

Eccles v Shamrock Capital Advisors, LLC
2022 NY Slip Op 30187(U)
January 17, 2022
Supreme Court, New York County
Docket Number: Index No. 651223/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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NIGEL ECCLES, LESLEY ROSS ECCLES, THOMAS GRIFFITHS, ROBAT JONES, CHRIS STAFFORD, ASKEK AHMED, ANDREW ALLAN, ALEXANDRA AMOS, JEANNICE ANGELA, KEN BERMAN, ALEX BIRD, DUNCAN BLAIR, CAMERON BOAL, EHI BORHA, JESSE BOSKOFF, GEORGE BOUGH, MICHAEL BRANCHINI, DANIEL BROWN, KELLI BUCHAN, CHARLENE BURNS, WILLIAM CARROLL, DAVE CAVINO, SHREE CHOWKWALE, CORAL HOUSE SERVICES LIMITED, CHRIS CORBELLINI, JIM CROFT, CYRUS DAVID, DAVIDSON FAMILY REVOCABLE TRUST, JAMES DOIG, RYAN DONER, KEVIN DORREN, PAYOM DOUSTI, CARL EKMAN, RYAN FABER, JASON FARIA, VICTORIA FARQUHAR, RORY FITZPATRICK, ADRIAN GENAO, MITCHELL GILLESPIE, ALAN GOLDSHER, WILL GREEN, MELANIE GRIER, JUSTIN HANKE, RYAN HANSEN, PETER HENDERSON, MATTHEW HEVIA, ANDREW HEYWOOD, STEVEN HOLMES, JUSTIN HUME, GREGORY HUMPHREYS, F RESIDUAL LLC, TIM JACKSON, CORY JEZ, THANYALUK JIRAPECH-UMPAI, DEVASHISH KANDPAL, MICHAEL KANE, ALAN KARAMEHMEDOVIC, MARCUS KELMAN, DAVID KERR, GALINA KHO, DYLAN KIDDER, SARAH KILLARNEY-RYAN, ALLAN KILPATRICK, ALI KING, STEVEN KING, DAVID KNAPP, MIKE KUCHERA, ANGELA KUO, JESSE LAMBERT, AMY LANGRIDGE, DIOMIRA LAWRENCE, JOHN LIGHTBODY, FRANK LOCASCIO, ANDY LOVE, KRISTEN LU, GARY MA, KEVIN MACPHERSON, MAX MANDERS, JOHN MANGAN, SUNJAY MATHEWS, CAROLINE MCDOWALL, JULIE MCELRATH, KEVIN MCFLYNN, EILEEN MCLAREN, MARTIN MCNICKLE, DAN MELINGER, ANDREW MELLICKER, RAYNA MENGEL, MATT MILLEN, JOSH MOELIS, VINCE MONICAL, JEN MORDUE, EILIDH MORRISON, SIMON MURDOCH, ANDERS MURPHY, MATTHEW MUSICO, JAMES NEWBERY, OWEN O'DONNELL, XAVIER OLIVER-DUOCASTELLA, MARK PETERS, MICHAEL PETERSON, MICHAEL PINE, RICHARD MELMON TRUST, THOMAS RICHARDS, SHAWN RINKENBAUGH, IAN RITCHIE, JUSTINE SACCO, NICHOLAS SHARP, SCOTT SHAY, JAKE SILVER, KEITH STERLING, DAVID STESS, JOHN SUTHERLAND, WARRICK TAYLOR, STUART TONNER, JOHN VENIZELOS, KYLE WACHTEL, LYNNE WALLACE, WALLEYE INVESTMENTS, LLC, BRENDAN WATERS, SKYE WELCH, MICHAEL WILLIAMS AND PHYLLIS L. JONES, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF MARK WILLIAMS, DECEASED, ROSS WILSON, KRISTIAN WOODSEND, KRIS YOUNG, and ALEXANDER ZELVIN,

INDEX NO. 651223/2020

MOTION DATE _____

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
 MOTION**

Plaintiffs,

651223/2020 ECCLES, NIGEL JOHN vs. SHAMROCK CAPITAL ADVISORS, LLC
 Motion No. 001 002

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- v -

SHAMROCK CAPITAL ADVISORS, LLC, SHAMROCK CAPITAL GROWTH FUND III, LP, SHAMROCK FANDUEL CO-INVEST LLC, SHAMROCK FANDUEL CO-INVEST II, LP, KKR & CO., INC., FAN INVESTOR LIMITED, FAN INVESTORS L.P., MICHAEL LASALLE, EDWARD OBERWAGER, ANDREW CLELAND, MATTHEW KING, CARL VOGEL, DAVID NATHANSON, FASTBALL HOLDINGS LLC, FASTBALL PARENT 1 INC., FASTBALL PARENT 2 INC., PANDACO, INC., FANDUEL INC., and FANDUEL GROUP, INC.,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 177, 178, 179, 184, 185

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 175, 183

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

This dispute arises out of the merger between nonparties FanDuel Ltd. (FDL), an online fantasy sports company, and Paddy Power Betfair plc (PPB), a publicly traded sports betting company, the result of which allegedly divested plaintiffs of their interests in FDL without compensation.

In motion sequence number 001, defendants Michael LaSalle, Edward Oberwager, Andrew Cleland, Matthew King, Carl Vogel, David Nathanson, Fastball Holdings LLC (Fastball), Fastball Parent 1 Inc., Fastball Parent 2 Inc., PandaCo, Inc. (PandaCo), FanDuel Inc. (FDI), and FanDuel Group, Inc. (FDG) (collectively, the

FanDuel Defendants) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint for failing to state causes of action under Scots law and New York law.

