Tang Capital has delivered to BRC information regarding everyone we believed worked on the BRC warrants trade (a total of *nine* individuals, including Tang Capital's founder and President, as well as its CFO), and offered to collect and search the ESI of all nine. BRC responded that it sought the documents of *seven* of these nine custodians. In this context, Defendant BRC cannot credibly claim that using six custodians of its own is unduly burdensome.

Respectfully Submitted,

/s/ Reed Brodsky
Reed Brodsky

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[1] BRC's position that facts surrounding its refusal to permit exercise of is warrants are immaterial because the case turns on a pure legal issue is belied not only by BRC's position at the Hearing before this Court, in which it agreed to embark on fact discovery, but also by the fact that BRC has agreed to collect, review, and produce the documents of certain other custodians, including Mr. Davin. It is also wrong on the law. *See GE Funding Cap. Mkt. Servs., Inc. v. Nebraska Inv. Fin. Auth.*, 2017 WL 2880555, at *5 (S.D.N.Y. July 6, 2017) (holding "statements may be admitted as extrinsic evidence of [defendant's] post-execution course of conduct").

[2] BRC has asserted that including Mr. Hafer and Mr. Best as custodians would yield "duplicative" documents. But duplicative documents would be de-duplicated in an automated fashion during document processing and prior to review, as is the industry standard.