SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NIGEL JOHN ECCLES, et al., *Plaintiffs*, -against- SHAMROCK CAPITAL ADVISORS, LLC , et al., *Defendants*.	Index No.: 651223/2020 IAS part 48 Justice Andrea Masley **Motion Seq. No. 20** **ORAL ARGUMENT REQUESTED**

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**MEMORANDUM OF LAW IN SUPPORT OF
THE FANDUEL DEFENDANTS' MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT**

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Defendants Andrew Cleland, Matthew King, David Nathanson, Fastball Holdings LLC, Fastball Parent I, Inc., Fastball Parent II Inc., PandaCo, Inc., FanDuel Inc., and FanDuel Group, Inc. (collectively, the "FanDuel Defendants") respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3211(a)(1), (2), (3), and (7), to dismiss Plaintiffs' Second Amended Complaint ("SAC") with prejudice.

PRELIMINARY STATEMENT

Plaintiffs' new allegations and newly cited discovery documents lift the curtain on this case, exposing that their claims are, and always have been, hollow. To be sure, Plaintiffs' original allegations were never properly tested: This Court "appl[ied] New York law" to those claims, NYSCEF 204 ("MTD Order") at 17; and after holding that Scots law applies, the Court of Appeals addressed only whether "the director defendants owed"—not breached—any "limited fiduciary duties," *see* NYSCEF 378 at 23, 26-27. Now, after receiving exhaustive discovery, Plaintiffs' own concessions and exculpating documents make clear that, as a matter of law, there was no fiduciary breach or any other wrongdoing. The entire SAC should be dismissed.

In ruling on Defendants' prior motions to dismiss, this Court lacked the benefit of the new allegations and documents incorporated into the SAC—which eviscerate Plaintiffs' claims. Plaintiffs' theory is that the directors of non-party FanDuel Ltd. ("FDL") purposely undervalued shares FDL received as consideration in an acquisition by PaddyPower Betfair plc ("PPB") to reap the maximum benefit for themselves, instead of common shareholders. But Plaintiffs' new allegations prove the Director Defendants were aligned with common shareholders because they held *far more* common shares than all Plaintiffs combined. *See* ¶¶ 23, 198-199.[1] They thus had every incentive to obtain the highest possible valuation for FDL's shares. *Infra* I.

[1] SAC paragraphs are cited as "¶__." Citations to "LDY Aff. ¶__" and "Ex.__" refer to,

Plaintiffs' newly cited documents also conclusively disprove their theory that the offer price and process were not "fair." *Infra* II.A-B. Scots law presumes the offer price was full and fair consideration because it was negotiated at arm's length by independent third parties (FDL and PPB). And Plaintiffs' new documents conclusively prove this, as the offer price was the highest FDL received (from 150 prospects), equaled what third parties would accept for those shares, and was found "sufficient" by "banking and legal advisors." Ex. 1 at FanDuel_Def_000225443. Meanwhile, Plaintiffs admit their preferred safeguards were not expressly required.

Plaintiffs' claims cannot withstand scrutiny in light of the new information they have conceded. The reality, as their new documents show, is that after Lead Plaintiff Nigel Eccles mismanaged FDL into the ground, the Director Defendants were forced to step in, pursue a buy-out that Plaintiffs had facilitated, and accept the highest available offer—indeed, the *only* lifeline that would save FDL from collapse. As a result, Plaintiffs' claims all fail. There was no fiduciary breach as a matter of Scots law because FDL's Articles authorized every challenged action. The oppression claims fail because Plaintiffs "no longer ha[ve] standing," as they concede. ¶¶ 407-408. Other claims fail to plead essential elements, such as a fiduciary breach or Articles violation. And the fraud claims (which Plaintiffs never even tried to bring before) fail to plead any misrepresentation or reliance.

The Court should dismiss the SAC with prejudice.

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respectively, the Affirmation of Lord Drummond Young and exhibits attached to the Affirmation of Melanie Burke, filed herewith. These exhibits may be considered because "the court may consider documents referenced in [the] complaint, even if the pleading fails to attach them" and "undisputed court records and files." *All. Network, LLC v. Sidley Austin LLP*, 43 Misc. 3d 848, 852 n.1 (Sup. Ct. N.Y. Cnty. 2014). The cited discovery documents are undisputed: Plaintiffs admit to using them to prepare the SAC. *See* Ex. 2.

STATEMENT OF FACTS

After receiving 400,000 pages of discovery, Plaintiffs have put before the Court new allegations and dozens of discovery documents either directly attached to the SAC (referenced by "NYSCEF" number) or used by Plaintiffs in drafting the SAC (referenced by "Ex."). *See* Ex. 2. Given the Court's familiarity with the case, this Statement focuses on the new allegations and documents, which conclusively refute Plaintiffs' claims.

A. Lead Plaintiff Nearly Destroyed FanDuel.

Led by FDL's co-founder and former CEO Nigel Eccles, Plaintiffs are founders and former shareholders and option holders of FDL, a Scottish company whose primary business was daily online fantasy sports. ¶¶ 15-22, 41, 45-46.

Between 2014 and 2017, FDL was in "poor financial condition." MTD Order at 20. While Eccles was CEO, FDL faced "mounting legal challenges, regulatory hurdles, and cash constraints." ¶ 63; *see* ¶¶ 51-52 ("significant capital outlay"). Eccles steered FDL to "slowed growth," ¶ 126, and "lack of profitability," NYSCEF 484 at FanDuel_Def_000104908, causing FDL to "sit in purgatory" as employee retention became "tough[er] by the day," Ex. 3 at KKR0035226.

In February 2017—over one year before the challenged acquisition—Plaintiffs and other FDL shareholders tried to facilitate FDL's buy-out by approving amendments to FDL's Articles that would take effect after a failed merger attempt with rival DraftKings. ¶¶ 71, 76; *see* NYSCEF 47 ("SA") ¶ 10. The amendments simplified FDL's capital structure to preferred and common (or "Ordinary") shares. ¶¶ 76-77. Under newly amended Article 83, upon "any winding up or reduction of capital," there would be a "waterfall" distribution of FDL's assets to shareholders. ¶ 86; *see* NYSCEF 40 ("Articles") at Article 83.1. Plaintiffs negotiated this waterfall, which *reduced* "by over $150 million" the maximum distribution preferred shareholders could receive upon a "change of control," SA ¶ 7—down to a $559.4 million Subscription Price, with common

shareholders receiving any remainder, ¶ 80. Further facilitating a buy-out, Plaintiffs modified pre-existing "Drag Along Rights" such that KKR and Shamrock investors could require shareholders to accept an offer made "on bona fide arm's length terms." ¶¶ 81, 83; NYSCEF 41 at 74.

