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COURT OF APPEALS
STATE OF NEW YORK

ECCLES,

Appellants,

-against-

NO. 49

SHAMROCK CAPITAL,

Respondents.

20 Eagle Street
Albany, New York
April 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE ANGELA G. IANNACCI
ASSOCIATE JUSTICE MOLLY REYNOLDS FITZGERALD

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Chrishanda Sassman-Reynolds
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon. I neglected
2 to announce before the last case that we're delighted to be
3 - - - to have been joined by Justice Angela Iannacci. And
4 now we also have with us Justice Molly Reynolds Fitzgerald.
5 It is our pleasure to have them here with us.

6 MR. YOUNGER: Welcome. May it please the court?

7 My name is Stephen Younger, and I would like to
8 reserve five minutes for rebuttal if that's okay?

9 CHIEF JUDGE WILSON: Yes.

10 MR. YOUNGER: Plaintiffs are the founders of
11 FanDuel and over one hundred of its employees and early-
12 stage investors.

13 Plaintiffs owned a class of shares that were
14 deliberately wiped out by the defendants. Defendants want
15 this court to adopt a choice of law rule that will leave
16 them with no remedy anywhere in the world. All we want is
17 a chance to prove our case in court.

18 So there are two issues. First, is whether New
19 York law applies here. Because of the unique circumstances
20 we have which involve looting of a company - - -

21 JUDGE RIVERA: Just, if I could stop you. They -
22 - - they'll have no remedy if - - - if the internal affairs
23 doctrine is applied because shareholders, supposedly, under
24 Scots law are not able to sue or - - - or because the
25 corporation - - - or - - - or excuse me. The defendants

1 cannot be sued otherwise if they're judgment proof. What -
2 - - what is the reason they have no remedy?

3 MR. YOUNGER: Two reasons. One, the First
4 Department got Scottish law wrong. I mean, completely
5 wrong. And I can give you three reasons why they got it
6 wrong.

7 First, they accepted the defendants' view of the
8 facts. This is a motion to dismiss.

9 JUDGE TROUTMAN: Were they - - -

10 MR. YOUNGER: You have to accept - - -

11 JUDGE TROUTMAN: - - - were they able to decide
12 it in the way that they did, in the posture that the case
13 was before them?

14 MR. YOUNGER: They had the power to decide these
15 issues but I think it was an improvident exercise of that
16 power, for several reasons. One, it's a motion to dismiss.
17 So in a motion to dismiss you have to accept our version of
18 the facts, not the defense version which is for their
19 expert's underpinnings.

20 JUDGE RIVERA: Yeah, but that's for whether or
21 not there's a factual dispute. But before you go on - - -

22 MR. YOUNGER: But there was a factual dispute,
23 Your Honor.

24 JUDGE RIVERA: - - - what was that second - - -
25 yes. I want to hear that too. What was the second one?

1 You said there were two and then you had the three parts to
2 the first. What's the second?

3 MR. YOUNGER: Well - - - well, the second reason
4 - - -

5 JUDGE RIVERA: Two reasons why they have no
6 remedies?

7 MR. YOUNGER: Yeah. The second - - -

8 JUDGE RIVERA: The first one, the AD got it
9 wrong?

10 MR. YOUNGER: Yeah. So - - - so they applied
11 Scots law wrong. But they should have applied New York law
12 because this is a New York - - -

13 JUDGE RIVERA: Is that the second reason?

14 MR. YOUNGER: - - - centric dispute.

15 JUDGE RIVERA: Just to be clear. That's the
16 second reason - - -

17 MR. YOUNGER: Yeah. That's actually, probably,
18 the first reason, Your Honor.

19 JUDGE RIVERA: - - - that they have no remedy?
20 No, no, that's why I'm saying. What was the second reason,
21 then you can go back and - - -

22 MR. YOUNGER: Yeah. The first reason, they
23 should have applied New York law.

24 JUDGE RIVERA: Okay.

25 MR. YOUNGER: This is a New York-centric dispute.

1 JUDGE RIVERA: Yes.

2 MR. YOUNGER: But the second reason, if you
3 actually get into Scots law, they got Scots law horribly
4 wrong. I mean, they - - - they determine Scots law as if
5 your shares are taken from you and you have no remedy under
6 fiduciary duty law. That's not the law in any common law
7 jurisdiction I've ever heard of.

8 And there's - - - there's several. You asked
9 about facts. The special circumstances test as our expert
10 shows, is a factual test. That's not something you can
11 decide on a motion to dismiss.

12 JUDGE RIVERA: So your point there is that the
13 Scots law generally, would not let shareholders sue but
14 there - - - there are exceptions and at a minimum your
15 clients fit the exceptions?

16 MR. YOUNGER: Yeah.

17 JUDGE RIVERA: Do I have that?

18 MR. YOUNGER: Yeah. And - - - and the - - - the
19 First Department missed one of the most crucial decisions -
20 - - exceptions. It's sort of like derivative law in
21 derivative suits in this country. If you're uniquely
22 harmed, you can bring a suit. Never mentioned in the First
23 Department decision. All they mentioned is the special
24 circumstances test.

25 But let me first touch on the issue of Greenspun.



1 This case goes back fifty years, to a decision of this
2 court by Judge Jones. There, the court rejected the
3 automatic application of the internal affairs doctrine.
4 Virtually everything you're going to hear from the defense
5 would invite you to have a brightline rule where you have
6 to embrace an automatic application - - -

7 JUDGE RIVERA: Well, isn't that also the
8 Restatement position that that's the default and then
9 you've got to find a reason why you don't go to the
10 default, which is the state of incorporation's local law?

11 MR. YOUNGER: The Restatement Section 309
12 supports our position. It says if a state has a more
13 significant interest, and we say the interest here is
14 deterring bad conduct in this state. That goes back to
15 Judge Cardozo's decision in German-American, when someone
16 comes into our state and commits horrible conduct, this
17 state takes action.

18 JUDGE RIVERA: Well, that would be - - - that
19 would be quite - - - that would be a big carve out because
20 when the - - -

21 MR. YOUNGER: No, it's not a big carve out.

22 JUDGE RIVERA: - - - it's not a big piece of why
23 you want to apply the local law?

24 MR. YOUNGER: No. It's - - - it's actually very
25 narrow. And if you look at the cases that have applied the

1 exception - - - first of all, the general rule is internal
2 affairs. We have things like shareholder voting cases,
3 you're going to apply the internal affairs doctrine.

4 But there are only a handful of cases and they're
5 always cases like this one, where you have looting, where
6 you have people that go outside of the corporate form.

7 JUDGE RIVERA: So the difference then is because
8 it's a business tort? And that's what takes it out of the
9 default that it's the state of incorporation?

10 MR. YOUNGER: That's one reason. And that's what
11 the - - - the comment C to Section 309 says.

12 JUDGE RIVERA: 309? 302? Which one?

13 MR. YOUNGER: No. That's 309.

14 JUDGE RIVERA: Sorry.

15 MR. YOUNGER: And - - - but it's more than Judge
16 Rivera. What you have here is a scheme where the
17 defendants allowed a shareholder to negotiate a deal, bake
18 in terms that help the shareholder. Then you have them
19 transferring the shares outside of the company to a company
20 that the same directors controlled. Classic self-dealing
21 situation.

22 JUDGE TROUTMAN: So this case - - -

23 MR. YOUNGER: So none of this had to do with the
24 internal affairs.

25 JUDGE TROUTMAN: So in this case, wouldn't the

1 very least this qualify as an exceptional circumstance?

2 MR. YOUNGER: Yeah. That's what we argue, is
3 that this is an exceptional circumstance. We're not
4 arguing that this - - - I mean, we have a - - - a amicus
5 brief from law professors that says we're saying overrule
6 internal affairs, no way, no how. We believe in the
7 internal affairs doctrine. It's just not this case.

8 JUDGE REYNOLDS FITZGERALD: So you don't think -
9 - - you're not arguing it's New York-centric then? Or are
10 - - - or maybe you are also?

11 MR. YOUNGER: Oh, yeah. Yeah.

12 JUDGE REYNOLDS FITZGERALD: Also? But you're
13 saying, okay. Would you agree we start with the
14 presumption of sorts, of the internal affairs?

15 MR. YOUNGER: Yeah. New York - - - New York law
16 - - - the New York Court of Appeals in Greenspun says it's
17 prima facie.

18 JUDGE REYNOLDS FITZGERALD: Okay.

19 MR. YOUNGER: Prima facie is probably a
20 presumption, roughly the same thing.

21 JUDGE REYNOLDS FITZGERALD: All right. So and
22 then are you asking us to consider not only where the
23 negotiations took place, the factors that are in Greenspun,
24 but also the nature of the conduct that you're alleging?