In motion sequence number 002, defendants KKR & Co. Inc. (KKR), Fan Investor Limited (FIL), Fan Investors L.P. (FILP) (collectively, the KKR Defendants), Shamrock Capital Advisors, LLC (Shamrock), Shamrock Capital Growth Fund III, LP (Shamrock CGF), Shamrock FanDuel Co-Invest LLC, and Shamrock FanDuel Co-Invest II, LP (collectively, the Shamrock Defendants) (together with the KKR Defendants, the KKR/Shamrock Defendants) move for dismissal under CPLR 3211 (a) (1) and (7) on the same grounds.

Background

The following facts are drawn primarily from the complaint and are assumed to be true for purposes of these motions. (*See Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993].) Additional facts are drawn from the documentary submissions.

The Parties

FDL, formerly known as Hubdub Ltd. (Hubdub), is a private limited company incorporated on November 12, 2007 in Scotland. (NYSCEF Doc No. [NYSCEF] 2, complaint ¶¶ 49 and 53.) In 2009, FDL entered the daily online fantasy sports market in the United States. (*Id.* ¶¶ 7 and 53-57.) FDL operated this online platform through FDI, a subsidiary incorporated in Delaware with headquarters in New York (*id.* ¶ 49), where FDL moved its headquarters in 2011. (*Id.* ¶ 27.)

Plaintiffs, who reside throughout the United States and the United Kingdom, are former founders, officers, directors, employees and/or agents of, or early investors in FDL. (*Id.* ¶¶ 29-36.) Each plaintiff owns either ordinary shares (Ordinary Shares), vested options to purchase Ordinary Shares, or both. (*Id.* ¶ 5.)

Private equity firms Shamrock and KKR are “late-stage investors in [FDL].” (*Id.* ¶ 6.) Shamrock invested in FDL in 2014. (*Id.* ¶ 45.) At the time of the merger, the Shamrock Defendants¹ owned 15% of all A Preference Shares in FDL (Preference Shares), which are held by Shamrock CGF, a nominating company. (*Id.*) KKR invested in FDL in 2014 and 2015. (*Id.* ¶ 44.) KKR is a Delaware corporation with New York headquarters. (*Id.*) At the time of the merger, the KKR Defendants² owned 21% of all Preference Shares, which are held by two nominating companies, FIL and FILP. (*Id.*) The KKR/Shamrock Defendants also owned Ordinary shares. (*Id.* ¶ 85.) At the time of the merger, nonparty Comcast (Comcast) owned 14.14% of all Preference Shares. (*Id.* ¶ 40.)

In 2014, Shamrock appointed LaSalle to FDL’s Board of Directors (the Board). (*Id.* ¶ 38.) LaSalle is a partner at Shamrock. (*Id.*) In 2015, KKR appointed Oberwager, a KKR director and member, to the Board. (*Id.* ¶ 39.) In 2012, Comcast appointed Cleland, a managing director at its subsidiary, nonparty Comcast Ventures (Comcast Ventures), to the Board. (*Id.* ¶ 40.) King, a former KKR director, was appointed as FDL’s chief executive officer and a director in 2017. (*Id.* ¶ 41.) Vogel, a senior industry advisor to KKR, was appointed to the Board in 2017. (*Id.* ¶ 42.) Nathanson, the chair of nonparty Falcon Waterfree Technologies, was appointed to the Board in 2017 because

¹ In the complaint, plaintiffs define Shamrock as defendants Shamrock Capital Advisors, LLC, Shamrock Capital Growth Fund III, LP, Shamrock FanDuel Co-Invest LLC, and Shamrock FanDuel Co-Invest II, LP. (NYSCEF 2, Complaint ¶ 45.) The court assumes when plaintiffs allege that Shamrock owns 15% of the stock, they are referring to all of these defendants, which the court defines as the Shamrock Defendants.

² In the complaint, plaintiffs define KKR as defendants KKR & Co., Inc., Fan Investor Limited, and Fan Investors L.P. (*Id.* ¶ 44.) Again, the court assumes that when plaintiffs alleged that KKR owns 21% of the stock, they are referring to all of these defendants, which the court defines as the KKR Defendants.

of his relationship with Shamrock. (*Id.* ¶ 43.) LaSalle, Oberwager, Cleland, King, Vogel and Nathanson (collectively, Director Defendants) all served as FDL directors at the time of the merger with PPB. (*Id.* ¶ 95.)

Fastball (together with defendants Fastball Parent 1 Inc. and Fastball Parent 2 Inc., Fastball Defendants) is a Delaware limited liability company formed on May 23, 2018 with its principal place of business in New York. (*Id.* ¶ 48.) Fastball was formed for the sole purpose of participating in the merger. (*Id.*) Shamrock, KKR and Comcast Ventures each appointed a manager to Fastball's three-member board of managers. (*Id.*)

PPB, now known as Flutter Entertainment plc, is a European bookmaker listed on the London Stock Exchange. (*Id.* ¶ 50.) Its subsidiary, nonparty TSE Holdings, Ltd. (TSE), is a U.K. private limited company. (*Id.* ¶¶ 46, 52.) Nonparty Betfair Interactive US LLC (BIU) is a Delaware limited liability company and a subsidiary of TSE. (*Id.* ¶¶ 51-52.) PPB, through TSE, Betfair or its other subsidiaries, operates an online gaming platform and two horse racing cable networks in the United States. (*Id.* ¶ 51.)

PandaCo is a Delaware corporation organized on May 18, 2018 and authorized to transact business in New York. (*Id.* ¶ 46.) It is a subsidiary of TSE. (*Id.*) FDG is a Delaware corporation with headquarters in New York. (*Id.* ¶ 47.) FDI and FDG (together, FanDuel Group) operate as the corporate form of PandaCo. (*Id.* ¶¶ 12, 47.)