Significantly, Plaintiffs' new allegations prove Defendants' interests were always aligned with common shareholders': Plaintiffs now allege "many shareholders held both preferred and common shares," ¶ 189, with KKR's investors (14.2%) and Shamrock's investor (12.2%) each holding *more* common shares than all Plaintiffs combined (10%), ¶¶ 23, 198-199. Collectively, Defendants held a majority of common shares. *See* SA ¶ 8.

B. FanDuel Negotiated an Acquisition at Arm's Length.

FDL's severe financial difficulties under Eccles continued through late 2017, with year-end losses of $38.8 million, accumulated losses of $231,971,757, and EBITDA of negative $21.3 million. SA ¶ 3; NYSCEF 484 at FanDuel_Def_000104915. FDL responded how distressed companies often do: It replaced its ineffective CEO with its CFO, Defendant King, *see* ¶¶ 97, 107; SA ¶ 8, and enlisted a consultant ("Moelis") to explore financing options, ¶ 115. After months of outreach to "more than 150 potential buyers/investors/partners," SA ¶ 12; *see* ¶¶ 121-122, Moelis identified just three viable options: (1) private funding at a $400 million valuation; (2) acquisition by a special purpose acquisition company ("SPAC") at a $544 million valuation; and (3) the PPB Acquisition at a $559 million valuation. NYSCEF 523 ("Shamrock Presentation") at 11; *see* ¶ 150.

The PPB Acquisition was "the best offer received by FanDuel." SA ¶ 12; *see* Shamrock Presentation at 11. Plaintiffs now admit other investors "'t[ook] a wait and see approach'" as to how the U.S. Supreme Court's forthcoming *Murphy* decision might affect the market for sports gambling. ¶¶ 75, 186. Unlike other offers, the Acquisition "create[d] real strategic value regardless of [*Murphy*'s] outcome." Shamrock Presentation at 4.

In March and April 2018, FDL and PPB negotiated initial terms. ¶ 172. Plaintiffs' new documents confirm these negotiations were at arm's length: (1) Each side had separate financial and legal counsel and covered its own expenses, *see* NYSCEF 42 ("Term Sheet") at 2, 7; (2) during negotiations, FDL's expected share in the combined entity (PandaCo) changed as FDL's expected contribution changed, *e.g.*, Shamrock Presentation at 24; and (3) FDL's $559.4 million Enterprise Valuation (minus debt) was higher than any other offer, *id.* at 11. To ensure the deal would close regardless of *Murphy*'s outcome, the parties agreed all valuations were "not dependent on any expected change in" sports-gambling law, and "neither party intends to request an alteration of such valuations" after *Murphy*. Term Sheet at 3. The parties thus factored in *Murphy*'s speculative long-term effects as possible future upside or downside in case a sports-gambling market didn't emerge or PandaCo couldn't capitalize on it. Plaintiffs do not allege this was improper.

Under the finalized terms, FDL would contribute "$491m Equity Value" in assets, and PPB $679 million in assets and cash. Term Sheet at 3. FDL's shares would be transferred to PandaCo; as consideration, roughly 40% of PandaCo's shares would be transferred to FDL and distributed under the Article 83 waterfall. ¶¶ 174, 176. Critically for cash-strapped FDL, PPB would "contribute significant primary capital"—about $145 million—"to fund the current and expected requirements of" PandaCo. Term Sheet at 1.

When the Term Sheet was finalized on April 28, *Murphy* was still pending, ¶ 184, and FDL had negative working capital, $60.3 million in debt, and would need "a bridging loan" to survive until "the sale [was] completed," SA ¶ 12. On May 14, *Murphy* issued, allowing states to legalize sports gambling (leaving unknown, of course, when and how many would do so). *Murphy v. NCAA*, 584 U.S. 453, 486 (2018). There are no allegations FDL received any offer after *Murphy*.

C. FanDuel's Directors Executed the Acquisition as the Articles Required.

Later in May 2018, PandaCo was established to own and operate the combined entity, ¶¶ 32, 174, and the Fastball entities were established to hold PandaCo shares, ¶¶ 34, 383. Plaintiffs concede FDL's Articles "d[id] not expressly require Defendants to obtain" "an independent valuation" of PandaCo or adopt any safeguards. NYSCEF 139 at 54. Plaintiffs also agree the Dragging Shareholders (KKR and Shamrock investors) were authorized to accept PandaCo's offer without other shareholders' consent. ¶ 81; Article 78. Once PandaCo's offer was accepted, the directors were required to distribute what was offered pursuant to the Article 83 waterfall. *See*, *e.g.*, Article 1.1 ("the aggregate consideration offered will … be paid to … the shareholders in accordance with" Article 83). They "could run the waterfall immediately upon closing," as Plaintiffs now concede. ¶ 191; *see* Article 83.

On May 22, FDL's Board of Directors unanimously approved the Acquisition and a resolution distributing PandaCo shares as consideration to FDL's shareholders. ¶¶ 273, 275. FDL, PPB, and PandaCo signed the Contribution Agreement confirming FDL would receive roughly 40% of PandaCo. ¶¶ 330-331. Consistent with their expectations that *Murphy* would not change any valuations, FDL's interest was expected to be valued at what it had contributed (less debt), *i.e.*, $465.5 million. ¶ 336. The Board unanimously voted to run the waterfall upon closing using "the consideration to be offered pursuant to [PandaCo's] Offer." NYSCEF 43, ¶ 6.2.3; *see* ¶ 193. PandaCo's formal offer stated, "[t]he Business Combination implies a cash equivalent value of the FanDuel Share Pool … of **US$465,493,638.84**." NYSCEF 39, ¶ 3(a). Because this did not exceed the $559.4 million Subscription Price, common shareholders would not receive PandaCo shares unless (like Eccles, SA ¶ 5) they also held preferred shares. *See* ¶ 5.

This Court has already found the Director Defendants properly "disclosed their [alleged] conflicts" when they voted. MTD Order at 18. Regardless, FDL's Articles authorize conflicts by

"Investor Directors," Article 19.8—which Plaintiffs agree included "Defendants Oberwager, LaSalle, and Cleland," ¶ 286. As to Defendants King, Nathanson, and Vogel, Plaintiffs now allege their management carve-out ("MCO") agreements were restructured for valid reasons: *i.e.*, so each would receive "the entirety of the MCO bonus they had originally negotiated" months or years earlier. ¶ 590 (Nathanson & Vogel); *see* ¶ 316 (King).

Despite previously complaining they received no notice, Plaintiffs now concede shareholders received many communications about the transaction, PandaCo's offer, and the Drag Along rights. ¶¶ 390-391. Mr. King's "Dear Shareholder" letters correctly explained it was "highly likely" "all Ordinary Shares will be compulsorily transferred … for no consideration," and therefore "the consideration [common shareholders] would receive" was "Nil" and options holders may not "recover the amount they paid for those shares." Ex. 4 at FanDuel_Def_000023786-87.