25 MR. YOUNGER: Yeah. I actually think the nature

1 of the conduct is the most critical. But all of those
2 facts weigh in our favor. The directors voted here. The
3 meetings were held here. The negotiations were here. They
4 even went out and celebrated here. But most important is
5 what's the conduct?

6 The conduct here is abhorrent conduct where
7 somebody had their shares taken from them. And that's
8 where we go back to German-American and Judge Cardozo.
9 Judge Cardozo said when you come into our state and you
10 commit bad conduct, we, as New York, act. We don't just
11 say you can go incorporate in some rock off in some - - -
12 some island somewhere and then say, oh, I got to come into
13 New York and take your money. That's just not - - -

14 JUDGE SINGAS: There's no - - - there's no
15 authority that says the conduct is what dictates, right? I
16 mean, because - - - because another factor that you can
17 look even under an interest analysis is where the company
18 is - - - is incorporated, right? So like, there's no
19 authority that says which one of those factors is decisive?

20 MR. YOUNGER: I have to degree - - - disagree.
21 Yes, the place of incorporation is one factor. In fact,
22 most cases, it's a very heavy factor. But in tort cases,
23 what you look at for conflicts of law is where did the tort
24 take place. And typically, that's where the injury was, we
25 have New Yorkers hurt here. But we have all the conduct

1 taking place here. None of this conduct took place in
2 Scotland. None of the defendant directors live in
3 Scotland. This was a New York-centric, you have a New York
4 headquartered company. They put the - - - the proceeds of
5 the - - - the thievery into a New York base company.
6 Everything took place here in New York.

7 JUDGE RIVERA: Let me - - - let me ask you this.
8 Let's assume for one moment. Just assume for a moment that
9 Scots law indeed would not allow your clients to be able to
10 sue? Just go with me for that - - -

11 MR. YOUNGER: Yeah.

12 JUDGE RIVERA: - - - for one moment. They - - -
13 they bought the shares knowing that that's the law. Why
14 shouldn't they be held to it?

15 MR. YOUNGER: Well, you can't assume that they
16 bought the shares knowing the law because that isn't the
17 law. I mean - - - and by the way, the real point - - -

18 JUDGE RIVERA: Well, I think you - - -

19 MR. YOUNGER: - - - is that the law of - - -

20 JUDGE RIVERA: - - - I think the Restatement says
21 that, but - - -

22 MR. YOUNGER: No, no. But the law of fiduciary
23 duty is almost exactly the same in Scotland as it is here.
24 I mean, if you - - -

25 JUDGE IANNACCI: And that - - -

1 MR. YOUNGER: - - - have to - - -

2 JUDGE IANNACCI: - - - and that, Counselor, is it
3 based on the waterfall provision and the special
4 circumstances and the drag along rights that you are saying
5 were created?

6 MR. YOUNGER: No, no. What I'm saying, Your
7 Honor, is the substantive body of law of fiduciary duty is
8 the same, Scotland and - - - and New York.

9 JUDGE IANNACCI: Right. But - - -

10 MR. YOUNGER: The only question is who can sue.

11 JUDGE IANNACCI: And they breached it and you
12 have -

13 MR. YOUNGER: Yes.

14 JUDGE IANNACCI: - - - various provisions based
15 on your expert's testimony which conflicts with the expert
16 testimony that defendant submitted, correct?

17 MR. YOUNGER: Exactly. And on a motion to
18 dismiss, under 3211, you can't accept their defendant's
19 expert, particularly when it's fact laden. And - - - I
20 mean, just take one example. You're going to hear all the
21 stuff about how this was an arm's-length transaction. Our
22 complaint alleges - - -

23 JUDGE RIVERA: Yeah, but we - - -

24 MR. YOUNGER: - - - that it was not an arm's-
25 length transaction.



1 JUDGE RIVERA: - - - we don't have to get to the
2 - - -

3 MR. YOUNGER: Yeah.

4 JUDGE RIVERA: - - - we don't have to get to
5 those - - - the merits, right? I mean, this is a question
6 of whether or not the internal - - - internal affairs
7 doctrine applies as a matter of law in this case. Right?
8 That - - - that's all we're - - - or the balancing test and
9 then you argue, well, under the balancing test, of course,
10 New York law must apply.

11 MR. YOUNGER: No. We actually have two - - -

12 JUDGE RIVERA: Isn't that the legal question?

13 MR. YOUNGER: - - - we actually have two
14 arguments. One is the legal question that you identified.

15 JUDGE RIVERA: Yes.

16 MR. YOUNGER: But then there's also a question of
17 whether they properly threw the case out on a 3211 motion
18 based on Scots law. So either way, it requires a reversal.

19 JUDGE RIVERA: Yes. But if on the first one - -
20 - yes, that's true.

21 MR. YOUNGER: Yeah. If you rule first way - - -

22 JUDGE RIVERA: Because if on the first one we
23 decide - - -

24 MR. YOUNGER: - - - you don't have to get to the
25 second.

1 JUDGE RIVERA: - - - that it was New York law - -
2 -

3 MR. YOUNGER: Yeah.

4 JUDGE RIVERA: - - - it's still a reversal. I
5 agree with you there.

6 MR. YOUNGER: Right.

7 JUDGE RIVERA: Yes.

8 MR. YOUNGER: So maybe I could turn to CPLR 4511
9 if you - - - if you may? Here, the First Department
10 resolved this issue without a hearing. And you go back to
11 the Rosman case, six times in Rosman this court talked
12 about a CPLR 4511 hearing. And the result was the
13 application of a rule, which is abhorrent to any common law
14 system. To say that - - - that a shareholder can't sue
15 when there's a breach of fiduciary duty is just not the law
16 in any jurisdiction I know.

17 JUDGE RIVERA: In violation of public policy that
18 way. But doesn't the CPLR say "may"? How do you get to
19 "must"?

20 MR. YOUNGER: The first way is because this is a
21 motion to dismiss. You cannot resolve the - - - so - - -
22 so the First Department said there were no special
23 circumstances. Our expert says that's a question of fact
24 under Scottish law. How do you resolve that under this
25 sort of a motion to dismiss setting? You just can't.

1 JUDGE REYNOLDS FITZGERALD: Did they plead any -
2 - - any special circumstances?

3 MR. YOUNGER: I'm sorry, Your Honor?

4 JUDGE REYNOLDS FITZGERALD: Did they plead any?

5 MR. YOUNGER: Well, to be clear, we pled this
6 case under New York law and under Scottish law.

7 JUDGE REYNOLDS FITZGERALD: All right. Okay.

8 MR. YOUNGER: But we pled the sorts of things
9 that would be special circumstances. Two, for example.
10 One, the defendants actually took our shares and dealt with
11 them. That is a special circumstance. Two, under the deal
12 documents that they put in front of the court, the
13 directors were agents of the shareholders. And so once
14 you're an agent, you've got a special circumstance, even
15 under the cases that they cite.

16 JUDGE REYNOLDS FITZGERALD: But that's inferred
17 in your complaint, right?

18 MR. YOUNGER: It - - - it - - - yeah, it's
19 inferred by - - - in the complaint and there was enough
20 before the commercial division Judge, to find that. But -
21 - -

22 JUDGE RIVERA: Did your - - - did the expert
23 point to that and say this is why Scots law applies?

24 MR. YOUNGER: Yes, he did. And - - - and he
25 pointed to quite a number of cases. So what you have is -

1 - - is - - -

2 JUDGE RIVERA: So - - - so why would you need the
3 hearing? Isn't that then just as a matter of law, is the
4 expert correct that, first of all, those are special
5 circumstances? Second of all, that they exist here?

6 MR. YOUNGER: Yeah.

7 JUDGE RIVERA: Assuming that they existed here,
8 are they special circumstances - - -

9 MR. YOUNGER: Yeah.

10 JUDGE RIVERA: - - - that fall under Scots law?

11 MR. YOUNGER: There are three reasons why we feel
12 we need a hearing. First, their expert didn't accept our
13 complaint as alleged. I mean, just one example that I
14 mentioned is he says that this was a commercial deal, it
15 was negotiated. We allege the opposite in our complaint.
16 The - - - the expert on a motion to dismiss can't have
17 their own set of facts. You have to accept our facts.

18 Two, there are numerous Scottish cases that hold
19 that when you're uniquely harmed, you have a claim. Never
20 mentioned in the First Department, not addressed by their
21 expert.