FDL's Articles of Association

Several provisions in FDL's governing document, the Articles of Association (the Articles), adopted on February 23, 2017 and later amended, are relevant here. Article 82 dictates the priority of income distributed to FDL's shareholders and states that "an aggregate amount equal to the Subscription Price of each A Preference Share" shall be

paid first, with any further dividends “shared among the holders of Ordinary Shares *pro rata*.” (NYSCEF 40, Articles of Association at 57-58³.) Article 83 (the Waterfall Provision) discusses the priority of assets allocated upon the winding up of the company, and reads, in part:

“83.1.1 first, an aggregate amount equal to the Subscription Price of each A Preference Share less any amount previously paid on such A Preference Share (whether pursuant to article 82.1.1, this article 83.1.1 or otherwise) shall be paid on each such share ... For the avoidance of doubt, the aggregate amount payable on each A Preference Share (whether pursuant to article 82.1.1, this article 83.1.1 or otherwise) shall not exceed the Subscription Price of such A Preference Share and, once an aggregate amount equal to the Subscription Price of such A Preference Share has been paid, such share's entitlement shall have been satisfied in full and such A Preference Share shall automatically convert into a Deferred Share; and

83.1.2 second, subject to article 91.3, any balance remaining shall be shared among the holders of Ordinary Shares, *pro rata* according to the numbers of such shares held by them respectively.”

(*Id.* at 58.) The “Subscription Price” is “the price at which a share is issued.” (*Id.* at 18.)

Article 78, entitled “Rights to drag non-accepting shareholders along in a sale,” furnished “Dragging Shareholders” with a “Drag Along Right.” (*Id.* at 52.) Article 1.1 defines the “Dragging Shareholders” as “the KKR Investor and the Shamrock Investor.” (*Id.* at 10.) The “KKR Investor” is “whichever of Fan Investors L.P. and/or any Permitted Group Transferee ... has the largest shareholding in [FDL].” (*Id.* at 12.) The “Shamrock Investor” is “whichever of Shamrock Capital Growth Fund III, LP and/or any Permitted Group Transferee ... has the largest shareholding in [FDL].” (*Id.* at 18.)

³ NYSCEF pagination.

Under Article 78.1, the Drag Along Right grants the Dragging Shareholders “the right to instruct and require all Called Shareholders to ... accept the Offer that the Dragging Shareholders wish to accept; and ... sell and transfer all of their shares to the Offeror ... in acceptance of that Offer.” (*Id.* at 52.) An “Offer” is defined, in part, as “an offer on bona fide arm’s length terms for the entire issued ... share capital of the company ... in terms of which the aggregate consideration offered will, subject to article 78.9, be paid to the company ... or the shareholders in accordance with their respective shares ... as set out in article 83.” (*Id.* at 14.) Under Article 78.9, “[t]he portion of aggregate consideration payable with respect to each share of each class as a result of such Offer shall be the same portion of the aggregate consideration from such Offer that would have been payable with respect to such share if such aggregate consideration had been distributed ... in accordance with ... article 83.” (*Id.* at 53.) The Dragging Shareholders must furnish a “Drag Along Notice” to each “Called Shareholder” stating that they are exercising the Drag Along Right and setting forth the date, time, and place for completing the purchase of “Called Shares.” (*Id.*) A “Called Shareholder” is any shareholder “other than the relevant Dragging Shareholders,” and “Called Shares” are “shares which Called Shareholders are required to sell and transfer pursuant to article 78.” (*Id.* at 9.)

The Proposed Merger with DraftKings

In May 2016, FDL explored merging with its main competitor, nonparty DraftKings, Inc. (DraftKings), and negotiated an implied fully diluted equity valuation of \$1.2 billion for the company which it intended to run under Article 83. (NYSCEF 2, Complaint ¶¶ 8, 61-62, 66.) In July 2017, FDL and DraftKings abandoned the merger

because of challenges from the Federal Trade Commission and two states attorneys general. (*Id.* ¶ 67.)

Changes to FDL's Capital Structure

That summer, FDL elected to simplify its capital structure. Under "Transaction Termination Arrangements" (TTA) approved by the shareholders, FDL simplified its capital structure by collapsing its multiple share classes into three classes – Deferred Shares, Preference Shares and Ordinary Shares. (NYSCEF 41, Notice of Court Meetings and Notice of General Meeting at 70.) The TTA amended several provisions in the Articles to account for the new share classes. (*Id.* at 72-76.) The aggregate Subscription Price for the Preference Shares stood at \$555 million when the reorganization of FDL's capital structure occurred and rose to \$559 million after the reorganization. (NYSCEF 2, Complaint ¶¶ 72, 92.)

The Merger between FDL and PPB

In December 2017, FDL retained nonparty Moelis & Company (Moelis) to explore financing alternatives. (*Id.* ¶ 75.) The options included an acquisition, a capital raise and a merger with PPB. (*Id.* ¶ 76.) Moelis' presentation did not contain analyses of the potential value of a new company formed from a merger with PPB or the values of the new company or FDL if the prohibition on legalized sports gambling in the United States was lifted. (*Id.* ¶ 77.) However, Moelis predicted that if the prohibition was set aside, FDL's revenue could significantly increase and its value as a standalone entity could rise to more than \$10 billion in five years. (*Id.* ¶ 78.)

FDL and PPB began merger negotiations, with initial terms agreed to on April 28, 2018. (*Id.* ¶¶ 79-80.) The term sheet (the Term Sheet) partially reads:

"PPB will contribute its US assets into a combined entity (MergerCo) with FanDuel's assets. PPB will also contribute

additional cash to MergerCo's balance sheet to ensure that there are sufficient resources available for working capital and investment.

...

FanDuel assets valued at \$560m Enterprise Value (4x 2018 Net Revenue), \$491m Equity Value (after adjustments for net debt and convertible bond) and \$514m post conversion of 50% of the 2017 Convertible Note PPB assets valued at an EV of 18x 2018 EBITDA of \$29.7m = \$534m equity value (on a debt and cash free basis). Note that this EBITDA excludes start-up losses associated with PPB's DRAFT and New Jersey exchange businesses.

PPB to also contribute \$145m in cash, into MergerCo upon completion, bringing the Total value contributed by PPB of \$679m, to gain a 56.9% shareholding. Post transaction, MergerCo would have \$100m of cash on its balance sheet to enable the business to capitalise on strategic opportunities as they arise.