In July 2018, the Acquisition closed and PandaCo's shares were distributed via the waterfall. *See* ¶¶ 399, 403.

D. Procedural History

Just before the Acquisition closed, four FDL founders (all Plaintiffs here) challenged it in Scottish court, ¶ 394, but abandoned their petition after FDL's answer asserted their claims were not cognizable under Scots law, SA ¶ 24. Plaintiffs say they "no longer had standing." ¶¶ 407-408. But because standing for those Scots-law claims is assessed only when the petition is filed, Plaintiffs could've continued had they thought their Scots-law claims had merit. LDY Aff. ¶ 24.

Trying to avoid Scots law, in 2020 Plaintiffs—including all four petitioners in the Scottish proceeding—filed this action in New York, claiming (1) fiduciary breach, (2) aiding and abetting that breach, and (3) unjust enrichment based on Defendants' alleged undervaluing of FDL's shares in PandaCo. MTD Order at 13.

Defendants' motions to dismiss argued that Scots law applied and that no fiduciary duty or breach was adequately pleaded under Scots law, as there were insufficient allegations Defendants "failed to comply … with the Articles." NYSCEF 15 at 14-21. In partly denying the motions, this Court declined to apply Scots law because Defendants were "not current officers, directors and shareholders" when the lawsuit was filed. MTD Order at 16. The Court held under New York law that Plaintiffs had pleaded a fiduciary breach by the Director Defendants. *Id.* at 17-26.

The First Department reversed, holding that Scots law applied because those Defendants were officers or directors "at the time of the events giving rise to the lawsuit," and no "special circumstances" necessary to establish "a fiduciary duty to … shareholder[s]" were adequately alleged. NYSCEF 355 at 7-8. Because that court dismissed the complaint for failure to plead a fiduciary duty, it did not reach the Director Defendants' argument that Plaintiffs also failed to plead any breach under Scots law. *See Eccles* Appeal, NYSCEF 14 at 39-43.

The Court of Appeals reversed, holding that "[t]he Appellate Division properly concluded that Scots law applies," NYSCEF 378 at 27, but erred in dismissing the complaint, as Plaintiffs had adequately pleaded "limited fiduciary duties," *id.* at 26. But "the existence and extent of any [fiduciary] duty," the Court emphasized, is "heavily dependent on plaintiffs proving the[ir] factual allegations." *Id.* at 27. That Court expressly did not rule on Plaintiffs' breach allegations: "At issue … is the first requirement: whether the director defendants owed plaintiffs any fiduciary duty." *Id.* at 23.

Plaintiffs then filed the SAC, alleging new Scots-law claims that are variations on a fiduciary breach, plus two fraud claims. NYSCEF 384. The non-fraud claims draw heavily on 400,000 pages of discovery Plaintiffs had received in the interim. *See* Ex. 2.

LEGAL STANDARD

CPLR 3211(a)(7) requires dismissal where plaintiffs "fail[] to assert facts in support of an element" or "the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mex. Grill, Inc.*, 29 N.Y.3d 137, 142 (2017). This Court must give Plaintiffs "every possible favorable inference" and "accept the facts as alleged" as true, except as to "allegations consisting of bare legal conclusions." *Id.* at 141.

CPLR 3211(a)(1) requires dismissal where the documents "utterly refute the plaintiff's factual allegations, conclusively establishing a defense." *Victory State Bank v. EMBA Hylan, LLC*, 169 A.D.3d 963, 965 (2d Dep't 2019). "[T]he court may consider documents referenced in [the] complaint, even if the pleading fails to attach them," and "undisputed court records and files." *All. Network*, 43 Misc. 3d at 852 n.1.

ARGUMENT

Past is not prologue here. When initially allowing some claims to go forward, this Court neither applied Scots law nor had the benefit of Plaintiffs' new concessions and documents incorporated into the SAC. And while the Court of Appeals held under Scots law that Plaintiffs "state[d] a claim that the director defendants at least *owed* limited fiduciary duties," NYSCEF 378 at 26 (emphasis added), it too never saw this new record, and it was never asked to decide whether any breach had allegedly occurred (no party had even briefed that issue). "[A]t issue," that Court made clear, was only "the first requirement: whether the director defendants owed plaintiffs any fiduciary duty." *Id.* at 23.

Crucially, the new allegations and discovery documents that *no* court has considered utterly refute Plaintiffs' theory that the Director Defendants purposely undervalued FDL's shares in

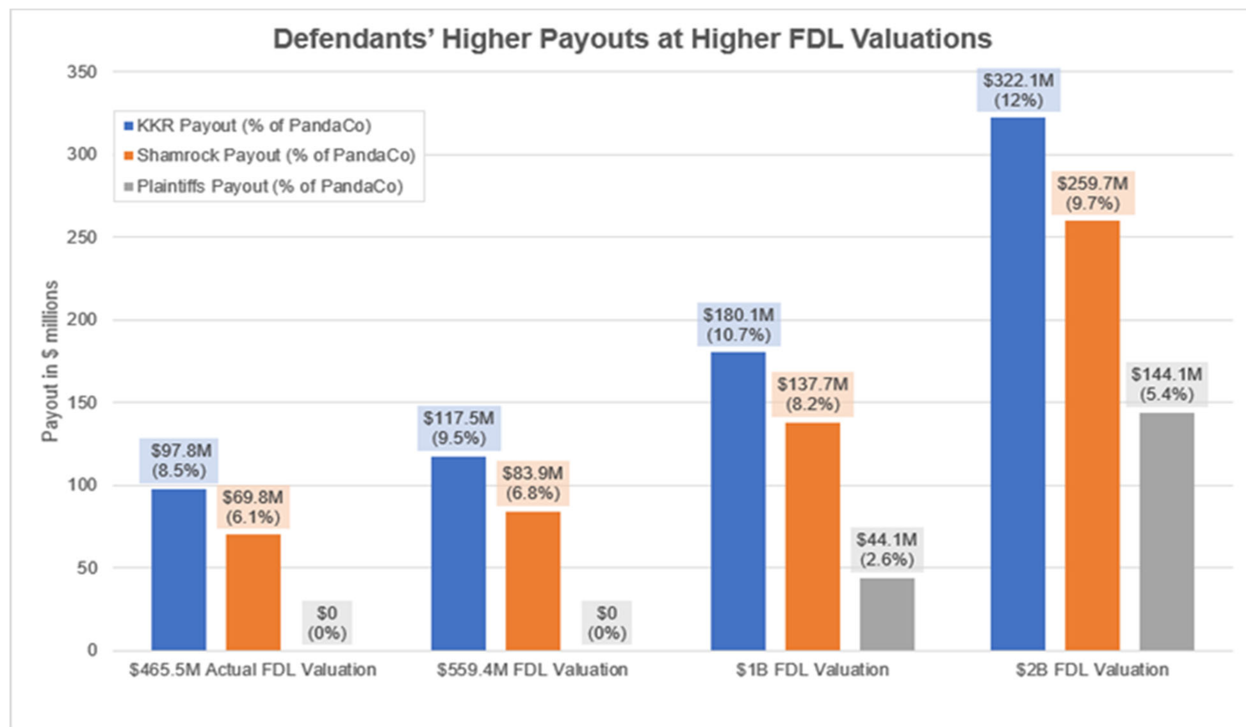
PandaCo to reap maximum benefit for themselves. Because Plaintiffs consequently cannot establish a fiduciary breach or any other claim, the SAC should be dismissed with prejudice.