22 And third, you have the special circumstances
23 issue that I mentioned. We believe that this is a pure
24 legal error because this was thrown out on a motion to
25 dismiss. And if you look at the Rosman case, the Rosman



1 case has been followed in many cases in lower court. The
2 Andes case, the Rawitz case, the Duysburgh case. All of
3 those cases have said you need a hearing. We asked for a
4 hearing down below. We asked for it again in the First
5 Department. You're going to hear - - - you know, some what
6 I call cockamamie argument about waiver. But we literally
7 asked the First Department to send this case back so we
8 could have testimony.

9 JUDGE CANNATARO: So is it your position that
10 this issue can only be resolved in the trial court - - - in
11 the Supreme Court and not even entertained at the Appellate
12 Division?

13 MR. YOUNGER: That's not our point. In fact,
14 this court could take judicial notice. We would never say
15 that the Appellate Division cannot. It was the - - - the
16 circumstances of this case, Judge Cannataro. This case was
17 won where there had been no record developed, there was no
18 discovery taken.

19 And there's a third problem in the Appellate
20 Division taking judicial notice. That is that 4511 talks
21 about taking an appeal, and a right to appeal. And you
22 know we don't have an automatic right of appeal from the
23 Appellate Division up to this court. Some of us - - - some
24 people remember the days when you almost did. The - - - we
25 believe it was improvident for the Appellate Division to

1 have decided this in the first instance. But I think our
2 main argument was you just can't do this on a motion to
3 dismiss. You can't throw a case - - -

4 CHIEF JUDGE WILSON: To put that point a little
5 differently, just to make sure I get it. The question of
6 foreign law is proven as - - - as fact, right? You put in
7 witnesses and it's demonstrated. It's a question of fact
8 for the court to determine what foreign law is, right?

9 MR. YOUNGER: Just a - - - a slight - - - it's a
10 question of law that's proved like a question of fact.

11 CHIEF JUDGE WILSON: That's fine. That's fine.

12 MR. YOUNGER: Yeah.

13 CHIEF JUDGE WILSON: And on a motion to dismiss,
14 you don't put in all of your proof. You put in enough to
15 create a genuine issue, which is what you did?

16 MR. YOUNGER: Yeah.

17 CHIEF JUDGE WILSON: And if there's a genuine
18 issue, then the court shouldn't dismiss that?

19 MR. YOUNGER: Well - - - well, that's actually -
20 - -

21 CHIEF JUDGE WILSON: To ask you a different
22 question, you have more proof you'd want to put in on
23 Scottish law?

24 MR. YOUNGER: Yeah. That's actually the problem
25 with the rule that they would advance.

1 CHIEF JUDGE WILSON: Right.

2 MR. YOUNGER: You'd have to put in stacks and
3 stacks of evidence as if it was a 3212 motion out of fear
4 that you were going to get thrown out of court before you
5 even had your day in court. And that would be a pernicious
6 result of their application of the rule.

7 Well, if there are no further questions, I'll
8 await my rebuttal time.

9 MR. ROSSMAN: May it please the court, Andrew
10 Rossman for the KKR respondents. I'll take the first
11 fifteen minutes and my colleagues the rest.

12 I'm going to focus, with the court's permission,
13 on the choice of law question, but I'm here for whatever
14 questions the court has.

15 The internal affairs doctrine has been the
16 bedrock choice of law rule for corporations in New York for
17 150 years. It's confirmed by eight decisions of this
18 court. The Greenspun decision did not say that it was
19 overturning the internal affairs doctrine. No court
20 decision has said that Greenspun overturned the internal
21 affairs doctrine.

22 JUDGE REYNOLDS FITZGERALD: But Greenspun says
23 that they - - - they reject automatic application, right?

24 MR. ROSSMAN: Yes. We raised - - -

25 JUDGE REYNOLDS FITZGERALD: Did the First



1 Department make any - - - did they show their work? Did
2 they give us any analysis of why they decided to use
3 internal affairs? I think they just said it generally
4 applies.

5 MR. ROSSMAN: Well, generally applies is exactly
6 the standard that Greenspun applied. Not automatically and
7 generally. There's no daylight between them.

8 JUDGE REYNOLDS FITZGERALD: But Greenspun listed
9 - - - listed various factors.

10 MR. ROSSMAN: Greenspun which applied
11 Massachusetts law by the way - - -

12 JUDGE REYNOLDS FITZGERALD: I got it.

13 MR. ROSSMAN: - - - I - - - did - - - applied.
14 What it said was in another case it could imagine looking
15 at factors. The factors that applied were case specific,
16 including where the trustees met, there happened to be a
17 business trust, and where real property was located. Not
18 an issue in this case.

19 There's never been a case, not Greenspun, not any
20 case since Greenspun, that has ever said there must be an
21 express balancing test and that you must show your work.
22 In Zion v. Kurtz, five years later, the court that had six
23 of the same judges that were on the Greenspun court, found
24 that the internal affairs doctrine governed in a case where
25 the parties were New York parties on both sides, involved a

1 New York stockbroker, and a bank account at Chase Manhattan
2 Bank. The court in that case did not - - -

3 JUDGE RIVERA: Well, why is - - -

4 MR. ROSSMAN: - - - say a balancing test was
5 necessary.

6 JUDGE RIVERA: But why isn't your adversary
7 correct that it turns on the nature of the claim? Because
8 as the Restatement indicates the internal affairs doctrine
9 is focused on issues related to the structure of the
10 corporation. These are torts.

11 MR. ROSSMAN: The - - - the fact that it's
12 labeled as a tort is of no consequence at all. The
13 question is, is it about the internal governance of the
14 corporation? And here, we have something that is in the
15 wheelhouse of the internal affairs doctrine. We have a
16 merger. We have the application of the articles of
17 association, the equivalent of a corporate charter,
18 governed by the U.K. Corporations Act. That is what's
19 complained about - - -

20 JUDGE CANNATARO: Counsel, what - - - what's the
21 significance of the corporate form? I think you mentioned
22 Greenspun was a trust of some sort, not a corporation?

23 MR. ROSSMAN: Correct.

24 JUDGE CANNATARO: Does - - - does that play any
25 decisive role in whether or not you apply the internal

1 affairs doctrine?

2 MR. ROSSMAN: I think the internal affairs
3 doctrine applies in both cases, but particularly even
4 Greenspun noted that the - - - particularly so, with
5 respect to corporations. So we're not urging - - - to be
6 clear, Your Honor. We're not urging that there are no
7 exceptions to the internal affairs doctrine. We're urging
8 the Restatement rule, which is that the exceptions are rare
9 and they're well recognized in this court. One time this
10 court has recognized an exception, and that's in the
11 German-American case and that's because there was a
12 statutory exception.

13 JUDGE RIVERA: Well, then, perhaps I've misread
14 the Restatement. I thought the Restatement did recognize
15 that a tort claim would fall within the exception.

16 MR. ROSSMAN: That's not correct, okay. There is
17 - - -

18 JUDGE RIVERA: Where - - - where can you point me
19 in the Restatement so that I will no longer make this
20 mistake you say I've made in my interpretation of the
21 Restatement.

22 MR. ROSSMAN: What the - - - there's an important
23 difference between and it's - - - it's described in the
24 McDermott case, the Delaware Supreme Court case, okay.
25 Corporations can, like people, enter into contracts and

1 commit torts. The question is not is there an exemption
2 for all torts? Okay. It's - - - is it external to the
3 rules that govern the corporation as a whole? Okay. So if
4 a company's truck runs someone over on 7th Avenue in New
5 York, yes, New York law applies then.

6 JUDGE RIVERA: Okay. Where can I find that in
7 the Restatement? That's a very good example, that's a very
8 good way of thinking about it.

9 MR. ROSSMAN: So the - - - the Restatement, Your
10 Honor, says that there have -- - the exceptions are,
11 besides the statutory exception that I've described in
12 German-American Coffee. That the second exception is where
13 there's little contact with the state of incorporation and
14 where the contacts are such that essentially all of the
15 business, or nearly all of the business and the
16 shareholders are in the forum state. So you have to show
17 two things absent the statute, which doesn't apply here.
18 No contact with law of incorporation, here's Scotland.
19 That's clearly not the case and I'll get back to why the
20 First Department noticed that in their opinion - - - did
21 their work, okay.

22 Second, there has to be such presence - - -
23 that's the phrase in Greenspun - - - such presence in the
24 forum state as to override the interest of the law of
25 incorporation. So if you had a circumstance where the only

1 connection was you had a piece of paper filed in a far-
2 flung jurisdiction that would be one case. That's not our
3 case.

4 This is a company founded in Scotland, by
5 Scottish founders, under the U.K. Corporations Act. And
6 what the First Department found, which is critical here is
7 that the directors who decided to take their positions
8 based on the understanding that it was Scottish law, they
9 were advised in the boardroom during this merger, that
10 Scottish law applied to this transaction. Okay? You
11 cannot have two different jurisdictions apply.