...

For the avoidance of doubt the valuation of FanDuel's equity includes both classes of existing shares (pref. and common original) and on completion of the transaction both share classes will be cancelled and replaced with a single class of shares in the MergerCo that will rank pari-pasu with one another and with any shares held by PPB."

(NYSCEF 42, Term Sheet at 4.) Thus, the consideration FDL would receive in the transaction was stock in the merged entity.

At the time of the merger negotiations, a court case about the constitutionality of the Professional and Amateur Sports Protection Act of 1992 (PASPA) (28 USC §§ 3701 *et seq.*) was pending in the United States Supreme Court. On May 14, 2018, the Supreme Court determined that 28 USC § 3702 (1), which prohibited states from authorizing sports gambling, was unconstitutional. (*See Murphy v National Coll. Athletic Assn.*, 584 US —, 138 S Ct 1461, 1478 [2018].) Despite predictions that FDL's value would likely increase (NYSCEF 2, Complaint ¶¶ 88-90), FDL and PPB had agreed in the Term Sheet that:

“the valuations set forth herein are not dependent on any expected change in, or lack of change in, the effectiveness of, or any interpretation of, the Professional and Amateur Sports Protection Act of 1992 (**‘PASPA’**), and neither party intends to request any alteration of such valuations, or any other material terms set forth herein, as a result of any such change, or lack thereof.”

(NYSCEF 42, Term Sheet at 4 [emphasis in original].)

The Board moved to approve the merger eight days after *Murphy*. (NYSCEF 2, Complaint ¶ 95.) According to the minutes from a May 22, 2018 Board meeting, FDL had agreed to a “change of control transaction” with PPB with the consideration to FDL paid in the form of common shares in PandaCo, a TSE subsidiary. (NYSCEF 43, FDL Board Minutes at 2-3.) Completion of the offer would be supported by the exercise of the Drag Along Right. (*Id.* at 2.) The directors declared their interests and confirmed they had no other interests that “were required to be declared under the Articles or C[ompanies] A[ct] 2006.” (*Id.*)

The Board resolved to enter into a contribution agreement (the Contribution Agreement) with PandaCo and TSE and to distribute the merger consideration of \$465.5 million, or FDL’s equity value less debt, under Article 83. (*Id.* at 4.) The Board voted unanimously to proceed, and only one director, nonparty Andrin Bachman, abstained from voting to price FDL’s shares so as not to exceed \$559 million. (NYSCEF 2, Complaint ¶ 96.) Notably, the minutes show that the Dragging Shareholders, identified as “KKR Investor and Shamrock Investor,” had been engaged in discussions with PPB “regarding the terms of the potential offer ... and the most material of the proposed terms for such offer including the valuation of the Company capital stock to be acquired.” (NYSCEF 43, FDL Board Minutes at 2.)

On May 23, 2018, FDL, PPB and PandaCo signed the Contribution Agreement, which confirmed that PPB would receive 60% of PandaCo's shares and FDL would receive 40%. (NYSCEF 2, Complaint ¶¶ 52, 110.) The Contribution Agreement set a "Signing Date Share Price" for one PandaCo share, even though ascribing a dollar value was unnecessary in the stock-for-stock transaction. (*Id.*) Fastball's representatives also participated in negotiating the Contribution Agreement because Fastball was granted a call option (Call Option) which, if triggered, would result in the transfer of the FDL shareholders' shares in PandaCo to Fastball. (*Id.* ¶ 119)

On June 30, 2018, FDL received an official offer from PandaCo. (*Id.* ¶¶ 14, 114.) PandaCo offered to acquire FDL's share capital in exchange for 4,058,004 shares of common stock which held a total cash equivalent value of \$465,493,638.84 or \$114.71 per share value. (NYSCEF 39, Offer Letter at 2.) The Offer Letter explained that the consideration allocated to FDL's shareholders would be made under Articles 83 and 84.2. (*Id.* at 3.) The Letter further explained that Fastball's Call Option would become effective upon the completion of the offer between FDL and PandaCo and that each share of PandaCo stock issued to FDL's shareholders "may be called by ... in exchange for one unit of membership interests in [Fastball]." (*Id.* at 7 [Appendix B].)

The Dragging Shareholders, FILP and Shamrock CGF,⁴ accepted PandaCo's offer, and on June 30, 2017, they exercised the Drag Along Right and delivered a Drag Along Notice to FDL. (NYSCEF 2, Complaint ¶¶ 44-45, 114; NYSCEF 44, Drag Along Notice at 2.) The Dragging Shareholders wrote that they had "irrevocably accepted" the offer and had exercised the Drag Along Right and that "our acceptance of the Offer and

⁴ The Drag Along Notice identifies "Shamrock Capital Growth Fund III (FD), LP" as one of the Dragging Shareholders. FILP is the other.

exercise of the Drag Along Right entitles us to require each FanDuel Stockholder to accept the Offer.” (NYSCEF 44, Drag Along Notice at 2.)

On July 3, 2018, FDL’s chief legal officer, Christian Genetski, emailed a transaction summary for the merger, the Drag Along Notice, the Offer Letter, and a disclosure on tax treatments to the shareholders. (NYSCEF 2, Complaint ¶¶ 122-123.) Four plaintiffs claim that they did not receive the documents. (*Id.* ¶ 122.) On July 10, 2018, Fastball informed FDL’s shareholders that it had exercised the Call Option. (NYSCEF 45, Exercise of Call Notice at 2.)

The merger closed on July 11, 2018, and the transfer of FDL’s shares was recorded on August 14, 2018. (NYSCEF 2, Complaint ¶¶ 126-127.) Because FDL’s equity value fell below the \$559 million Subscription Price, the Preference shareholders received all the PandaCo shares issued to FDL. (*Id.* ¶ 107.) The Ordinary shareholders received nothing, and their interests in FDL were eliminated. (*Id.* ¶¶ 19, 107.) Fastball presently owns 3,914,298 shares or 39.1% of PandaCo. (*Id.* ¶ 48.)