I. PLAINTIFFS' NEW CONCESSIONS AND DOCUMENTS DEFEAT THEIR CLAIMS.

It is now clear Plaintiffs cannot prove the key facts the Court of Appeals found essential to their claims. That Court held "the existence … of any duty" is "heavily dependent" on "proving" that "common shareholders [were] in an especially vulnerable position" and that the Director Defendants' interests were "at the expense of the common shareholders." NYSCEF 378 at 26-27. Plaintiffs' new allegations and documents conclusively show just the opposite.

New allegations and documents prove <u>the Director Defendants were aligned with common shareholders</u> and had no incentive to undervalue FDL's share in PandaCo. Plaintiffs now concede "many shareholders held both preferred and common shares." ¶ 189. KKR's investors (14.2%) and Shamrock's investor (12.2%) each held more common shares than all Plaintiffs combined (10%), ¶¶ 23, 198-199; and other Director Defendants had huge interests in FDL common shares, ¶¶ 286, 308, 318. The directors thus had every incentive to obtain the highest possible valuation for FDL's share in PandaCo, thereby maximizing not only the payout on their preferred shares (capped at $559.4 million), but also any additional payout on their common shares.

This is basic arithmetic: As the valuation of FDL's contribution increased, FDL stood to receive a *larger percentage of PandaCo*. Plaintiffs emphasize that at valuations above $559.4 million, Preferred Shareholders would no longer receive 100% of FDL's pie. ¶ 190. But they overlook two key points: the higher the valuation, (1) the larger FDL's pie (in fact, this happened, *infra* II.A.3), and (2) the larger the Director Defendants' payout on their common shares (even higher than Plaintiffs' payout). As the below Figure illustrates, at higher FDL valuations, the Director Defendants thus would have received both a higher payout and *more* PandaCo shares:



Plaintiffs' new documents further show that PPB's $465.5 million offer—*i.e.*, the $559.4 million Term Sheet valuation minus debt—was fair. FDL was going bankrupt and running out of time; it needed "bridge financing" just to survive until the deal closed. Shamrock Presentation at 3-4, 25; *see* SA ¶ 12 ("bridging loan" necessary for "the sale [to be] completed"); NYSCEF 488 at KKR0022591 (given "cash balance low," "we can't afford to wait"). FDL nevertheless conducted a robust process: As Plaintiffs now acknowledge, Moelis spent months engaging 150 potential buyers, yet received only two other offers, both at lower valuations. *See* ¶ 122; SA ¶ 12; Shamrock Presentation at 11 (private funding at $400 million valuation; SPAC at $544 million valuation). And the PPB offer was the best lifeline available: Despite receiving exhaustive discovery, Plaintiffs cannot allege any better offer—or *any* offer after *Murphy*.

Because it is now clear common shareholders were *not* "in an especially vulnerable position" and the Director Defendants' interests were *not* "at the expense of the common shareholders," Plaintiffs cannot plead the "limited fiduciary duties" recognized by the Court of

Appeals. NYSCEF 378 at 26. Dismissal would be warranted on this basis alone. At minimum, the new allegations and documents require dismissal on other grounds explained below.

II. COUNT 1 (FIDUCIARY BREACH) FAILS TO STATE A CLAIM.

The fiduciary-breach claims require Plaintiffs to plead, among other things, a breach of fiduciary duties under Scots law. No court has decided whether Plaintiffs have done so. The Court of Appeals considered only allegations that "the director defendants owed"—not breached—"any fiduciary duty." NYSCEF 378 at 23. And this Court evaluated Plaintiffs' breach allegations under New York (not Scots) law. *See* MTD Order at 17-21. Crucially, this Court's earlier analysis is inapposite here: An Articles violation is essential to a fiduciary breach under Scots law, LDY Aff. ¶ 7; yet this Court neither found any Articles violation (it was applying New York law), nor had the benefit of Plaintiffs' new allegations and discovery documents, which conclusively show the Articles authorized the Director Defendants' actions.

At a basic level, these claims fail because any "limited fiduciary duties" here, NYSCEF 378 at 26, were *not* to craft the perfect deal (as Plaintiffs assume), but merely to do what the Articles prescribed. Plaintiffs' breach allegations fall into three main buckets concerning the legitimacy, procedural fairness, and substantive fairness of the valuation of FDL's shares in PandaCo. ¶ 485. That valuation was legitimate—indeed, presumptively adequate under Scots law—because it resulted from arms-length negotiations, as Plaintiffs do not meaningfully dispute. *Infra* II.A. It was procedurally fair because, Plaintiffs admit, the Articles did "not expressly require" any further safeguards. NYSCEF 139 at 54; *infra* II.B.1. And it was substantively fair, reflecting the highest offer received and a price other independent parties accepted for PandaCo shares. *Infra* II.B.2. These claims should be dismissed.

A. The Director Defendants Properly Valued FDL's Consideration.

Plaintiffs variously contend the Director Defendants breached their fiduciary duties by using an "illegitimate" $465.5 million valuation for "the 'aggregate consideration'" FDL received. ¶ 485. But the Articles *required* this. The Articles provided that, where there was "an offer on bona fide arm's length terms," "the aggregate consideration offered will … be paid to … the shareholders" pursuant to the waterfall provision. Article 1.1; *see* Article 78.9 ("[t]he portion of aggregate consideration … as a result of such Offer shall be" distributed). Although the Articles did not specify when that distribution had to occur, Plaintiffs concede the directors "could"—and did—"run the waterfall immediately upon closing." ¶ 191. Given the competitive bidding process, the Articles thus required distribution of "the valuation in the highest offer received," *i.e.*, the amount stated in PandaCo's offer. LDY Aff. ¶ 19.

Consistent with this directive, the Director Defendants voted to run the waterfall using "the consideration to be offered pursuant to [PandaCo's] Offer," NYSCEF 43, ¶ 6.2.3, then used the value expressly stated in PandaCo's offer to value FDL's aggregate consideration, *see* NYSCEF 39 ¶ 3(a) ("The Business Combination implies a cash equivalent value of the FanDuel Share Pool … of **US$465,493,638.84**."). Contrary to Plaintiffs' allegations, FDL thus did "determin[e] the actual 'value' for [FDL's] shares in PandaCo" and did define the "aggregate consideration" for running the waterfall. *Contra* ¶ 192.