12 The - - - there's one transaction - - -

13 JUDGE RIVERA: What - - - what aspect of the
14 merger occurs in Scotland?

15 MR. ROSSMAN: What aspect of the merger occurs in
16 Scotland?

17 JUDGE RIVERA: Yes.

18 MR. ROSSMAN: Well, you have the merger of - - -
19 here it's a - - - an Irish - - -

20 JUDGE RIVERA: Didn't they negotiate any terms?
21 Did they sign any documents?

22 MR. ROSSMAN: They were advised by Scottish
23 counsel. Okay.

24 JUDGE RIVERA: In Scotland?

25 MR. ROSSMAN: And you had corporations - - - yes.



1 Neither of the corporations is a New York corporation,
2 okay. They were advised by Scottish counsel. They had
3 lawyers who were - - - and advisors who were outside of New
4 York. Shareholders outside of New York. The plurality of
5 plaintiffs here are Scottish. Okay. Not in New York.

6 JUDGE SINGAS: So under a balancing analysis, you
7 would fare pretty well?

8 MR. ROSSMAN: Even if you were balancing. And -
9 - - and I urge the court to look at the Hart case which is
10 probably the most cited case on internal affairs in all
11 kinds of corporate textbooks. Certainly, I believe the one
12 I read when I was in law school. The Hart case says that
13 there's a special interest that the law of incorporation
14 has. So even if you looked at it as a balancing test,
15 that's the most important one. And only if you've got a
16 circumstance so extreme, like the examples I gave where
17 there's no other contact with law of incorporation, that's
18 when you might apply another law.

19 Here, you - - - this is a real company that
20 operated in Scotland. Had more offices in Scotland than it
21 does - - - did in New York. And its connection to New York
22 in terms of business, only ten or fifteen percent of the
23 revenue is in New York. It does its business across the
24 country. Should we say that California law should apply?
25 Or California plaintiffs sue. That perhaps South Carolina

1 law should apply - - -

2 JUDGE RIVERA: So - - - so this is all - - -

3 MR. ROSSMAN: - - - for South Carolina?

4 JUDGE RIVERA: - - - in the record and that's
5 what shows that the Appellate Division has - - - has
6 provided its reasoning?

7 MR. ROSSMAN: The reasoning in - - -

8 JUDGE RIVERA: You said you want to get to that.

9 MR. ROSSMAN: - - - I think it's 2241 of the
10 record, Your Honor. And there the Appellate Division
11 specifically observes that the board was advised of
12 Scottish law at the time of the merger. And what's
13 critical here and the forty-seven leading corporate law
14 professors who put an amicus brief in on - - - on our side
15 of this - - - of this issue observed, you can only have one
16 set of rules - - -

17 JUDGE RIVERA: Right.

18 MR. ROSSMAN: - - - that apply intersect.

19 JUDGE RIVERA: So if the advice was erroneous - -
20 - if we now look back and said that's erroneous advice,
21 does that matter at all?

22 MR. ROSSMAN: Well, it - - - it could be that you
23 have erroneous advice. The critical point is that you
24 can't have competing advice. The - - - what the
25 Restatement observed is that the reason why you have one



1 law that applies to the corporate governance of a
2 corporation is because you want certainty, you want
3 uniformity, you want predictability, ex-ante, so the people
4 can organize their affairs. They can decide whether or not
5 to sit on boards. They can decide whether or not - - -

6 JUDGE TROUTMAN: But even if - - - even if you
7 say that Scots law applies and that the Appellate Division
8 was right here, shouldn't plaintiffs been afforded the
9 opportunity to plead a case under Scots law, considering
10 that this came under a 3211?

11 MR. ROSSMAN: I'm glad you asked that question.
12 Plaintiffs did have that opportunity. They filed a
13 petition in Scotland, asserting Scots law. They invoked
14 two sections of the U.K. Corporation Act. If they believed
15 that Scottish law provided for relief for them under breach
16 of fiduciary duty or other concepts, they had that
17 opportunity. They tactically abandoned that claim - - -

18 JUDGE REYNOLDS FITZGERALD: But we don't - - - we
19 don't - - -

20 MR. ROSSMAN: - - - and two years later pursued
21 New York.

22 JUDGE REYNOLDS FITZGERALD: We don't care about
23 that.

24 MR. ROSSMAN: I mean, yeah.

25 JUDGE CANNATARO: Yeah. There's no res judicata

1 effect there.

2 MR. ROSSMAN: That's not what I'm urging. That's
3 not what I'm urging. But my point is, there's - - -
4 there's no - - - it is not a circumstance where they had no
5 remedy - - - had no remedy or had no claim.

6 JUDGE REYNOLDS FITZGERALD: Shouldn't they have a
7 remedy? Not whether had one. Shouldn't they have one, is
8 the question?

9 MR. ROSSMAN: Well, not - - -

10 JUDGE REYNOLDS FITZGERALD: In other words, it's
11 a 3211. Whatever happened in Scotland, and you've got
12 competing versions of what happened in Scotland with the
13 case there. Whatever that was, shouldn't they - - - when
14 it's a 3211, shouldn't they be given the chance to plead it
15 under Scottish law?

16 MR. ROSSMAN: It is a 3211 claim that asserts
17 breach of fiduciary duty.

18 JUDGE REYNOLDS FITZGERALD: Right.

19 MR. ROSSMAN: And the breach of fiduciary duty
20 claim is governed - - - that is a core internal affairs
21 claim. The relationship between shareholders and
22 directors, okay. So the first two questions here in this
23 appeal - - - the very first question is whose law applies?
24 Real question is, what is the legal regime that we apply to
25 answering that question? That's a choice of law question,

1 right? So we say it's very straightforward, internal
2 affairs. That requires the application of Scots law.

3 The next question is going to be, okay, what does
4 Scots law say? If Scots law says that you - - -
5 shareholders individually do not have a claim for breach of
6 fiduciary duty, which is what we urge it said. Which is
7 what - - -

8 JUDGE CANNATARO: Absent special circumstances.

9 MR. ROSSMAN: Absent special circumstances. If
10 that's right, okay. Then that question means that they
11 don't have a claim. And that's okay. Cases get dismissed.

12 JUDGE CANNATARO: But what about Counsel's
13 argument that they - - - they didn't present this like you
14 would a 3212 motion. This was a 3211 motion.

15 MR. ROSSMAN: What they - - - please.

16 JUDGE CANNATARO: They raised a sufficient amount
17 of a issue with respect to whether special circumstances
18 are present, to allow them to get some sort of hearing and
19 evaluation of that evidence.

20 MR. ROSSMAN: Well, you heard at podium what they
21 claim their special circumstances were. Their special
22 circumstances are the relationship between directors and -
23 - - and shareholders. Those aren't special. Those are the
24 ordinary relationships that all directors have with all
25 shareholders.

1 Special circumstances are a situation where
2 there's some relationship apart from the status - - - from
3 the status relationship of just being a director and just
4 being a shareholder. So I don't think special
5 circumstances - - -

6 JUDGE RIVERA: Well, that sounds like a good
7 argument. But don't they get a chance to make that to
8 Supreme Court?

9 MR. ROSSMAN: But they did. So here's the key
10 and it was conceded at podium, too. In the same way that
11 Mr. Younger said this court could decide, could take
12 judicial notice of the question. The First Department is
13 one of every court, that's the - - - that's the language in
14 4511, "every court". First Department could take judicial
15 notice.

16 They had 1,000 pages of submissions on the Scots
17 law issue. 1,000 pages, expert affidavits on both sides.
18 The experts had common ground on this issue. They both
19 agree that under Scots law the duty - - - the fiduciary
20 duty, is owed to the corporation as a whole, not to
21 individual shareholders, absent special circumstances.
22 They might disagree on the application of that, okay. They
23 agreed on that foundation and it was within the First
24 Department's right to decide that question as a matter of
25 judicial notice. And what plaintiffs did, when they were

1 in front of the First Department, albeit in the
2 alternative, is they said to the First Department you can
3 decide this.

4 They said we'd like a remand, but absent remand
5 we'd like you - - -

6 CHIEF JUDGE WILSON: In the - - -

7 MR. ROSSMAN: - - - to decide in our favor.

8 CHIEF JUDGE WILSON: - - - in the First - - - in
9 the First Department did you take the position that if the
10 Appellate Division decided that Scots law applied, it
11 should go back to the trial court?

12 MR. ROSSMAN: I don't believe we did take that
13 position. My colleagues who are going to address that
14 issue can - - - can confirm that, but I do not believe we
15 did take that position, Your Honor.