The Prior Petition Brought in Scotland

On July 13, 2018, four of FDL’s co-founders, plaintiffs Nigel John Eccles, Lesley Jayne Ross Eccles, Thomas Gordon Griffiths, and Robat Jones (collectively, Petitioners) brought a petition (Petition) under Sections 994 and 996 of the Companies Act against FDL in the Scottish Court of Session. (NYSCEF 2, Complaint ¶¶ 29-32; NYSCEF 46, Petition at 3.) The Petitioners alleged:

“[FDL’s] board of directors, which is de facto controlled by institutional investors, who stand to benefit from the purported share transaction as a result of their large holdings of preferential shares, has acted unfairly and has caused prejudice to the Petitioners. The decision of the board (whose interests are aligned with preference shareholders), not to seek and act upon a new market valuation in the face of a material event, which is likely to have significantly increased

the market valuation of FanDuel, is a breach of its fiduciary duties.”

(*Id.* at 8.) The Petitioners alleged that the Preference shareholders received value for their shares while the Ordinary shareholders received “nil value.” (*Id.* at 8.) After FDL served an answer (NYSCEF 47), Petitioners moved to abandon the Petition (NYSCEF 48, Motion to Abandon.) The motion was granted unopposed on November 21, 2019. (NYSCEF 49, Order.)

The Present Action

Plaintiffs commenced this action on February 25, 2019 by filing a summons and complaint asserting five causes of action for: (1) breach of fiduciary duty against the Director Defendants; (2) breach of fiduciary duty against King; (3) breach of fiduciary duty against the KKR/Shamrock Defendants; (4) aiding and abetting breach of fiduciary duty against the KKR/Shamrock Defendants, the FanDuel Defendants, PandaCo, and the Fastball Defendants; and, (5) unjust enrichment against the KKR/Shamrock Defendants and the Fastball Defendants. Plaintiffs seek compensatory and punitive damages; disgorgement of defendants’ ill-gotten gains; pre- and post-judgment interest; the imposition of a constructive trust over the stock in PandaCo, the FanDuel Defendants, and/or the Fastball Defendants and the proceeds obtained from any transfers or appreciation of stock held by defendants since the merger; and costs and attorneys’ fees.

The FanDuel Defendants and the KKR/Shamrock Defendants now move to dismiss the complaint. The court notes that plaintiff Michael Pine discontinued his claims. (NYSCEF 9, Notice of Discontinuance; NYSCEF 63, Order of Discontinuance.)

Discussion

On a motion to dismiss brought under CPLR 3211, the court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law,” the motion will be denied. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) But, “allegations consisting of bare legal conclusions ... are not entitled to any such consideration.” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted].) In addition, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003].)

Dismissal under CPLR 3211(a)(1) is warranted “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].) “When documentary evidence is submitted by a defendant ‘the standard morphs from whether the plaintiff stated a cause of action to whether it has one.’” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted].) “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable.’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010].)

A. Choice of Law

The parties disagree over which jurisdiction's laws apply, and whether the interest analysis is necessary when the internal affairs doctrine requires application of Scots law.

There is no dispute that, since New York is the forum state, New York's choice-of-law rules govern. (*See Padula v Lilarn Props. Corp.*, 84 NY2d 519, 520 [1994].) Defendants assert that plaintiffs' claims are governed by Scots law, as New York courts apply the internal affairs doctrine where the claims relate to the internal affairs and governance of a corporation.

"The internal affairs doctrine is a 'conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its *current* officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands.'" (*New Greenwich Litig. Trustee, LLC v Citco Fund Servs. [Europe] B.V.*, 145 AD3d 16, 22 [1st Dept 2016], *lv denied* 29 NY3d 917 [2017], quoting *Edgar v MITE Corp.*, 457 US 624, 645 [1982].) Under the doctrine, the relationship between a company and its directors and shareholders are generally governed by the substantive law of the jurisdiction of incorporation. (*Id.*) This allows for the "uniform application of one body of law to corporations and their directors on issues involving the regulation of a corporation's internal affairs." (*Hart v General Motors Corp.*, 129 AD2d 179, 184 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987].)

Plaintiffs' first three causes of action assert claims for breach of fiduciary duty; such claims are usually governed by the law of the state of incorporation. (*See Leviton Mfg. Co. v Blumberg*, 242 AD2d 205, 208 [1st Dept 1997].) Moreover, contrary to

plaintiffs' contention, issues related to a merger implicate a corporation's internal affairs. (See Restatement [Second] of Conflict of Laws § 302, comment a.) However, where the defendants are not current officers, directors and shareholders, the internal affairs doctrine is inapplicable. (*Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422, 422 [1st Dept 2014]; *New Greenwich Litig. Trustee*, 145 AD3d at 20; *Unique Goals Intl., Ltd. v Finskiy* (2018 NY Slip Op 32788[U] [Sup Ct, NY County 2018], *affd* 178 AD3d 626 [1st Dept 2019].) As applied here, the internal affairs doctrine is inapplicable as defendants are not current officers, directors and shareholders.

The FanDuel Defendants do not challenge that the defendants are not current officers, directors and shareholders. Instead, they posit that *New Greenwich Litig. Trustee* and *Culligan* are inapplicable because those actions involved third parties external to the corporations. However, the Appellate Division, First Department, did not carve out this exception because *New Greenwich Litig. Trustee* and *Culligan* involved third parties, it declined to apply the doctrine in those actions because the defendants in those actions were not current officers, directors, and shareholders.

To the extent the FanDuel Defendants rely on *Mason-Mahon v Flint* (166 AD3d 754, 756-757 [2d Dept 2018], *rearg denied* 2019 NY Slip Op 66517[U] [2d Dept 2019]), for the proposition that the internal affairs doctrine applies to claims against a company's former directors, it is distinguishable as plaintiffs in that action were suing both current and former directors. If both current and former directors are involved in an action, it is reasonable to apply the internal affairs doctrine because of the mixed status of the defendants. Defendants have not articulated a basis for deviating from *New Greenwich Litig. Trustee* and *Culligan*.