Plaintiffs allege no Article requiring a *different* valuation than what PandaCo offered. The only issue, then, is whether PandaCo's offer—which derived from the Term Sheet (or "enterprise") valuation of FDL's contributions—was made on bona fide arm's length terms, as Article 1.1 requires. Plaintiffs' new allegations and documents conclusively show it was.

1. To begin, as explained by the KKR/Shamrock brief (at 18-19)—which the FanDuel Defendants join in full—Plaintiffs misapprehend what "bona fide arm's length terms" means.

Under Scots law and the Articles, that phrase refers not to the *content* of specific "terms of the PandaCo offer," *contra* ¶¶ 381, 532, but to whether the parties' *relationship* is independent, LDY Aff. ¶ 15; *see* Articles at 59-60 (offer "shall be deemed to be on bona fide arm's length terms where the Offeror is an Unconnected Third Party"). Because Plaintiffs nowhere allege this correct definition was not met, their claims fail at the outset.

2. As a matter of Scots law, the offer *was* made on bona fide arm's-length terms. LDY Aff. ¶¶ 13-15. As independent, sophisticated business entities, FDL and PPB indisputably acted at arm's length. ¶¶ 36, 345 (PPB was "third party" listed on London Stock Exchange); Term Sheet at 2, 7 (each side had separate counsel and paid own expenses). There are no contrary allegations. Moreover, because PPB contributed $145 million in cash in exchange for PandaCo shares, it had every incentive to ensure the correct cash value of each share. And given new allegations that Defendants held significantly more common shares than Plaintiffs, *see* ¶¶ 198-199, they had every incentive to obtain the highest possible valuation for FDL—so as to maximize FDL's shares in PandaCo, the share value, and hence the payout to all FDL shareholders. *Supra* I.

Plaintiffs' new allegations and documents likewise conclusively show PPB and FDL acted in good faith. Plaintiffs now concede PPB was worth $300-$800 million, ¶ 179, which confirms its $679.1 million valuation was fair. And FDL's $559.4 million valuation (less debt) was "the best offer received by FanDuel" from over 150 potential investors engaged by Moelis. SA ¶ 12; *supra* I. There are no allegations FDL received any better offer or that some other, better offer was forthcoming. If anything, FDL "FULLY expect[ed] [PPB] to push back on [its] valuation" as too *high*. NYSCEF 501 at FanDuel_Def_000006413. It is therefore irrelevant which Defendants led the negotiations. All Director Defendants wanted the highest possible valuation, and the valuation they obtained was the highest FDL received.

3. Plaintiffs' new documents conclusively refute their attempts to manufacture improprieties in FDL's "enterprise valuation." For example, there was no "predetermined 40-60 split" in PandaCo. *Contra* ¶ 177. Plaintiffs allege no document even mentioning a "40-60" split (none exists). And Term Sheet drafts prove the split was not predetermined; it evolved throughout FDL and PPB's arm's-length negotiations, with FDL's share consistently *increasing* in exact proportion to how much its expected contribution increased. *See* NYSCEF 504 at FanDuel_Def_000117122 (increasing FDL's share from 41.8% to 41.9% as valuation increased from $487m to $491m); Term Sheet at 3 (further increasing FDL's share to 43.1% as valuation increased to $514m); Shamrock Presentation at 11 (FDL's share was 43.1% or 41.9% given "$514M or $500M Equity Value").

Plaintiffs suggest the parties' enterprise valuations were artificial because FDL's was based on "4x 2018 Net Revenue," whereas PPB's used EBITDA. Term Sheet at 3; *see* ¶ 177. But Plaintiffs' preferred valuation likewise used a "Revenue Multiple @ 4x," NYSCEF 553 at FanDuel_Def_000123128, and their new documents show FDL couldn't use EBITDA because its EBITDA was *negative* $21.3 million, NYSCEF 484 at FanDuel_Def_000104915; *see* NYSCEF 507 at KKR0022225 ("apples to oranges comparison" needed "given the lack of free cash flows of FD"). Importantly, Plaintiffs do not allege a 4x-revenue multiplier was improper. While FDL's 4x-revenue multiplier happened to coincide with the Subscription Price, that does not plausibly indicate bad faith. Had the directors wanted to maximize their payout by pegging FDL's valuation to the Subscription Price, they would have *ended* with $559.4 million—thereby increasing FDL's share in PandaCo—not *started* with that figure before deducting nearly $100 million in debt to reach the actual $465.5 million offer price. *Supra* 10-11.

Plaintiffs' allegations that FDL's enterprise value was "gerrymandered," ¶ 179, are therefore "conclusory and speculative" and cannot be credited, *TJ PRP LLC v. Rag & Bone Holdings LLC*, 2018 WL 3743900, at *7 (Sup. Ct. N.Y. Cnty. Aug. 7, 2018) (Masley, J.); *see Mullin v. WL Ross & Co. LLC*, 2018 WL 1030313, at *7 (Sup. Ct. N.Y. Cnty. Feb. 23, 2018) (Masley J.) ("conclusory allegations are insufficient to support … breach of fiduciary duty" claims). Because the offer was "made on *bona fide* arm's length terms," the Articles authorized the exercise of KKR and Shamrock's "Drag Along Rights," Article 77.3; *contra* ¶ 485, and the use of the offer price when running the waterfall, Article 1.1. LDY Aff. ¶¶ 16-19.

B. The Offer Price Was Procedurally and Substantively Fair.

Plaintiffs fare no better in alleging the Director Defendants did not "appoint an independent expert" or "adopt procedural safeguards" to obtain a "fair" valuation after *Murphy*. ¶ 485.

1. Plaintiffs previously conceded the "Articles d[id] not expressly require Defendants to obtain" "an independent valuation" or adopt other safeguards. NYSCEF 139 at 54. For good reason: Their contrary position now cannot be reconciled with what Articles 77, 78, and 83 say. Article 83 does not mention any independent valuation expert or procedural safeguard. And Articles 77.5 and 78.10 provide for an independent expert only if there is a formal "dispute" over certain matters. No cognizable "dispute" occurred here, however, because all "disputes" must be formally raised "at a general meeting," Article 36, and that did not happen (Plaintiffs allege only queries via email, *see* ¶¶ 206-207, 255). Accordingly, Plaintiffs' preferred procedures were not required, and there can be no breach on this basis. *See* LDY Aff. ¶ 19.