16 So the - - - the question of whether or not the -
17 - - the question before the court is the 4511 question.
18 Which is, did the First Department have the authority to
19 apply it or not? And does the statute require a hearing?

20 Your - - - Your Honor, observed correctly it says
21 may. It does not say must. The vast majority of cases
22 applying - - - courts apply foreign law, we have very
23 sophisticated court system with a global clientele, if you
24 will. And New York courts are applying foreign law all the
25 time.

1 JUDGE IANNACCI: Excuse me. Can you just clarify
2 the special circumstances? Because you're referring to
3 special circumstances as being general in terms of how the
4 corporation operates, but plaintiffs' expert is talking
5 about the way the stocks were valued at nil value. And
6 that that was the special circumstance that created this
7 breach of fiduciary duty.

8 MR. ROSSMAN: I'm - - - I'm glad you asked that
9 question as well. So it gives me a chance to explain.
10 Ninety percent of the common shares here, the ordinary
11 shares here, were not held by plaintiffs. My client's and
12 Mr. Weiss' client is Shamrock, actually held more common
13 shares than plaintiffs did. All of which got wiped out.

14 JUDGE IANNACCI: The value - - - I'm not even
15 talking about the value. But you use different criteria to
16 value both corporations. And they're saying that one was a
17 revenue and the other was EBITDA or something to that
18 effect. Why were two different values used?

19 MR. ROSSMAN: Well, the reason why two different
20 values were used was because the FanDuel company had no
21 EBITDA. It was a money losing company. It would be worth
22 zero if valued on the basis of multiple of EBITDA. It was
23 running out of money. 150 bidders were pursued to buy this
24 company at the time, which is when the - - - this - - -
25 it's been the law that was - - -

1 JUDGE IANNACCI: That was before the Murphy
2 decision.

3 MR. ROSSMAN: It was before Murphy but after
4 Murphy had been argued. So folks had a view about the
5 Murphy decision. At that time, no one was interested in
6 paying for this corporation. If there were a bid, my
7 clients and Mr. Weiss' clients had an enormous financial
8 interest in selling it to a higher bidder. They merged
9 with Paddy Power Betfair because it was the only viable
10 deal. And when Paddy Power Betfair - - -

11 JUDGE IANNACCI: Part of that agreement also said
12 that even if there was a different result in Murphy the
13 value would not change.

14 MR. ROSSMAN: Correct. And because they hadn't
15 reached that deal in a term - - - at the time that they
16 signed the term sheet, then they risked losing the one and
17 only deal that would have kept the company alive. So we
18 think - - -

19 JUDGE IANNACCI: Right. Then Murphy would have
20 never changed the situation?

21 MR. ROSSMAN: And - - - and - - -

22 JUDGE IANNACCI: If Murphy was ruled differently,
23 it just would have kept the same amount of money.

24 MR. ROSSMAN: If Murphy were ruled differently?

25 JUDGE IANNACCI: If Murphy did not come down the

1 way it came down, correct?

2 MR. ROSSMAN: Yes. I'm following, Your Honor.

3 JUDGE IANNACCI: Then there was no reason to have
4 any change in the valuation because that's what the - - -
5 it was valued at pre-Murphy.

6 MR. ROSSMAN: So if I - - - if I may answer the
7 question, please, Judge. So the - - - the reason why we
8 say, just to explain. The reason why we say it was arm's-
9 length with the parties on both sides knowledgeable about
10 this - - - about the Murphy situation at the time, is
11 because 145 million dollars of cash that was injected into
12 the company on the Paddy Power Betfair side of the - - - of
13 the balance sheet, okay. They were given credit in terms
14 of the value of the new company - - - the percentage of the
15 new company that they owned, dollar for dollar, based on
16 that cash injection.

17 So it had a real translatable into cash value at
18 arm's-length, for which my clients and Mr. Weiss' clients
19 gave up an enormous amount of value. And they did that to
20 keep the company alive. And the very last thing I'll say
21 connected to that, is they had the right to do this deal in
22 the articles of association that they bargained for when
23 they put hundreds of millions of dollars into this company
24 because they had a contractual drag along and a contractual
25 waterfall preference as preferred shareholders. That's

1 just the - - - the outcome of the deal.

2 Thank you, Your Honors.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. WEISS: May - - - may it please the court.

5 Jonathan Weiss for the Shamrock respondents.

6 I'm going to touch on CPLR 4511. The hallmark of
7 CPLR 4511 is its flexibility. It affords both appellate
8 courts and trial courts broad discretion to take judicial
9 notice of foreign law.

10 The plaintiffs' interpretation of that rule would
11 severely restrict that flexibility. It would impose a
12 categorical requirement that would mandate an evidentiary
13 hearing every time the substance of the foreign law was in
14 dispute. That is manifestly inconsistent with the plain
15 language - - -

16 JUDGE RIVERA: But would only require it - - -

17 MR. WEISS: - - - of the rule.

18 JUDGE RIVERA: - - - when there's a factual
19 dispute. Not when it's truly a question of law that
20 requires no fact-finding or there's an agreement about the
21 fact amongst the parties.

22 MR. WEISS: Well, this is an important point and
23 Judge Wilson raised it. What happened with the sea change
24 with the implementation of CPLR 4511 and its predecessor
25 Statute CPA 344-a, was to say we want to codify this

1 change. We are no longer going to deem the determination
2 of foreign law as a fact question. That is a pure question
3 of law. And so the change in the rules codified that.

4 JUDGE SINGAS: But 4511 talks about findings and
5 what here are findings versus conclusions. And I think
6 that's a - - - that's a significant difference here.

7 MR. WEISS: The - - - the findings that 4511
8 refers to are the conclusions that the court makes upon
9 taking judicial notice.

10 JUDGE SINGAS: But doesn't findings connote some
11 kind of analysis that has to be done? It doesn't say
12 conclusions, it says findings. So you know to me that - -
13 - that sort of suggests that there needs to be some
14 exploration of the issues, taking into account both sides
15 not just one, and then analyzing it and making a conclusion
16 that way. Do you disagree with that?

17 MR. WEISS: Well, I - - - I would say that the
18 whole premise of this rule change that said, listen, courts
19 can take judicial notice of foreign law, they do not have
20 to prove that as a question of fact. You're - - - I - - -
21 I understand the - - - the nuance here because you normally
22 think of findings as findings of fact and you have to state
23 your - - - you know, the - - - the explanation for your
24 findings of fact and perhaps it's an infelicitous choice of
25 words. But what that requirement is stating is that if you

1 take judicial notice of law - - - of foreign law, you have
2 to - - - you have to express what, in fact, you found the
3 law to be. And that's exactly what the court - - -

4 JUDGE CANNATARO: Well, taking that on face value
5 - - -

6 MR. WEISS: - - - did in the First Department.

7 JUDGE CANNATARO: - - - that was my question.
8 There doesn't seem to be a lot of explanation at the
9 Appellate Division about what it found. It just said this
10 is what the law requires.

11 MR. WEISS: Well, so I grant you that there's not
12 a lengthy explanation of - - - of the law but there is a
13 statement of what it found the law to be, which is in fact
14 - - - I mean - - - and this is a very important point
15 actually. Because my colleague Mr. Younger said that there
16 was no record developed on this point. There were, as Mr.
17 Rosman said over 1,000 pages before the First Department on
18 Scots law. That included hundreds of pages of decisional
19 authority. That included multiple affidavits from experts
20 that were impeccably credentialled on both sides - - -

21 JUDGE SINGAS: How much of the oral argument was
22 devoted to this issue?

23 MR. WEISS: Well, the - - - the - - - the First
24 Department - - - the - - - the oral argument on the First
25 Department really hinged on - - - on the - - - on the

1 internal affairs doctrine. That was the focus of that
2 argument.

3 JUDGE SINGAS: Okay.

4 MR. WEISS: But the - - - the point is that the
5 First Department had before it this expansive record. And
6 it wasn't just the - - - it wasn't just the record. It
7 wasn't just the - - - the - - - you know, the affidavits of
8 these impeccably credentialled experts on both sides, but
9 it was argument of the parties. There were dozens of pages
10 of real estate in the briefing devoted to this issue. So
11 it's not as though they didn't have material upon which
12 they could rely.

13 JUDGE CANNATARO: So Counsel, in the absence of
14 an elaborate explanation from the Appellate Division about
15 what the basis of that finding was, what are we as a
16 reviewing court - - - what's our jurisdiction here with
17 respect to - - - I - - - I don't think it's just judicial
18 notice of foreign law. I think it's also an application of
19 the foreign law, which to me - - - I'm sure you disagree,
20 but that seems like a different question. How are we
21 supposed to review that?