As to the fourth and fifth causes of action, aiding and abetting breach of fiduciary duty and unjust enrichment, respectively, defendants have not demonstrated that the internal affairs doctrine is applicable against the other defendants the FanDuel Group, PandaCo, or the Fastball Defendants who were never officers, directors or shareholders.

As defendants rely exclusively on the internal affairs doctrine, which is inapplicable here, the court will apply New York law.

B. The First and Second Causes of Action for Breach of Fiduciary Duty

Plaintiffs allege in the first and second causes of action breaches of fiduciary duty against the Director Defendants and King. The FanDuel Defendants argue that plaintiffs cannot establish a breach a fiduciary duty because the Board followed the procedures set forth in the Articles in accomplishing the merger, and nothing in the Articles calls for the types of procedural safeguards identified in the complaint. In addition, defendants contend that the Articles expressly permitted conflicted directors to take part in transactions.

A cause of action for breach of fiduciary duty requires a fiduciary duty, breach, and damages. (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011].) The claim is subject to a heightened pleading standard under CPLR 3016(b). (*Stang LLC v Hudson Sq. Hotel, LLC*, 158 AD3d 446, 446 [1st Dept 2018].)

“[C]orporate officers and directors ... owe a fiduciary duty to the ... shareholder[s]” (*Quasha v American Natural Beverage Corp.*, 171 AD2d 537, 537 [1st Dept 1991]), and must “adhere to fiduciary standards of conduct and [] exercise their responsibilities in good faith when undertaking any corporate action, including a merger.” (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568 [1984], *rearg denied* 64

NY2d 1041 [1985].) A “fiduciary must treat all shareholders, majority and minority, fairly” and discharge “all corporate responsibilities ... in good faith and with ‘conscientious fairness, morality and honesty in purpose.’” (*Id.* at 569 [citations omitted].) A fiduciary must avoid “blatant self-dealing” and “situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.” (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], *rearg denied* 74 NY2d 843 [1989] [citation omitted].)

Here, plaintiffs allege that the Director Defendants were conflicted because of their relationships with the KKR/Shamrock Defendants or their own personal or financial interests. (NYSCEF 2, ¶¶ 98-99 and 106.) King, who owns Preference Shares, is to receive or has received more than \$10 million in payments and benefits, and Vogel and Nathanson are to receive a management carveout potentially in excess of \$1 million. (*Id.* ¶¶ 41-43.) Oberwager, Vogel, LaSalle and Cleland had indirect interests because of interests they owned in private equity funds that held Preference Shares. (*Id.* ¶ 97.) However, Article 19.1 states:

“For the purposes of Section 175 of the Companies Act 2006, the directors have the power to authorise any matter which would or might otherwise constitute or give rise to a breach of the duty of a director under that section to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.”

(NYSCEF 40, Articles of Association at 23.) The Board’s minutes show that the directors declared their interests and were entitled to count in a quorum and vote on the transaction. (NYSCEF 43 at 2). Having disclosed their conflicts, the Director Defendants complied with the Articles. (*See Barbour v Knecht*, 296 AD2d 218, 225 [1st Dept 2002] [dismissing a breach of fiduciary duty claim where the director’s interests in

a transaction had been disclosed].) Thus, plaintiffs do not adequately plead a breach of fiduciary claim based on self-interest.

The complaint is also devoid of specific factual allegations describing the Director Defendants' conflicts based on their relationships with the KKR/Shamrock Defendants. KKR and Shamrock appointed only two directors – Oberwager and LaSalle – to the Board. Comcast appointed Cleland. King, Vogel and Nathanson allegedly enjoyed a relationship with the KKR/Shamrock Defendants, but this vague assertion is insufficient to establish domination or control. (See *Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 NY3d 268, 279 [2016] [stating that “[f]riendships, traveling in the same circles, some financial ties, and past business relationships are not enough to rebut the presumption of independence; the ties must be material in the sense that they could affect impartiality”]; *Bansbach v Zinn*, 294 AD2d 762, 763 [3d Dept 2002], *affd as mod*, 1 NY3d 1 [2003], *rearg denied* 1 NY3d 593 [2004] [finding that the directors' personal relationships were insufficient to create a question of fact on independence].) Significantly, the complaint fails to describe how the KKR/Shamrock Defendants caused King, Vogel and Nathanson to be appointed to the Board or how the KKR/Shamrock Defendants controlled them.

Nevertheless, the allegations are sufficient to plead claims for breach of fiduciary duty. The allegations concern whether the Director Defendants engaged in a fair valuation process, and whether or how they arrived at a fair value before distributing the merger proceeds under Article 83. Plaintiffs assert that the Director Defendants failed to value the consideration properly and fairly, account for FDL's fair value as a standalone company or account for the synergies the merger would generate after *Murphy*. (NYSCEF 2, Complaint ¶¶ 101-105.) For instance, FDL had been valued at

\$1.2 billion in 2017, yet despite “booming” business, the Director Defendants halved this value in 2018 without explanation. (*Id.* ¶ 104.) By doing so, the Director Defendants allegedly manipulated the valuation process to favor the Preference shareholders, thus breaching their duty to treat all shareholders fairly.

In response, the FanDuel Defendants point to FDL’s poor financial condition, as evidenced in the statements in FDL’s answer to the Scottish Petition and emphasize that the merger consideration was based upon an arm’s length valuation. The documents, though, show that the Dragging Shareholders, not the Director Defendants, negotiated “the most material of the proposed terms for such offer, including the valuation of the Company capital stock” with PPB. (NYSCEF 43, FDL Board Minutes at 1.) It is unclear, at this juncture, what value the Dragging Shareholders had settled on for FDL, and whether the Director Defendants accepted that assessment without further deliberation. The Term Sheet also shows that PPB and FDL utilized different methods to evaluate their contributions to PandaCo. PPB valued its assets on an EBITDA value of \$29.7 million multiplied by 18 whereas FDL valued its assets based on net revenue multiplied by four. (NYSCEF 42, Merger Proposal at 3.) Notably, the enterprise valuation set forth in the Term Sheet matched the aggregate Subscription Price of the Preference Shares.