2. New allegations and documents also utterly refute Plaintiffs' theory that the offer price was not fair. Scots law presumptively considers the offer to be full and fair consideration because it was negotiated at arm's length. *See* LDY Aff. ¶ 11; *Lafferty Constr. Ltd. v. McCombe* (NYSCEF 28), 1994 SLT 858, 861D. By any metric, PandaCo's offer price was fair: It was FDL's highest

offer; it was the product of arm's-length negotiations; and it reflected what third parties thought PandaCo shares were worth. *See supra* I-II.A; NYSCEF 39 ¶ 3(c) (some investors "s[old] all of their entitlement to [PandaCo] Shares" at a "share value equal to the [offer's] Share Price"). Even independent "banking and legal advisors" thought Moelis' "thorough process" "to test the market was a sufficient benchmark for the valuation." Ex. 1 at FanDuel_Def_000225443. (Plaintiffs conspicuously fail to attach this document to the SAC, despite quoting it extensively. ¶ 276.)

Ignoring all this, Plaintiffs disregard that a company is worth only what others are willing to pay for it. The supposed "smoking gun[s]" in their case are two projections of PandaCo's potential future value that no third party ever allegedly endorsed. ¶¶ 363, 365. Yet even those projections confirm PandaCo's offer price was fair. The first is a "model of PandaCo" Mr. King created for "discussions with Boyd Gaming about a potential partnership." ¶ 365. Despite developing this model after running the waterfall, *id.*, Mr. King did exactly what the Term Sheet did and calculated valuations using a "Revenue Multiple @ 4x," NYSCEF 553 at FanDuel_Def_000123128. His projection that "MergerCo Valuation" (*i.e.*, PandaCo) could be worth $1.3 billion *by 2019* (a year after the Acquisition) was well in line with PandaCo's $1.14 billion valuation in mid-2018 when PandaCo's offer was accepted. *See id*.[2]

Plaintiffs' second preferred projection is an "internal" planning model of PandaCo's "potential lines of business." ¶¶ 363-364. As Plaintiffs concede, those projections were based on speculation about as-yet-undeveloped "potential" business lines and pie-in-the-sky assumptions—

[2] The actual projections clearly refute Plaintiffs' assumption that Mr. King was valuing "FanDuel's 40% interest." ¶ 365. FDL and PPB's combined 2018 EBITDA was at most $30 million. *See* Term Sheet at 3; *supra* II.A.3. That fact is consistent with projecting that PandaCo's 2019 EBITDA would be "$72" million, increasing by $30-40 million each year. NYSCEF 553 at FanDuel_Def_000123128. Plaintiffs' view, in contrast, would dramatically increase those projections by 250%, making PandaCo's 2019 EBITDA skyrocket in one year to *$180 million* (= $72m/0.4).

like "$800 million in annual EBIDTA by 2022"—that PandaCo did not achieve. ¶ 363. Even so, the model's conclusion that PandaCo might someday be worth "billions of dollars" *still* was consistent with PandaCo's $1.14 billion valuation in mid-2018. *Id.*

Plaintiffs' new documents also utterly refute their incorrect assumptions that the offer price "did not take into account the *Murphy* decision" and "was not a valuation of PandaCo." ¶ 339.

First, PandaCo's offer did factor in *Murphy*—specifically, as potential "upside" (or downside) in the future that did not change PandaCo's present valuation. Shamrock Presentation at 4, 13-14, 34-35; NYSCEF 488 at KKR0022591 ("upside" included "potentially a very positive event for longer-term valuation," but no "markup at deal close"). When the Term Sheet was signed, FDL and PPB agreed on valuations that factored in *Murphy*'s potential effects in this manner. That is why those valuations were "not dependent on any expected change" from *Murphy* and the parties expected no "alteration of such valuations" after *Murphy*. Term Sheet at 3.

Tellingly, there are no allegations this approach was improper. *Every* investment has upside and downside that does not define the offer price; there is tremendous uncertainty, after all, when it takes years to develop an idea until it can realize its potential future value. Here, it was particularly appropriate—even after *Murphy*—to treat sports betting as speculative upside (or downside) given (1) no new states had legalized it, (2) it was unknown how many might do so and when, and (3) a U.S. sports-betting business was still just an idea in its infancy facing significantly uncertain development, as FDL and PPB had minimal U.S. sports-betting operations and no combined operations ready to capture that market.

Plaintiffs further ignore two basic realities: Had *Murphy* actually increased valuations overnight by billions of dollars (as Plaintiffs assume), some investor would have offered FDL more—yet none did. And FDL needed to account for *Murphy* in this manner to ensure the deal

could close while FDL still had enough capital to survive. *See* NYSCEF 488 at KKR0022591 (given "cash balance low," "we can't afford to wait until we have guaranteed clarity on PASPA"). Having already agreed it would *not* "request any alteration of such valuations," Term Sheet at 3, FDL risked blowing up its best available deal had it tried revisiting those valuations after *Murphy*. Plaintiffs thus have not sufficiently alleged any impropriety in PandaCo's offer.

Second, PandaCo's offer was expressly predicated on the value of the whole "Business Combination." NYSCEF 39, ¶ 3(a). The offer valued PandaCo at $1,147,100,000, based on a "Share Price" of "**US$114.71**" and 10 million PandaCo shares. *See id.* (FDL's "**4,058,004** shares" were "approximately 40 percent" of PandaCo). The Term Sheet likewise valued PandaCo by combining the two sides' contributions—with FDL initially expected to receive 43.1% for its $491 million contribution, and PPB 56.9% for its $679 million contribution (including $145 million cash). Term Sheet at 3. Here, too, there are no allegations it was improper to value the combined entity by combining the value of each side's contributions.

Plaintiffs' remaining quibbles are makeweight. While they allege "conflicts of interest," ¶ 481, this Court already found the Director Defendants "disclosed their [alleged] conflicts," thereby authorizing them, MTD Order at 18; *infra* III. Nor did the Director Defendants "[p]ay the FanDuel preference shareholders an amount exceeding the Subscription Price." *Contra* ¶ 485. According to Plaintiffs, the "'deal valuation'" actually equaled "the aggregate Subscription Price." ¶ 276. Plaintiffs also received "adequate notice." *Contra* ¶ 485. The Articles required the directors to "promptly send a copy of the Drag Along Notice (together with a copy of the relevant Offer…)" to shareholders. Article 78.5. They did that. *See* ¶ 382 ("[t]he offer letter and the Drag Along Notice were delivered" to "FanDuel shareholders"). Plaintiffs complain they did not receive other materials, too, but no Article required such additional notice.

Because Plaintiffs have failed to adequately plead any fiduciary breach under Scots law, the fiduciary-breach claims must be dismissed.

III. COUNT 2 (OPPRESSION OF THE MINORITY) FAILS TO STATE A CLAIM.

As explained by the KKR/Shamrock brief (at 10-15), the oppression-of-the-minority claims must be dismissed for several reasons:

Because FDL is a Scottish-registered company, this claim is jurisdictionally limited to "the Court of Session or the sheriff court" in Scotland and is not justiciable because Plaintiffs made no "appl[ication] to the court" (*i.e.*, a formal petition not brought here). NYSCEF 23 ("Companies Act"), §§ 994(1), 1156(1)(b); *see* LDY Aff. ¶ 25.