22 MR. WEISS: I see my time is expired. May - - -
23 may I respond to that?

24 CHIEF JUDGE WILSON: Go ahead, yes.

25 MR. WEISS: Thank you. So the answer to that

1 question lies in the plain text of CPLR 4511. If you look
2 at - - - at Section - - - if you look at Section - - - if
3 you look at Section 4511(b). I'm sorry, 4511(d). "In
4 considering whether a matter of law should be judicially
5 noticed and in determining the matter of law to be
6 judicially noticed, the court may consider any testimony,
7 document, information, or argument on the subject whether
8 offered by a party or discovered through its own research."

9 So it's not just that you're taking judicial
10 notice to establish what's the raw material that I'm
11 dealing with here, and I respectfully submit over 1,000
12 pages of record, evidence on Scots law, is plenty raw
13 material to ascertain. But it's also per 4511(d), what is
14 the determination of the - - - of the matter of law that is
15 to be judicially noticed - - - the determination of the
16 law.

17 And to do that you can consider a whole variety
18 of things. That's the flexibility - - -

19 JUDGE RIVERA: And - - - and what - - -

20 MR. WEISS: - - - of the statute.

21 JUDGE RIVERA: - - - how should we understand
22 that requirement if - - - if the party is saying we want to
23 put in more? We think this record is insufficient. We
24 want further discovery. We may want a hearing.

25 MR. WEISS: That is up to the sound discretion of

1 the court. And that was the - - -

2 JUDGE RIVERA: Is it a question of law as to
3 whether or not the record is sufficiently robust to make a
4 decision under (d)? Would that be a question of law?

5 MR. WEISS: That would - - - that would - - - so
6 the - - - the answer to that question would be did the
7 First Department abuse this wide latitude of discretion
8 afforded to them by 4511 when they determined an issue of
9 Scots law on over 1,000 pages of record, evidence, dozens
10 of pages of specific briefing, and - - - you know,
11 impeccably credentialled experts on both sides. A retired
12 judge of the - - - the highest court in Scotland on the
13 defendant's side and a King's Counsel on the plaintiff's
14 side. These were people whose bona fides were without
15 question. Whether it was an abuse of discretion on the
16 part of the First Department with that record before it,
17 and that briefing and argument, which was expressly
18 identified argument - - -

19 JUDGE RIVERA: But they never - - -

20 MR. WEISS: - - - may be considered.

21 JUDGE RIVERA: - - - they never explained why
22 there are no special circumstances here. They say this - -
23 - the - - - that a share - - - that a director may owe a
24 fiduciary duty to a shareholder in special circumstances
25 under Scots law, but such circumstances are present are

1 present here and they don't say why.

2 MR. WEISS: They do. That is - - - that is
3 correct, Your Honor. They - - - they do not say why but
4 the - - - the affidavits - - -

5 JUDGE RIVERA: Yes.

6 MR. WEISS: - - - that were in the record.

7 JUDGE RIVERA: Yes.

8 MR. WEISS: Go - - - and I could - - - I could
9 direct you to it if you'd like, but they go chapter and
10 verse through why it is - - - through the case that on - -
11 - on the facts as pled in the complaint, the special
12 circumstances exception doesn't apply. There may have been
13 different views on the part of the experts as a matter of
14 Scots law, whether or not on the facts of the case, that
15 exception applied. But it was well within the power and
16 the discretion of the First Department, having reviewed
17 that record, to make the determination of the law as 4511
18 provides.

19 JUDGE SINGAS: Well, can I, Chief?

20 CHIEF JUDGE WILSON: Of course.

21 JUDGE SINGAS: I - - - I know that the - - - the
22 information was available to the First Department but when
23 you say that they reviewed it, we're not really able to
24 ascertain that from this record, right? I mean, I - - -
25 because they're not referencing any of it. I - - - I

1 understand that they might have very well reviewed the
2 thousands of pages of documents but there's nothing
3 indicating to us that they did.

4 But I have a - - - I have a separate question. I
5 know that you don't think a hearing was required here, but
6 do you think a hearing is required ever? And under what
7 circumstances?

8 MR. WEISS: It is up - - - it - - - it - - - a
9 hearing might be, given the circumstances, in the
10 discretion of the court, something that would be
11 appropriate. Absolutely. Rosman absolutely acknowledges
12 that. But it - - - it - - - it's not required. And the
13 rule that they're espousing here is that it should be
14 required whenever - - - whenever the substance of foreign
15 law is in dispute.

16 Not that it may, on a case-by-case basis, but it
17 always should be required. That is not what the statute
18 says. That is not what the statute says.

19 The last thing I will say is if you accepted
20 their rule, it would have profound implications for the
21 efficient administration of the courts of this state.
22 Because what it would require is - - - and - - - and we all
23 know, in an increasingly global society and, arguably, New
24 York is the center of commerce in the world, we see
25 increasingly matters of foreign law at issue in our courts,

1 particularly in the commercial division.

2 So every time you had an issue of foreign law
3 that was in dispute and was outcome determinative, you're
4 invariably going to have differences of opinion about what
5 that substance of the law is. That's what litigation is
6 about - - -

7 JUDGE IANNACCI: Chief, may I? Just - - - I
8 don't mean to interrupt you.

9 MR. WEISS: Yeah. I - - - I - - -

10 CHIEF JUDGE WILSON: Of course.

11 JUDGE IANNACCI: Just a quick question. So we're
12 talking about hearings. We're talking about judicial
13 notice of foreign law. But now we have a 3211 motion,
14 correct? And the court must accept the facts as true.
15 What if you have the defendant who has the burden, and
16 their expert is not accepting the facts as true, which is
17 what plaintiff's expert is alleging? Then what happens
18 with respect to the hearing? Not just in this case, in
19 every case that we have before us?

20 MR. WEISS: So that - - - that's their argument.
21 But the First Department - - -

22 JUDGE IANNACCI: I'm not arguing. I'm asking.
23 It's a 3211 motion - - -

24 MR. WEISS: Right.

25 JUDGE IANNACCI: - - - correct?

1 MR. WEISS: Correct. And - - - and so - - - so
2 our - - -

3 JUDGE IANNACCI: I'm not arguing, please.

4 MR. WEISS: No, no, no. I'm saying that with
5 respect to - - - so I guess, the - - - the important thing
6 I just want to distinguish because it's a - - - it's a - -
7 - a very subtle question; I want to answer it properly. So
8 with respect to the determination of law on the part of the
9 First Department, that's a pure question of law. So that
10 is not a fact question, even though it's a matter of
11 foreign law. So it's not as though you have to draw all
12 reasonable inferences in favor of the nonmoving party with
13 respect to the determination of foreign law. That's a pure
14 legal question.

15 With respect to your point about, well - - - you
16 know, they did not - - - the - - - the - - - the - - - the
17 First Department didn't accord all reasonably favorable
18 inferences to - - - you know, to the facts or even accept
19 the facts as pled as true - - -

20 JUDGE IANNACCI: I said the expert.

21 MR. WEISS: The - - - the expert did not. I'm
22 sorry. That was something that the First Department, after
23 reviewing the - - - you know, the extensive affidavits of
24 the experts, and looking at the allegations in the
25 complaint, could very well decide for itself as a matter of

1 its discretion. Which is - - - which is - - - you know,
2 perfectly within the right and the province of the court to
3 do.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. WEISS: Thank you.

6 MR. KIRSCH: Good afternoon, Your Honors. Mark
7 Kirsch for the FanDuel entities and Mr. King, Mr.
8 Nathanson, and Mr. Cleland.

9 Your Honors, I join in the arguments my
10 colleagues have made.

11 I want to make a couple of points about the - - -
12 the work of the Appellate Division. I think what they
13 found, it's - - - with looking at the 1,000 pages of the
14 expert affidavits and with all the qualifications on both
15 sides. It's not that the facts plaintiffs pleaded were
16 disputed. It's what those facts may mean - - - do mean
17 under Scottish law. That's what the experts were opining
18 on. Scottish law holds this, that shareholders - - - I'm
19 sorry. That directors don't owe fiduciary duties to
20 shareholders except in certain circumstances. Those are
21 not applicable here. That's what the legal determination
22 was, just as if one was making a determination here. And
23 the Appellate Division had every - - - every right to
24 exercise its discretion to make that finding.

25 Now, I'd like to also say or underscore - - -



1 JUDGE TROUTMAN: When you use the word,
2 "finding", the manner in which they rendered their
3 decision, are you saying it was sufficient to show that
4 they made a finding in the way that the CPLR requires?

5 MR. KIRSCH: I think that's the inexorable
6 conclusion of what they've done. I think we all have to
7 assume that they, in fact, did read the 1,000 pages. In
8 fact, did do their homework, just as this court would do.
9 Just as Supreme Court would do.

10 JUDGE CANNATARO: Can you justify that answer in
11 terms of Justice Iannacci's last question? This is a
12 motion to dismiss.

13 MR. KIRSCH: Yeah.

14 JUDGE CANNATARO: It's - - - it's not a summary
15 judgment motion. So what - - - and - - - and I - - - I - -
16 - the answer - - - your colleague who was just up prior to
17 you, seems to suggest that for purposes of this Section
18 foreign law under 4511, we treat it more like summary
19 judgment than we do a motion to dismiss. Is that your
20 position as well?

21 MR. KIRSCH: I - - - I think without - - - I'll
22 answer your question directly. I don't think we have to
23 get there, and it's because the - - - the Appellate
24 Division, based on the opinions, detailed opinions of two
25 Scottish law experts - - - nobody disputed that - - - had a

1 view as to what the facts pleaded. Whether those in fact,
2 plead violations under Scottish law as they understand
3 Scottish law. And the determination was it does not plead
4 violations under Scottish law.

5 The Appellate Division was entitled to make that
6 finding. If they can't make that finding, then all it's
7 going to take - - - if the court announces a rule that they
8 - - -

9 JUDGE TROUTMAN: Should they have been given an
10 opportunity to re-file, to file a complaint under Scottish
11 law? Asserting it, rather?

12 MR. KIRSCH: Whether it should have been, in
13 effect, dismissed with prejudice or without, Your Honor?

14 JUDGE TROUTMAN: Right.

15 MR. KIRSCH: I think they're entitled to make the
16 finding that it would be futile and I think that's clearly
17 what they must have done. Or they could have said without
18 prejudice.

19 But this is really important, respectfully.
20 Because in the event this court were to announce a rule
21 that all it would take to get to an evidentiary hearing
22 when there's a question of foreign law, is somebody styling
23 their claims not just to say breach of contract claims but
24 is wrongful - - - other kinds of wrongful conduct, then
25 you'd have an evidentiary hearing every single time.

1 It should be the case, in fact, and I believe it
2 is the case, that the Appellate Division - - -

3 CHIEF JUDGE WILSON: Well, when you say
4 evidentiary hearing, it could simply be on paper, right?

5 MR. KIRSCH: It could.

6 CHIEF JUDGE WILSON: That is, this could have
7 been a summary judgment motion on this record?

8 MR. KIRSCH: Sure. But you didn't have - - - one
9 didn't have to get there because - - -

10 CHIEF JUDGE WILSON: Well, that - - - that sort
11 of seems to me the question is, which rule we should
12 choose, right? One way to look at it is, I think, the way
13 you're putting it, which is somebody's filed a motion to
14 dismiss. To know whether the complaint states a claim, you
15 have to know under what law it states a claim.

16 MR. KIRSCH: Right.

17 CHIEF JUDGE WILSON: And so the first thing you
18 would have to determine under your theory is what is the
19 governing law. The court has to make that determination to
20 decide whether to dismiss the complaint and it has to make
21 it on whatever record the parties decide to put in front of
22 it for that purpose. That's one way to look at it, right?
23 That's your way to look at it?

24 MR. KIRSCH: Yes, Your Honor. And it comes right
25 back - - - oh.

1 CHIEF JUDGE WILSON: And the other way to look at
2 it is, the parties - - - if the parties have put in dispute
3 what foreign law is, that can really only be decided on a
4 motion for summary judgment. Not necessarily with a
5 hearing, but with a full record about what foreign law is?

6 MR. KIRSCH: Your Honor, respectfully, I
7 disagree. 4511 allows for a decision on the law without an
8 evidentiary hearing. Now, there's nothing that stops the
9 Appellate Division from having such a hearing, but they're
10 not required to. And here, with 1,000 pages of briefing in
11 effect and affidavits, they clearly have made up their mind
12 that this was enough.

13 And this comes right - - -

14 JUDGE SINGAS: I think the point is that there's
15 a lot of real estate between no hearing and a hearing. You
16 know, you could have an assessment of the evidence, you can
17 have a - - - a - - - their findings outlined and their
18 conclusions and what they drew on to reach those
19 conclusions. And then, if we had to review whether it was
20 an abuse of discretion, at least we had the basis for what
21 the conclusions - - - where the conclusions came from. So
22 it doesn't - - - I - - - I don't think the - - - the - - -
23 the decision is, is it a formal hearing or not a formal
24 hearing. Is there a basis under which these conclusions
25 came?

1 MR. KIRSCH: Well, if Your Honor's suggesting
2 that this court might not have enough information about
3 what the Appellate Division was thinking, is - - - is that
4 - - - is that what you're getting at?

5 JUDGE SINGAS: Yeah. I mean, yes.

6 MR. KIRSCH: And so whether - - - whether or not
7 they have to spell out at a certain level of detail what
8 the reasoning is, Your Honor, could - - - Your Honors,
9 could decide to do that, of course.

10 But here, with the - - - with voluminous record,
11 when - - - you know, you almost want to - - - it's crushing
12 the amount of information they had. The fact that they
13 didn't have a - - -

14 JUDGE RIVERA: But would - - -

15 MR. KIRSCH: - - - more detailed opinion - - -

16 JUDGE RIVERA: - - - but wouldn't - - - wouldn't
17 your burden be on - - - on motion to dismiss to show that
18 there is nothing else that is relevant that they're going
19 to find or that they could put forward to reach a decision?
20 That was in part my question before, about whether or not
21 you have a robust, sufficient record to reach your
22 determination, which is the way I read 4511. That the
23 judge decides whether or not they have enough in front of
24 them to take judicial notice of something.

25 What you wanted is them to take judicial notice

1 that Scots law in this case, on these facts, right, would
2 not allow the plaintiffs to be able to sue?

3 MR. KIRSCH: So they didn't - - - so I'll agree
4 with you, they didn't use any kind of magic words, saying
5 we have enough information. But given the information we
6 know they did have, and the - - - the firmness and the
7 finality - - -

8 JUDGE RIVERA: Well, I'm not disagreeing with
9 you. My - - - my point is, doesn't that mean that our work
10 is to look at this record and say, yes, there's enough in
11 this record for them to have come to that determination.
12 But my point is, the burden was on you all to say there is
13 nothing more to put in this record, and we can look at the
14 record and say, no, they're right. They would have been
15 able to put X, Y, and Z, or they could have explored A, B,
16 and C. That strikes me that that's - - - that's the
17 question if we're going to go down this road.

18 MR. KIRSCH: Well, the court of course would
19 review the entire record. This court would review the
20 entire record, no doubt. But again, the absence of magic
21 words saying we had enough, respectfully, need not be
22 required. And I think it's apparent that they thought they
23 had enough. It would be inconceivable to me that they
24 would have thought, well, maybe we have enough, maybe we
25 don't have enough. We're not going to say. And we're just

1 going to decide. It's not a - - - I don't think that's a -
2 - - for me, wouldn't be a critique that I would find
3 appealing.

4 Now, if I might just say, though, this idea also
5 comes right back to some of the policy concerns that
6 animate the internal affairs doctrine. I don't want to - -
7 -

8 JUDGE IANNACCI: If I may, before you even get
9 into the - - -

10 MR. KIRSCH: Please.

11 JUDGE IANNACCI: - - - policy concerns. Because
12 we - - - we understand - - - I understand your policy
13 concerns. I just want to get back to what was before the
14 court. When you have an affidavit from your expert and
15 says that special circumstances are very limited. And then
16 you have a plaintiff's affidavit that plaintiff's expert's
17 saying, you know, it's like - - - you cited a 1914 case and
18 plaintiff has a 2001 case and a 2017 case. Plaintiff's
19 expert under Scots law is saying that the question is one
20 of fact in each case. It's not your typical type of
21 situation when you could take judicial notice of statute of
22 limitations, correct?

23 MR. KIRSCH: I - - - I hear that, Your Honor.
24 But I don't believe the experts actually disagreed on what
25 Scots law is.

1 JUDGE IANNACCI: No, I agree. They - - - they
2 didn't disagree. But they - - - I think, there's a
3 difference here with respect to special circumstances.
4 That's where I am asking you to - - - there were two cases
5 here, one from 2001, and 2017.

6 MR. KIRSCH: Understood.

7 JUDGE IANNACCI: Talking about special
8 circumstances.

9 MR. KIRSCH: But the appellee's expert and the
10 appellant's expert did not disagree on what the categories
11 of special circumstances may be. They agreed on that. The
12 question was whether the facts that were alleged actually
13 make out those claims. And the Appellate Division went
14 with appellee's expert. They had all the information,
15 again, a - - - you know, a really crushing amount, and
16 that's their decision. And the question is whether the
17 Appellate Division was able to do that from the record, and
18 clearly, they felt they could and I see no reason why not.
19 You know, even in the absence of - - -

20 JUDGE RIVERA: And we could look at that and say
21 that that was a wrong conclusion, based on the record.

22 MR. KIRSCH: I'm sorry, Your Honor?

23 JUDGE RIVERA: We could look at that and say
24 that's a wrong conclusion, based on the record. Because it
25 sounds like you're saying the Appellate Division didn't

1 exercise any authority to find facts. They looked at the
2 record before them and concluded this is not - - - these
3 are not special - - - their language - - -

4 MR. KIRSCH: It's correct.

5 JUDGE RIVERA: - - - there are no special - - -
6 those special circumstances are not - - -

7 MR. KIRSCH: Your Honor's not bound.

8 JUDGE RIVERA: - - - found here.

9 MR. KIRSCH: Your Honor's not bound by the
10 opinion, clearly. This court is - - - court is not. And
11 we have not argued otherwise. We're just - - - you know,
12 suggesting what the court should do, respectfully.

13 JUDGE RIVERA: Yes, I understand.

14 MR. KIRSCH: Which is affirm. And - - - and - -
15 - may I just have just a moment on the internal affairs
16 doctrine?

17 CHIEF JUDGE WILSON: If you can do it very
18 quickly.

19 MR. KIRSCH: I can. I'll just say again how
20 important it is. Imagine the difficulties for directors
21 when they are told by their lawyers and when they're
22 thinking about a fundamental corporate transaction or a
23 restructuring that will wipe out the equity and the new
24 directors will come in. When they're told here's the law,
25 but by the way, we don't know if this is the law that's

1 actually going to apply in the end to how you did your
2 work. And you know why we can't say that? Because you
3 might get clever plaintiffs who in addition to just saying
4 breach of contract, might spin out misconduct claims and
5 then it won't apply. And then we're into some balancing.

6 That's - - - that - - - that is - - - that - - -
7 if you take that point of view, respectfully, then I'll
8 tell you what's going to happen. It's going to deter - - -

9 JUDGE RIVERA: But then that means you're looking
10 for an automatic rule, and I thought - - -

11 MR. KIRSCH: No.

12 JUDGE RIVERA: - - - that - - - that your side is
13 taking the position, no, it's a default rule. There were
14 circumstances when it doesn't apply and so now the
15 shareholders are left with maybe we're the rare
16 circumstance.

17 MR. KIRSCH: I'm just suggesting very
18 respectfully that there should not be competing demands on
19 lawyers - - - rather on directors, as to what law is going
20 to comply - - - apply. You should try to minimize that
21 because otherwise it will deter director service and
22 clearly you want the best directors to serve possible,
23 whether in - - - you're - - - whether you're sitting in New
24 York, you're sitting anywhere else.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. KIRSCH: Legal uncertainty - - - okay. Thank
2 you, Your Honor. I appreciate it.

3 MR. YOUNGER: Your Honor, just a few points'
4 rebuttal. I think Judge Rivera just summed it up. They
5 don't agree with Greenspun. In fact, the automatic
6 application that Greenspun denied is exactly what they're
7 advocating here. And much of what they're saying is, yeah,
8 there should be an exception, but the exception is only
9 this small. The exception that they advocate, either a
10 statute or almost no context with the incorporation state,
11 is nowhere found in Greenspun. It's nowhere found in all
12 the cases that follow Greenspun that Mr. Rossman said don't
13 exist. It's just simply - - -

14 JUDGE REYNOLDS FITZGERALD: I think it's a pretty
15 small exception, right? You got generally, you got rarely,
16 you got - - - I mean, you know. So let me - - - let me
17 switch though and ask you another question.

18 MR. YOUNGER: Yeah. I - - - I agree that it's a
19 very small exception. That's why you don't have to worry
20 about these directors moving out of New York. We've had
21 Greenspun for fifty years and no director has said I can't
22 be a director because of Greenspun.

23 JUDGE REYNOLDS FITZGERALD: Okay. Is it your
24 position, I think that's what you're - - - you're - - - the
25 other lawyers allege, that you have to have - - - you

1 require a hearing under 4511 every time there is a question
2 of - - - a difference in substantive law?

3 MR. YOUNGER: No. This is more like a 3211
4 motion - - - a 3212 motion. I'm sorry. We had a 3211
5 motion; it was turned into a 3212. It's only when there's
6 a genuine, material dispute. And we talked about the text.
7 The text of 4511 was barely mentioned. It talks about
8 sufficient information. If you put in - - - and they talk
9 about these thousands of pages of affidavits. No. Most of
10 them are just copies of cases. But - - -

11 JUDGE RIVERA: So if we agreed with you, what - -
12 - what is it that's going to be the focus of this hearing?

13 MR. YOUNGER: The focus of the hearing is three-
14 fold. One, what are the facts? Their expert, and he said
15 that - - - that they weren't fact-findings there. No.
16 They grabbed onto the defendant's expert's facts, not ours.
17 They didn't accept our facts, which is what you have to do
18 in a 3211. That's number one. Number two, as was pointed
19 out, our expert says whether you have special circumstances
20 is a question of fact. And that's something you develop at
21 a hearing, after you've had discovery. Three, something
22 never mentioned - - -

23 JUDGE RIVERA: But yeah, what - - - what - - -
24 what are the facts that you're going to present related to
25 that question - - -

1 MR. YOUNGER: Yeah.

2 JUDGE RIVERA: - - - that - - - that is not
3 already in the record?

4 MR. YOUNGER: Yeah.

5 JUDGE RIVERA: What - - - right? What value
6 comes from the hearing? That's what I'm trying to say.

7 MR. YOUNGER: Two facts in particular go to
8 special circumstances.

9 JUDGE RIVERA: Yes.

10 MR. YOUNGER: One, the fact that they were
11 dealing in our shares. Remember, they took our shares from
12 the company that they were in and moved them to another
13 company where they were on both sides of the transaction,
14 same director, classic self-dealing. So that's number one.
15 And then they dealt with our shares. That's a classic
16 special circumstance under Scottish law.

17 But number two, never mentioned in their
18 affidavits, is they appointed the directors as agents under
19 the terms of the offer. That - - - even their cases, the
20 Hyatt case in Scotland, says that you have special
21 circumstances.

22 I just want - - - want to go back to one point
23 which I think is - - - is - - - has been lost here. We're
24 not arguing with the merger. We like the merger. This is
25 a merger classic, one plus one equals more than two. Why?

1 Because we were on the verge of a gold mine. Sports
2 betting was about to come.

3 What we disagree with is a whole course of
4 conduct where, number one, they appointed one of the common
5 shareholders, KKR, to negotiate the deal in their own self-
6 interest. Two, they then took the shares and moved them to
7 a different company. How is that internal affairs? I
8 mean, I don't know how it's internal affairs if I take my
9 shares, put it into a wholly different company. And then,
10 three, they came up with terms that hid their misconduct.

11 So this is not an argument about a merger. This
12 is an argument about how they distributed the shares.

13 Your Honor, you mentioned value. They valued the
14 wrong thing. They valued FanDuel, but that's not what they
15 had to value. They had a value PandaCo. So you took a
16 forty percent interest and a sixty percent interest in
17 PandaCo. That's what we were getting. And by the way,
18 they never valued the huge opportunity of sports betting.

19 There's been a lot of talk here about we're
20 arguing for a hearing in every case. We're not arguing a
21 hearing in every case. We're only arguing for when there's
22 a - - - a factual dispute, a real, genuine, material
23 dispute like you have on 3212. The problem here is, we had
24 a 3211 motion and at the end of the day, what the
25 defendants want is, they want to throw us out of court on a

1 conflict of law rule that just doesn't make any sense - - -

2 JUDGE RIVERA: So just to understand, since your
3 view is that even under Scots law, you fit the special
4 exceptions. Which means you would have had - - - I
5 understand the choice here. But you would have had a
6 remedy in Scotland? Yes? Because you would have argued.
7 As your - - - right? As your expert - - -

8 MR. YOUNGER: We would have argued it for two
9 reasons, Your Honor.

10 JUDGE RIVERA: Yes.

11 MR. YOUNGER: For that and something never
12 mentioned by the First Department, that we were uniquely
13 harmed. If you're uniquely harmed, you can sue in
14 Scotland. And that's something that the First Department
15 never mentioned, even though it's set out squarely in our
16 affidavits.

17 Well, thank you, Your Honor, and we appreciate
18 the time Your Honors take.

19 CHIEF JUDGE WILSON: Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Eccles v. Shamrock Capital, No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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