Plaintiffs also allege that the Signing Date Share Price for a single PandaCo share did not reflect a fair valuation of PandaCo. (NYSCEF 2, Complaint ¶ 111), and that it was the actual value of the PandaCo shares that should have been distributed under the Waterfall Provision. (*Id.* ¶ 113.) When the merger consideration was distributed, the Preference shareholders received more than the value of their Preference shares, and thus, captured all the benefits from the merger. (*Id.* ¶¶ 19, 119.)

Because the documentary evidence does not utterly refute plaintiffs' allegations, the motion insofar as it seeks to dismiss the first and second causes of action is denied.

C. The Third Cause of Action for Breach of Fiduciary Duty

In the third cause of action, plaintiffs allege a breach of fiduciary duty against the KKR/Shamrock Defendants.

The KKR/Shamrock Defendants argue that the claims brought by those plaintiffs who held only vested options to purchase shares should be dismissed. An option holder is not in a fiduciary relationship with a corporation (*see Cutler v Ensage, Inc.*, 18 Misc 3d 1101[A], 2007 NY Slip Op 52373[U], *7 [Sup Ct, NY County 2007] [collecting cases]), and here, the complaint states that numerous plaintiffs owned Ordinary shares, vested options "or both." (NYSCEF 2, Complaint ¶¶ 34-35.) While the allegations can be read to mean that some plaintiffs may have owned only vested options, the same allegations can be read to mean that plaintiffs owned both shares and vested options. On a motion to dismiss, the court must accord plaintiffs every favorable inference. (*See Leon*, 84 NY2d at 87.) Thus, despite plaintiffs' imprecise pleading, the court is constrained to deny this part of the motion.

"[N]o trust relation ordinarily exists between the stockholders themselves or between the stockholders and the corporation, because the stockholders ordinarily are strangers to the management and control of the corporation business and affairs." (*Sager Spuck Statewide Supply Co. Inc. v Meyer*, 273 AD2d 745, 747-748 [3d Dept 2000], quoting *Kavanaugh v Kavanaugh Knitting Co.*, 226 NY 185, 194 [1919].) A majority shareholder who manages and controls a corporation's affairs, though, is a fiduciary. (*See Alpert*, 63 NY2d at 568.) "A majority means the majority in value." (8 Fletcher, *Cyclopedia of Corporations* § 5759 [2020]) [Note: online version.] The

complaint alleges that the KKR/Shamrock Defendants collectively owned 36% of the Preference Shares, which is less than a majority.

The complaint, though, describes the KKR/Shamrock Defendants as “controlling shareholders that possessed a drag along right to force a sale ... [and] exerted control over the conflicted Director Defendants.” (NYSCEF 2, Complaint ¶ 146.) A controlling shareholder is one who controls the majority of a company’s voting stock. (See e.g. *Matter of Kenneth Cole Productions, Inc.*, 2013 NY Slip Op 32114[U], *3 [Sup Ct, NY County 2014], *affd as mod* 122 AD3d 500 [1st Dept 2014], *affd* 27 NY3d 268 [2016].) A minority shareholder may be a controlling shareholder if it “dominate[s] the corporation through actual control of corporate conduct,” which is usually accomplished through its control of the corporation’s board of directors. (12B Fletcher, *Cyclopedia of Corporations* § 5811.50 [2020] [Note: online version].)

As applied here, plaintiffs fail to adequately plead facts showing that the KKR/Shamrock Defendants are controlling shareholders such that they owed a fiduciary duty to plaintiffs. First, there is no allegation that the KKR/Shamrock Defendants, as Preference shareholders, held most of the FDL’s voting stock or that they enjoyed superior voting rights over the Ordinary shareholders. Second, as explained above, the allegations of control over the Director Defendants are not sufficiently specific. (See *Matter of Kenneth Cole Prods., Inc.*, 27 NY3d at 279.) Apart from exercising the Drag Along Right, plaintiffs do not allege that the KKR/Director Defendants previously directed or managed company operations.

Plaintiffs maintain the claim centers on the “fiduciary relationship created when KKR and Shamrock acted on their rights under the Articles and took control of the corporate affairs of FanDuel with respect to the merger.” (NYSCEF 139, Plaintiffs’

Memorandum in Opposition at 46.) However, a breach of fiduciary duty ordinarily involves “a duty separate and apart from the duty to abide by the terms of the contract.” (*Schindler v Rothfeld*, 153 AD3d 436, 437 [1st Dept 2017].) Here, mere ownership and exercise of the Drag Along Right did not transform the KKR/Shamrock Defendants into controlling shareholders, since that right was expressly granted to them in the Articles and the TTA. The KKR/Shamrock Defendants exercised the Drag Along Right, which allowed them to “drag” the other shareholders into accepting PandaCo’s offer without their approval as was permissible under Article 78. Plaintiffs fail to cite caselaw in support of the proposition that ownership or exercise of this right gave rise to a fiduciary relationship. Thus, the complaint fails to sufficiently plead a breach of a fiduciary duty against the KKR/shamrock Defendants. (See e.g. *Seeking Valhalla Trust v Deane*, 182 AD3d 457, 458 [1st Dept 2020], *lv denied* 36 NY3d 904 [2020] [dismissing a breach of fiduciary duty claim where the defendants complied with the terms of an operating agreement].)

D. The Fourth Cause of Action for Aiding and Abetting a Breach of Fiduciary Duty

In the fourth cause of action, plaintiffs plead a claim for aiding and abetting a breach of fiduciary duty against the KKR/Shamrock Defendants, the FanDuel Group, PandaCo, and the Fastball Defendants.