As Plaintiffs concede, they do not "ha[ve] standing to pursue a Section 994 claim" because they are no longer FDL shareholders. ¶ 408; *see* Companies Act § 994(1) (only "members of a company" can bring a claim); LDY Aff. ¶¶ 23-25.

Finally, Plaintiffs fail to adequately allege the requisite unfair conduct because the Articles authorized the challenged conduct. *See* LDY Aff. ¶ 26; *supra* II.

IV. COUNT 3 (UNLAWFUL MEANS CONSPIRACY) FAILS TO STATE A CLAIM.

The unlawful-means-conspiracy claims require, among other elements, that Defendants "use[d] unlawful means" that were "calculated to" cause Plaintiffs' harm. Walker, *Delict* (NYSCEF 166) at 927 (setting forth elements). Neither element is sufficiently alleged.

Plaintiffs fail to adequately allege any unlawful means, including any fiduciary breach, fraud, or secret commission. *Supra* II; *infra* VI-VII. Any supposed "failure to disclose" alleged conflicts of interests, ¶ 509, was not unlawful for two reasons.

First, the alleged conflicts were authorized (hence lawful) without disclosure. *See* LDY Aff. ¶¶ 9-10. Plaintiffs now concede Defendants Oberwager, LaSalle, and Cleland "were

considered 'Investor Directors,'" ¶ 286, meaning they were authorized "to have interests which arise from … [their] relationship (as employee or otherwise)" with KKR, Shamrock, or Comcast, Article 19.8. No disclosure was required, and these Defendants could "vote on" any matter "relevant to [those] interests." Article 19.9.

The restructured MCOs for Defendants King, Nathanson, and Vogel also created no unlawful conflicts. LDY Aff. ¶ 22. MCOs are lawful bonuses commonly used to retain "senior management." *See* ¶ 313. As Plaintiffs concede, these Defendants' restructured MCOs merely ensured they would receive "the entirety of the MCO bonus they had originally negotiated" months or years earlier. ¶ 590 (Nathanson & Vogel); ¶ 313 (King's MCO "ma[de] him whole"). Far from creating conflicts, these agreements *removed* potential conflicts by keeping the directors "'materially economically indifferent'" to the Acquisition. ¶ 316; *see* ¶¶ 309-310; *infra* VII.

Second, as this Court found, the directors "disclosed their conflicts" before voting on the waterfall. MTD Order at 18. The Articles allow any director to authorize through disclosure any potential conflict, including personal benefits, *see* Articles 18.1, 19.1-19.7, and the Board's meeting minutes show "the Directors declared their interests," NYSCEF 43, § 4.1. Documents utterly refute the new speculation—made "on information and belief"—that this conflicts-disclosure language was added "to cleanse the Board's decision." ¶ 286. In reality, Board minutes on other votes consistently included identical language. *See* Exs. 5-7.[3] Plaintiffs complain these disclosures were not made sooner. ¶ 576. But the directors were permitted to modify the notice requirement, *see* Article 19.4.1, and there are no allegations they failed to properly do so.

[3] The supposed "draft minutes" omitting this language were not minutes at all, but meeting *notes* that failed to mention many key agenda items, including exercise of the "Drag Provisions." *Compare* Ex. 1 *with* NYSCEF 43, § 7.

Plaintiffs also fail to plead the requisite intent to harm. Their conclusory allegations that "[t]he intent of each Defendant … was to deprive the common shareholders of their interests in PandaCo," ¶ 508, are both implausible—the Director Defendants benefited more as payouts on common shares increased, *supra* I—and legally insufficient, *see* CPLR 3016(b). As a matter of law, the Directors cannot have had the requisite intent to harm because FDL's Articles required valuing the consideration based on PandaCo's offer, *supra* II.A, and permitted "run[ning] the waterfall immediately upon closing," ¶ 182. *See* LDY Aff. ¶ 30.

V. COUNTS 4 (KNOWING RECEIPT) AND 9 (AIDING AND ABETTING) FAIL TO STATE A CLAIM.

As the KKR/Shamrock brief explains (at 15-17, 23-26), the knowing-receipt and aiding-and-abetting-a-fiduciary-breach claims likewise fail.

For both claims, Plaintiffs fail to adequately plead the requisite fiduciary breach. *Supra* II; *see Cw. Oil & Gas Co. Ltd. v. Baxter*, [2010] SC 156 (NYSCEF 435) at [86] (knowing receipt); *McBride v. KPMG Int'l*, 135 A.D.3d 576, 579 (1st Dep't 2016) (aiding and abetting). Plaintiffs' "conclusory and sparse" allegations of knowledge likewise cannot establish the requisite "'actual knowledge'" of a fiduciary breach. *Glob. Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 101-02 (1st Dep't 2006) (citation omitted); *see Baxter*, [2010] SC 156 at [88] (requiring "knowledge" there was a breach). Plaintiffs impermissibly allege only that Defendants acted "[k]nowingly," ¶ 519, or were "aware of" the directors' actions, ¶ 530—not that they *knew* those actions breached fiduciary duties. *See* LDY Aff. ¶ 32.

The knowing-receipt claims separately fail because there are no allegations the transferred PandaCo shares were "already in existence and subject to a trust" in Plaintiffs' favor. *Baxter*, 2010 SC 156 at [94]; *see* LDY Aff. ¶ 33.

The aiding-and-abetting claims separately fail because Plaintiffs' allegations of PandaCo's and Fastball's substantial assistance impermissibly consist of "just performing routine business services," *McBride*, 135 A.D.3d at 579—*i.e.* forming entities to effectuate the Acquisition and taking steps to complete it, *see* ¶¶ 368, 383-384, 519.

VI. COUNTS 7 AND 10 (FRAUD UNDER SCOTS LAW AND NY LAW) FAIL TO STATE A CLAIM.

Despite originally complaining of *no* "adequate notice," NYSCEF 2, ¶ 132, Plaintiffs have changed their tune and now claim the notice they received was fraudulent. Like their no-notice theory, their fraud theory is baseless.

A. The Dear Shareholder Letters Were Not False as a Matter of Law.

Count 11 and part of Count 7 allege fraud based on the Dear Shareholder letters. *See* ¶¶ 569-570, 617-619. Those claims must be dismissed for two reasons.

First, the letters contained no misrepresentations as a matter of law. They correctly explained that PandaCo had "made an offer to" FDL's shareholders, KKR and Shamrock had "irrevocably accepted the Offer and ha[d] agreed to transfer their shares in FanDuel to [PandaCo]," and "as a result of the exercise of the Drag Along Right" common shareholders "[we]re required to accept the Offer and to transfer all of [their] shares." Ex. 4 at FanDuel_Def_000023786. The letters did not fraudulently mislead common shareholders into believing their shares were "Nil." They accurately explained that, because FDL's consideration was not expected to exceed the Subscription Price, "the consideration [common shareholders] would receive" would be "Nil." *Id.* Nor did the letters fraudulently induce options holders to let their options expire. Had options holders exercised their options to receive common shares, they still would have received no PandaCo shares as consideration—as the letters explained. *See id.* at FanDuel_Def_000023787

("it is highly likely that" exercising their option would not allow holders to "recover the amount they paid for those shares").

Second, the claims are untimely because they were not filed within CPLR 213(8)'s six-year limitations period. *See* CPLR 202 (foreign-law claims must satisfy CPLR limitations periods). The Dear Shareholder letters were sent July 3, 2018, ¶ 209, yet these claims were not added until August 8, 2024. These untimely claims cannot relate back: Because the original complaint never mentioned the Dear Shareholder letters, much less alleged fraud or "that the facts stated [therein] were … false," it "did not sufficiently state the circumstances surrounding the amended fraud claim such as to give notice enabling defendant[s] to prepare a defense." *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 72-73 (1st Dep't 1990); *Jolly v. Russell*, 203 A.D.2d 527, 528-29 (2d Dep't 1994) ("unique factual allegations" that "requir[ed] proof of facts not contemplated" by original action did not relate back).

B. The Remaining Fraud Claims Are Not Adequately Pleaded.

As to the remaining asserted frauds, Plaintiffs fail to plead detrimental reliance. Their lead authority explains "a claim for damages for fraud" requires a "misrepresentation *inducing a course of action* that causes loss." *GWR Prop. Co. v. Forrest Outdoor Media Ltd.* (NYSCEF 466), 2022 SCLR 57, at [29] (emphasis added). Because Plaintiffs fail to allege *any* course of action induced by these purported frauds, these claims must be dismissed. *See* LDY Aff. ¶¶ 42-50.

The "distinct frauds" asserted, ¶ 560, are not adequately pleaded for other reasons. Notably, Plaintiffs do not allege that the Term Sheet's "enterprise" valuations were fraudulent for how they factored in *Murphy*, and they ignore the presumptive adequacy of those valuations under Scots law. *Supra* II.A. Plaintiffs' allegations thus amount to smoke and mirrors—not fraud.

Use of "enterprise value": Plaintiffs allege Defendants variously "us[ed] the 'implied enterprise value' of FanDuel" to value FDL's consideration. ¶¶ 561, 565, 569, 572, 617. It is

settled that estimates of "the value of" property generally "constitute[ ] 'nonactionable opinion that provide[ ] no basis for a fraud claim.'" *Rubin v. Sabharwal*, 171 A.D.3d 580, 581 (1st Dep't 2019) (citation omitted). Because "[v]aluing a closely held corporation" like PandaCo "is not an exact science," it admits "a variety of … methods" and range of valuations. *In re Seagroatt Floral Co., Inc.*, 78 N.Y.2d 439, 445 (1991). Just as PPB's valuation ranged from "$300 million to over $800 million," ¶ 179, the valuation of FDL's shares in PandaCo was not an objective *certainty*, but a highly subjective *estimate*. Accordingly, "that valuation could not be the basis for a fraud claim." LDY Aff. ¶ 46.

Critically, Plaintiffs do not allege it was unreasonable for the valuation of FDL's consideration to treat speculative uncertainties—*e.g.*, when or how many states might allow sports betting or how much of that potential market PandaCo might capture—as future upside (or downside). Nor can they: a newly alleged document shows that "banking and legal advisors" agreed there was "a sufficient benchmark for the valuation." Ex. 1 at FanDuel_Def_000225443; *see* ¶ 276. As a matter of law, therefore, Defendants did not commit fraud by relying on that valuation, especially when they knew it had been negotiated at arm's length.

Conflicts of Interest: Allegations that the Director Defendants fraudulently did not disclose purported conflicts, ¶¶ 564-565, fail because any conflicts were "disclosed" and "complied with the Articles," MTD Order at 18; *see supra* IV. Plus, this challenge sounds only in contract (as an alleged breach of FDL's Articles), not in fraud. LDY Aff. ¶ 49.

Procedural Changes: Plaintiffs specifically allege "the Company" (*i.e.*, non-party FDL) made the challenged statement that certain Articles amendments would be "procedural, and designed to facilitate a faster close." ¶ 373. Because no Defendant had any alleged involvement with this statement, they cannot be liable for it. LDY Aff. ¶ 50. Moreover, Plaintiffs again fail to

adequately plead falsity, as the amendments *were* procedural and designed to facilitate a closing by placing FDL options holders on even ground with common shareholders vis-à-vis pre-existing Drag Along Rights. *See* Article 78.8A.

There was no fraud.

VII. COUNT 8 (SECRET COMMISSIONS) FAILS TO STATE A CLAIM.

Like the oppression claims, Plaintiffs' secret-commissions claims fail for lack of jurisdiction and justiciability. *See* LDY Aff. ¶ 25. Those claims further fail to plead the required elements of (1) a "secret" payment that (2) created a potential conflict. *Id.* ¶ 51.

First, because the directors authorized and "disclosed their conflicts" at the May 22 Board Meeting, MTD Order at 18; *supra* IV, any payments were not secret as a matter of law and could not create any actionable conflict, *see* LDY Aff. ¶ 51.

Second, there cannot have been any potential conflict because Defendants Nathanson and Vogel remained aligned with common shareholders due to their sizeable interests in FDL's common shares. ¶ 318; *supra* I. Their MCOs did not change that. The original MCOs—signed in 2017, long before the Acquisition—"aligned Vogel's and Nathanson's incentives with common shareholders" by entitling them to "a percentage of the purchase price of any change-in-control transaction." ¶ 319. The updated MCOs merely extended that status quo by ensuring they could receive "the entirety of the MCO bonus they had originally negotiated" even if a change-in-control transaction did not exceed the Subscription Price. ¶ 590. Absent restructuring, Defendants Nathanson and Vogel would not have received their original bargain and would have had self-interested reasons to oppose any acquisition below the Subscription Price. The restructured MCOs thus removed, not created, potential conflicts with the Acquisition. *See* LDY Aff. ¶ 51.

CONCLUSION

Plaintiffs' new concessions and documents make clear this is not a case about a conflicted Board. FDL was in financial ruin; and Defendants undisputedly pursued FDL's best and only viable lifeline so as to obtain the best result for FDL and *all* shareholders. Plaintiffs may be disappointed, but in reality FDL was on its last legs and had no better option. There was no wrongdoing. The Court should dismiss the entire SAC with prejudice.

Dated: September 16, 2024

Respectfully submitted,
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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Mark A. Kirsch, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complied with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 8,000 words, excluding the parts of the memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: New York, New York
September 16, 2024

/s/ Mark A. Kirsch

Mark A. Kirsch