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead “(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.” (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citations omitted].) “A defendant knowingly participates in the breach of fiduciary duty when he or she provides ‘substantial assistance’ to the fiduciary, which occurs ‘when a

defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.” (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015] [citation omitted]). A “plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty.” (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007].) Mere inaction will suffice if the defendants owe a fiduciary duty to the plaintiff. (See *Kaufman*, 307 AD2d at 126.) The plaintiff must also allege that the defendant knew of the fiduciary duty and had actual, not constructive, knowledge of a breach. (*Id.* at 125.) Where there is no underlying breach of fiduciary duty, a cause of action for aiding and abetting a breach of fiduciary duty cannot stand. (See *Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 594 [2012], *rearg denied* 19 NY3d 1065 [2012].) The claim must be pled with particularity. (*Schroeder*, 133 AD3d at 25.)

PandaCo, the Fanduel Group, and the Fastball Defendants argue that the fourth cause of action should be dismissed because the complaint fails to plead an underlying breach of fiduciary duty but, as discussed above, the complaint adequately states a claim for breach of fiduciary duty against the Director Defendants. In reply, these defendants contend that plaintiffs have not adequately pled the elements of actual knowledge or substantial assistance. The purpose of a reply, though, is not to raise new arguments in support of the motion. (See *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992].) Because these defendants did not argue whether allegations were vague or conclusory in their initial moving papers, that part of the motion brought by the FanDuel Defendants to dismiss the fourth cause of action is denied.

As to the KKR/Shamrock Defendants, they argue that plaintiffs have engaged in improper group pleading. Although the failure to distinguish the specific tortious conduct charged to each defendant in a pleading is generally impermissible (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981]), the complaint, as supplemented by the documentary evidence suffices for purposes of satisfying CPLR 3013 and 3016(b) by identifying the role each KKR- or Shamrock-related defendant played in FDL as an investor or shareholder. Additionally, the KKR/Shamrock Defendants have not challenged the assertion that the Preference or Ordinary Shares were held by Shamrock CGF, FIL or FILP for KKR's or Shamrock's benefit.

The KKR/Shamrock Defendants also argue that plaintiffs fail to plead substantial assistance, but the Board minutes show that the KKR/Shamrock Defendants took an active part in the merger negotiations with PPB. (*See Ahrenberg v Liotard-Vogt*, 165 AD3d 570, 570 [1st Dept 2018] [denying a motion to add a cause of action for aiding and abetting a breach of fiduciary duty where the defendant "was not a party to and did not participate in the transactions that plaintiffs allege were improper, namely, the actual merger ... and the valuation process in connection with the merger".]) Their participation in the negotiations and their structuring the merger transaction in such a way that was detrimental to plaintiffs' interests satisfies the substantial assistance element. (*Balance Return Fund Ltd. v Royal Bank of Can.* 83 AD3d 429, 431 [1st Dept 2011]; *Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008].) Further, the KKR/Shamrock Defendants requested that FDL enter into the Contribution Agreement. They also established Fastball for the sole purpose of holding the PandaCo shares that FDL received in the merger. These allegations satisfy the actual knowledge element

since PandaCo's offer matches the Subscription Price to be paid to the Preference shareholders. Accordingly, the branch of the KKR/Shamrock Defendants' motion to dismiss the fourth cause of action is denied.

E. The Fifth Cause of Action for Unjust Enrichment

The fifth cause of action against the KKR/Shamrock Defendants and the Fastball Defendants is predicated upon a claim that these defendants, through their allegedly wrongful conduct, have obtained PandaCo shares that should have been distributed to plaintiffs, who helped build FDL.

To plead a cause of action for unjust enrichment, the plaintiff must allege that “that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.’” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [citation omitted].) While privity is not required, there must be a connection between the parties that is not too attenuated that could cause reliance or inducement. (*Id.*) Moreover, “unjust enrichment is not a catchall cause of action.” (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012].) Where a cause of action for unjust enrichment merely duplicates other tort claims, the unjust enrichment claim will be dismissed. (*Bavers v Shepherd*, 189 AD3d 606, 609 [1st Dept 2020].)

Here, the unjust enrichment claim is duplicative of the fourth cause of action for aiding and abetting a breach of fiduciary. The claims are predicated upon the same facts, namely an undervaluation of the merger consideration which led to the Preferred shareholders being paid more than the Subscription Price for their shares. Thus, the part of the motions seeking to dismiss the fifth cause of action are granted.

Accordingly, it is

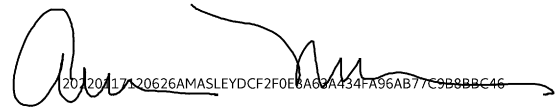
ORDERED that the motion of defendants Michael LaSalle, Edward Oberwager, Andrew Cleland, Matthew King, Carl Vogel, David Nathanson, Fastball Holdings LLC, Fastball Parent 1 Inc., Fastball Parent 2 Inc., PandaCo, Inc., FanDuel Inc., and FanDuel Group, Inc. to dismiss (motion sequence no. 001) is granted to the extent of dismissing the fifth cause of action, and the fifth cause of action of the complaint is dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion of defendants KKR & Co. Inc., Fan Investor Limited, Fan Investors L.P., Shamrock Capital Advisors, LLC, Shamrock Capital Growth Fund III, LP, Shamrock FanDuel Co-Invest LLC, and Shamrock FanDuel Co-Invest II, LP to dismiss the complaint (motion sequence no. 002) is granted to the extent of dismissing the third and fifth causes of action, and the third and fifth causes of action of the complaint are dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit, within 30 days of the date of this order, a joint preliminary conference order to SFC-Part48@nycourts.gov, or if the parties cannot agree, each may submit competing PC Orders for the court's review; and it is further

ORDERED that the parties are directed to mediation. The Part Clerk shall contact the parties with a referral to mediation.


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1/17/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE