IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE DRAFTKINGS INC. SECURITIES LITIGATION	)	No. 1:21-cv-05739 (PAE)
	)	***ORAL ARGUMENT REQUESTED***

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

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April 26, 2022

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TABLE OF ABBREVIATIONS

AC or Amended Complaint	Amended Complaint for Violation of the Federal Securities Laws (Dkt. No. 52)
B2B	Business-to-Business segment
B2C	Business-to-Consumer segment
BCA	Business Combination Agreement, dated December 23, 2019, annexed as Exhibit 5 to the Frawley Declaration
DEAC	Diamond Eagle Acquisition Corp.
DraftKings	DraftKings, Inc.
Exchange Act	Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78qq
Frawley Declaration	Declaration of Brian T. Frawley, dated April 26, 2022
Hindenburg Editorial	Hindenburg Research commentary, dated July 15, 2021, annexed as Exhibit A to SAC
Individual Defendants	Jason D. Robins, Jason K. Park, Jeff Sagansky, Eli Baker and Shalom Meckenzie
Proxy	DEAC Proxy Statement on SEC Schedule 14A, filed April 15, 2020, annexed as Exhibit 2 to the Frawley Declaration
PSLRA	Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4
Rule 10b-5	SEC Rule 10b-5, 17 C.F.R. § 240.1b-5
SBTech	SBTech (Global) Limited
SEC	U.S. Securities and Exchange Commission
SAC or Second Amended Complaint	Second Amended Complaint for Violation of the Federal Securities Laws (Dkt. No. 62)
Section 10(b)	Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b)
Section 20(a)	Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a)

Defendants respectfully submit this memorandum in support of their motion to dismiss the Second Amended Complaint (Dkt. No. 62) pursuant to Rules 9(b) and 12(b)(6) and the PSLRA.

PRELIMINARY STATEMENT

"Securities fraud claims are subject to heightened pleading requirements that the plaintiff must meet to survive a motion to dismiss." *ATSI Commc'ns, Inc*. v. *Shaar Fund, Ltd*., 493 F.3d 87, 99 (2d Cir. 2007). Rather than set out detailed and particularized facts as the PSLRA requires, the SAC here does nothing more than repackage the contents of an internet posting from a short-seller, Hindenburg Research, that the author concedes reflects biased opinions based on publicly-available information (the "Hindenburg Editorial"). Plaintiff admittedly did nothing to verify those allegations—neither before the filing of his initial complaint in July 2021, nor in support of his two amended pleadings filed in the ensuing nine months—and he offers nothing else in support of his claims. But, no matter the source of plaintiff's allegations, the conjecture and misdirection in the SAC fail to state any claim in compliance with the PSLRA.

Unable to defend his previous Amended Complaint in response to defendants' first motion to dismiss (Dkt. Nos. 59-61), in his now third pleading plaintiff simply erases his own factual admissions and appends 26 new paragraphs to the SAC containing no factual or legal substance. The crux of plaintiff's theory in all three complaints is that DraftKings failed to disclose that it supposedly generated revenues from foreign jurisdictions where gambling was restricted, but his own allegations did not purport to support that theory. Instead, plaintiff said at least eighteen times in each of his first two complaints only that those jurisdictions were ***either*** "black and/or grey markets"—*i.e.*, impermissible and/or permissible gaming markets. In his SAC, plaintiff did nothing more than delete every reference to those jurisdictions as "grey markets," and add various sundry and irrelevant details. Beyond the impropriety of plaintiff's

effort to discard his own previous allegations, the SAC should be dismissed for at least four reasons.

First, plaintiff does not plead any actionable misstatement or omission. His principal misstatement theory is that a putative acquisition target, SBTech—an entity DraftKings acquired through a December 23, 2019 Business Combination Agreement (the "BCA")—represented *to* DraftKings in the BCA that SBTech was in sufficient compliance with certain laws, and that representation allegedly was inaccurate or incomplete. Plaintiff cites no basis for him to predicate fraud claims on representations to DraftKings by a contractual counterparty, and his assertions that SBTech was at any time in violation of U.S. sanctions or foreign gaming laws through unspecified conduct at unspecified times are supported by nothing. Beyond that, plaintiff mischaracterizes the scope of the representation, and his contention that DraftKings was obligated to volunteer judgments about the lawfulness of any SBTech conduct—*none* of which *ever* has been challenged—is illogical and contrary to well-settled law.

Second, the SAC is bereft of particularized allegations supporting a strong inference of scienter, which the Supreme Court has held must include facts demonstrating a "cogent" and "compelling" inference of fraud. *Tellabs, Inc*. v. *Makor Issues & Rights, Ltd*., 551 U.S. 308, 323-24 (2007). Plaintiff nowhere alleges any specific facts known to any defendant that conflicted with an alleged statement at the time it was made. The SAC does not contend that defendants—or anyone else (*even* Hindenburg)—agrees with his conjecture about the meaning or scope of various foreign laws referenced in the SAC. Instead, plaintiff concedes U.S. gaming regulators reject his speculation that those nations are so-called "black markets."

Finally, the SAC does not plead (i) each element of his claims, for each challenged statement as to each defendant, or (ii) loss causation, as required by the PSLRA and settled law.

ALLEGATIONS OF THE SECOND AMENDED COMPLAINT

A. The Parties

DraftKings is a "digital sports entertainment and gaming company." (SAC ¶ 2.) Through its "B2C" segment, DraftKings provides users with daily fantasy sports, sports betting and online casino opportunities. (*Id.*) Through its "B2B" segment, DraftKings designs, develops, and licenses sports betting and casino gaming software for online and retail sportsbook and casino gaming products. (*Id.*) Jason Robins is a founder of DraftKings, serves as its CEO and Chairman, and is its largest stockholder and controls about 90% of DraftKings' voting power. (SAC ¶ 17; Ex. 1 (FY 2020 10-K) at 43.) Jason Park is DraftKings' CFO. (SAC ¶ 18.)

Jeff Sagansky and Eli Baker are former executives of DraftKings' legal predecessor, DEAC, which merged with DraftKings in April 2020. (SAC ¶¶ 3, 20-21.) Shalom Meckenzie is the founder of SBTech, and he has served as an outside director of DraftKings since the Business Combination. (SAC ¶ 19.)

B. The Business Combination

DraftKings was founded in 2011 and thereafter operated as a private company primarily in the B2C segment with its famous fantasy sports business. (SAC ¶ 38.) In 2018, DraftKings expanded into the rapidly growing sports betting and online casino businesses, and its revenues grew from $226 million in 2018 to over $323 million in 2019. (Ex. 2 (Proxy) at 40, 188-92.)[1]

On December 23, 2019, DraftKings announced a three-way Business Combination with SBTech and DEAC, a publicly-traded special purpose acquisition company. (Ex. 3 (Press Release).) In the Business Combination, DraftKings would become a public company through a merger with DEAC and simultaneously acquire SBTech, a privately-held company incorporated

[1] On this motion, the Court may consider, in addition to well-pleaded allegations of the SAC, documents referenced in, or integral to, the SAC, or any other document "upon which [plaintiff] relied in bringing the suit." *Gagnon* v. *Alkermes PLC*, 368 F. Supp. 3d 750, 762 (S.D.N.Y. 2019). Defendants include as Exhibits ("Ex.") to the accompanying Declaration of Brian T. Frawley certain public statements and public filings relied upon in the SAC.

and headquartered in the Isle of Man, whose "principal business activities involve the design and development of sports betting and casino gaming platform software for online and retail sportsbook and casino gaming products." (SAC ¶ 39; Ex. 2 (Proxy) at 21.) The combined company would retain the DraftKings name and become a publicly-traded, "vertically-integrated powerhouse for sports betting." (SAC ¶ 44.)

On April 15, 2020, DraftKings filed its 324-page Proxy (Ex. 2) containing detailed discussions of, among other things, the BCA, DraftKings' and SBTech's businesses and financials, and risk factors affecting the combined company. As the Proxy explained in detail, by acquiring SBTech's established technology platform and infrastructure, DraftKings would no longer need to rely, as it had historically, on a third party to license and operate DraftKings' core sportsbook offering that was the foundation of its future business plans. (*Id*. at 77, 204.)

Prior to the BCA, SBTech was a software and technology provider to third-party operators and resellers; it neither accepted wagers nor operated a casino or sportsbook. "SBTech's proprietary platform *allows leading mobile sportsbook and casino gaming operators to deliver products under their own brands*, powered by SBTech's leading industry platform engine." (Proxy at 243 (emphasis added).) DraftKings disclosed repeatedly that SBTech is "a business-to-business software service provider," and it "generates revenue by offering its services and software to customers throughout Europe, Asia and the United States." (*Id*. at 28, 103, 245.) "[T]he SBTech business generates revenue from operators by providing sports betting and iGaming content directly to operators in exchange for a share of operators' revenues, as well as through fixed fee contracts with resellers." (*Id.* at 200.) "SBT[ech] offers their services directly to operators in Europe and uses a reseller model in Asia." (*Id.* at 75.) Hence, in Europe, SBTech's gaming engine is incorporated into its customers' applications and "distributed online . . . by operators that have licensed such products and services directly from

SBTech." (*Id*. at 204.) In Asia, by contrast, SBTech "licenses its products and services to resellers (through a fixed-fee model) who sublicense to operators."[2] (*Id.* at 204.)

Every document referenced in the SAC disclosed repeatedly that SBTech derived significant revenues from business conducted *by its B2B resellers* in Asia. The Proxy, for example, disclosed that SBTech's B2B customer base was concentrated "primarily in international jurisdictions," and that, in 2019, "approximately 37% and 63% of SBTech's revenue . . . was derived from customers in Europe and other regions (primarily Asia)," respectively. (*Id*. at 75, 245; *see id.* at 246 ("Organic revenue growth [in 2019] reflected mainly additions of new customers in Asia.").) DraftKings further disclosed that SBTech "relies primarily on one reseller for its Asia revenue" and that "[t]his reseller accounted for approximately 46% of SBT[ech]'s revenue in the year ended December 31, 2019." (*Id*. at 75.)

Over several pages of the Proxy, DraftKings warned that its business was subject to "a variety of U.S. and foreign laws, many of which are unsettled and still developing, and which could subject [DraftKings] to claims or otherwise harm our business." (*Id*. at 63-65.) DraftKings noted that there could "be no assurance that legally enforceable legislation" may not be enacted in jurisdictions relevant to its business "to prohibit, legislate or regulate various aspects" of its business, or that "existing laws in those jurisdictions will not be interpreted negatively." (*Id.* at 64.) Thus, while DraftKings believed it was "in compliance in all material respects with all applicable . . . sports betting and iGaming laws . . . [it] cannot assure that [its] activities or the activities of [its] users will not become the subject of any regulatory or law enforcement, investigation, proceeding or other governmental action." (*Id.* at 211.) The Proxy further disclosed that gaming regulators may "refuse to issue or renew a gaming license . . .

[2] Substantially similar disclosures to those in the Proxy were contained in other SEC filings, including a registration statement filed on April 23, 2020 and each of the prospectuses referenced in the SAC. (*See, e.g.*, Ex. 4 (April 27, 2020 Prospectus) at 11, 27-29, 39, 41, 81, 84, 91, 122, 124-25.)

based on the past or present activities of DraftKings, SBT[ech], . . . or third parties with whom we have relationships," and that "failure to renew or maintain [its] licenses . . . would have a material adverse effect" on DraftKings. (*Id.* at 69-70.)

On April 23, 2020, the transactions contemplated by the BCA were completed. As a result, SBTech became a subsidiary of DraftKings, and DEAC merged into DraftKings, which retained the "DraftKings" name as a public company. (SAC ¶ 3.)

C. Plaintiff's Regurgitation of the Hindenburg Editorial

Every single substantive allegation in the SAC is borrowed wholesale from a self-serving internet posting by Hindenburg Research, a short seller that "stands to realize significant gains in the event that [DraftKings] stock declines." (SAC, Ex. A at 43.) Plaintiff attributes his entire SAC *exclusively* to the Hindenburg Editorial, but admittedly he has *no clue* of the truth or falsity of his own accusations: His "counsel attempted to confirm the statements" in the Editorial with Hindenburg Research, but Hindenburg *declined*. (SAC ¶ 51 n.13.) Plaintiff nevertheless thoughtlessly adopts the entirety of the Hindenburg Editorial as fact, even though Hindenburg itself does not—the Editorial says that it reflects the publisher's "opinion" based upon information "obtained from public sources." (SAC, Ex. A at 43-44.)

On its face, the Hindenburg Editorial says nothing relevant. Indeed, its entire thesis is that—***years*** before the Business Combination—SBTech reorganized to jettison more risky business lines in anticipation of gambling markets opening in the United States in 2018. (*Id*. at 10-13, 17-18.) The foundation for this thesis is Hindenburg's assertion that certain Asian markets—primarily China—***could be*** "grey or black" in terms of the permissiveness of domestic gambling, while begrudgingly burying the lede in a footnote: "At the time, China was classified as a 'grey' market by the [U.S.] regulator," meaning U.S. casino operators may operate in that market. (*Id*. at 12 n.1.) Beyond this, the Hindenburg Editorial relied primarily on purported

"conversations" with unnamed "former [SBTech] employees" (*id*. at 1), not one of whom is identified by name or title, or even job responsibility or time period of employment. Following publication of the Hindenburg Editorial, DraftKings' stock price fell a modest 4.2% (SAC ¶¶ 9, 143), but very quickly recovered and remained above that level for many months.

Still, this lawsuit promptly followed. Plaintiff haphazardly embraces the Hindenburg Editorial as supposed facts, and then proceeds to attempt to transform that speculation and guesswork into securities law claims under Sections 10(b) and 20(a) of the Exchange Act. Plaintiff offers three, equally implausible, misstatement theories that lack any support.

First, plaintiff illogically seeks to transform highly conditional representations *by SBTech* in the BCA regarding its historical compliance with certain laws into statements *by DraftKings*, and then proceeds to declare those contractual representations inaccurate by reference to assertions in the Hindenburg Editorial that say nothing of the sort. This is nonsense. Even if SBTech's contractual representations are challengeable—and they are not—plaintiff's contention that an SBTech sub-licensee accepted wagers from Iran in 2018 (SAC ¶¶ 85) does not remotely plead any violation of law or breach of contractual representations *by SBTech*. And, plaintiff's assertion that SBTech misrepresented its compliance with gaming laws "*[e]xcept for operations conducted . . . in any jurisdiction that is a Grey Market*" is entirely circular. (SAC ¶ 105 (emphasis added).) Plaintiff nowhere establishes any "black market" in which SBTech operated.

Second, plaintiff alleges that every mention of SBTech or report of DraftKings' financial results were misleading because they did not at the same time (i) volunteer "that the Asian markets in which the unnamed reseller operated were black markets for gambling; and (ii) identify that the unnamed reseller was BTi/CoreTech and disclose that BTi/CoreTech was affiliated with SBTech at that time." (SAC ¶¶ 107-112, 113-115, 129-30, 136-39.) Plaintiff challenges these statements even though the very same documents disclosed repeatedly that the

majority of SBTech revenues came from grey markets in Asia, and that it "relied primarily on one reseller for its Asia revenue," which generated 46% of SBTech's 2019 revenues and 52% of its 2020 revenues. (SAC ¶¶ 111, 113, 129, 136.) Worse still, plaintiff concedes BTi/CoreTech "is not a part of SBT[ech]" after a "full separation" in 2018 (SAC ¶ 73), and all agree BTi/CoreTech is not and never was (or could have been) an "affiliate" *of DraftKings*.

Third, plaintiff adds a throwaway allegation that every statement covered in 40 paragraphs of the SAC was misleading because each supposedly failed to disclose (a) SBTech's "record of operating . . . in black markets," (b) SBTech's "attempts to distance itself" from those markets "were illusory," (c) the Business Combination exposed DraftKings to "black market gambling," and (d) DraftKings' revenues "were derived, in part, from operations in black markets." (SAC ¶ 142.) This tactic cannot plead a securities law claim.

Beyond citing some unremarkable stock transactions by certain individuals, plaintiff offers no allegations or theory of scienter, but simply alleges that each company performed due diligence "that made them privy to confidential proprietary information." (SAC ¶¶ 179-189.)

ARGUMENT

"To avoid dismissal under Section 10(b) and Rule 10b-5, a complaint must plausibly allege: (1) a material misrepresentation (or omission); (2) scienter, *i.e.*, a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance . . . ; (5) economic loss; and (6) loss causation." *Singh* v. *Cigna Corp.*, 918 F.3d 57, 62 (2d Cir. 2019) (internal quotation marks omitted). While well-pled factual allegations are accepted as true, this Court is "not required to credit conclusory allegations or legal conclusions couched as factual . . . allegations." *Rothstein* v. *UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs' fraud allegations are subject to heightened pleading standards. Rule 9(b) requires Plaintiffs to specify the time, place and contents of each misrepresentation, and "explain why the statements were fraudulent." *Anschutz Corp.* v. *Merrill Lynch & Co.*, 690 F.3d 98, 108 (2d Cir. 2012). The PSLRA likewise requires plaintiffs to allege with particularity "each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u-4(b)(1), and these particularized facts must "giv[e] rise to a strong inference that the defendant acted with the required state of mind," *id.* § 78u-4(b)(2)(A). The PSLRA thus "requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention 'to deceive, manipulate, or defraud.'" *Tellabs*, 551 U.S. at 313. Plaintiff alleges neither.

I. Plaintiff Does Not Plead With Particularity Any Actionable Misstatement or Omission.

A. The SAC Fails to Comply with the PSLRA and Rule 9(b).

"[T]he case law reflects a particular need for close scrutiny where a short-seller report relied upon by a securities plaintiff itself relies on 'confidential' or anonymous sources, without corroboration." *Long Miao* v. *Fanhua, Inc.*, 442 F. Supp. 3d 774, 801 (S.D.N.Y. 2020). Although there is no categorical prohibition against reliance on short-seller reports to plead fraud, *see In re Hebron Tech. Co. Ltd. Secs. Litig.*, 2021 WL 4341500, at *13 (S.D.N.Y. Sept. 22, 2021), the SAC here "does not contain any 'independent [well-pled] factual allegations'" that support or *in any way* corroborate the Hindenburg Editorial. *Long*, 442 F. Supp. 2d at 803. Instead, as in *Long*, plaintiff's exclusive reliance upon the Hindenburg Editorial cannot plead fraud with particularity because, among other things, (1) the "positions and job responsibilities" of the anonymous sources "are not described at a sufficient level of particularity," (2) "the anonymous interviewees' statements are . . . entirely unmoored in time" and, if anything, confirm that their statements relate to the irrelevant past, (3) the assertions that SBTech—a

licensor of software that did *not* operate any gaming business—"operated" at all in "grey or black" (*i.e.*, permissible ***or*** impermissible) markets, are "insufficiently particular," (4) "plaintiff's counsel in this case appear to have done nothing whatsoever to confirm the identities or statements of the confidential sources cited" by Hindenburg, and (5) the Hindenburg Editorial "contain[s] significant factual errors," not the least of which is that SBTech does not "operate" in Asia or take wagers from anywhere. *Id.* at 803-04. And, by deleting from his SAC every reference to Asian markets being "grey," plaintiff flatly contradicts the central thesis of the Hindenburg Editorial that is the foundation of his case. (SAC, Ex. A at 8, 11, 13.)

B. Plaintiff in All Events Comes Nowhere Close to Pleading Any Material Misstatement or Omission.

"Silence, absent a duty to disclose, is not misleading." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988). There is no duty to disclose information simply because it is material, or of potential interest. *Ark. Pub. Empl. Ret. Sys.* v. *Bristol-Myers Squibb Co.*, 28 F.4th 343, 352-53 (2d Cir. 2022). A duty to disclose arises under the federal securities laws only when particular information is subject to an "affirmative legal disclosure obligation," or when necessary "to prevent existing disclosures from being misleading." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360-66 (2d Cir. 2010). Nothing of the sort has been alleged here.

1. SBTech's Contractual Representations Are Neither Actionable Fact Statements Nor Shown to Have Been Inaccurate.

Plaintiff alleges that highly qualified representations in the BCA *to* DraftKings *by* SBTech regarding SBTech's compliance with certain laws were misleading because DraftKings failed to disclose that SBTech had (i) operated or had clients located in jurisdictions "where gambling was illegal," and (ii) conducted business with a resident of Iran, "a country that is subject to" OFAC sanctions. (SAC ¶¶ 103-106.) This theory is hopelessly flawed.

First, plaintiff nowhere explains how or why a representation *by SBTech* in a contract somehow qualifies as a statement of fact *by DraftKings* to its investors. To the contrary, DraftKings told investors that those contractual representations were ***not*** statements of fact nor should be relied upon as such:

> The representations, warranties and covenants made in the BCA by DEAC, DraftKings, SBT[ech] and the SBT Sellers were qualified and subject to important limitations . . . [and] were negotiated with the principal purpose of establishing circumstances in which a party to the BCA may have the right not to consummate the Business Combination if the representations and warranties of the other party were to be untrue . . . and allocating risk between the parties to the BCA, rather than establishing or attempting to set forth matters as facts. . . . Moreover, information concerning the subject matter of the representations and warranties, *which do not purport to be accurate as of the date of this proxy statement/prospectus*, may have changed since the date of the BCA. For the foregoing reasons, the representations and warranties or any descriptions of those provisions *should not be read alone or relied upon as presenting the actual state of facts or condition of DEAC, DraftKings, SBT[ech] and the SBT Sellers, or any of their respective subsidiaries or affiliates*.

(Ex. 2 (Proxy) at 112 (emphasis added).) Indeed, SBTech agreed that the compliance representations cited in the SAC would be "true and correct" at signing and at closing *only* insofar as any deviations would not have a Material Adverse Effect on SBTech's overall business (Ex. 5 (BCA) § 11.2(a)), which is nowhere alleged to be the case here.[3]

Second, plaintiff nowhere even alleges that SBTech breached the representation. He first references various bribery and money-laundering laws, but he does not contend that they were violated. (SAC ¶ 103 n.23.) Plaintiff next references U.S. sanctions laws, but does not even argue that those laws then applied to SBTech, a company incorporated and based in the Isle of Man, or the SBTech sub-licensee that accepted wagers in 2018 from Iran, or even the customer in Iran that placed the wager. (SAC ¶ 103 n.24.) Plaintiff finally references certain gaming

[3] Even if an issuer's unqualified contractual representation about ***its own*** business might be actionable, *see In re Bank of Amer. Corp. Secs., Derivative, and ERISA Litig.*, 757 F. Supp. 2d 260, 299 (S.D.N.Y. 2010), no court has held an issuer responsible for a counterparty's representations, much less one with the qualifications present here. *See Jaroslawicz* v. *M&T Bank Corp*., 2017 WL 1197716, at *5 (D. Del. Mar. 30, 2017) (representations accompanied by warning that they were for parties' benefit alone not actionable).

laws, but ignores that SBTech's agreement excluded ***entirely*** any representation about the business or operations of SBTech or its customers or end users in "Grey Markets" (SAC ¶ 105) (quoting Ex. 5 (BCA) §§ 4.6(l), (v)), and the SAC fails to contend that the parties to the BCA viewed *any* Asian jurisdiction mentioned in the SAC to be anything but a "Grey Market."

Third, where, as here, "a complaint claims that statements were rendered false or misleading through the non-disclosure of illegal activity, the facts of the underlying illegal acts must also be pleaded with particularity, in accordance with the heightened pleading requirement[s] of Rule 9(b) and the PSLRA." *Gamm* v. *Sanderson Farms, Inc*., 944 F.3d 455, 465 (2d Cir. 2019). Plaintiff's allegation that the acceptance of wagers originating in Iran by a sub-licensee of SBTech (SAC ¶ 86) violated some law or rule is supported by nothing. Plaintiff does not identify the participants in these transactions, the laws violated, or how and why U.S. sanctions laws applied to entirely foreign transactions, or to SBTech, which was not a party to the transactions and then had *no connection with the U.S.* *See Menaldi* v. *Och-Ziff Cap. Mgmt. Grp. LLC*, 164 F. Supp. 3d 568, 578 (S.D.N.Y. 2016) (rejecting sanctions violation where plaintiffs "have not explained how [the conduct] violated the Executive Orders they invoke"). Plaintiff merely references the U.S. government webpage on "Iran Sanctions" (SAC ¶ 54) and a transaction involving an indirect SBTech licensee in early *2018* (SAC ¶ 86), but does not plead any connection between the two, or their relevance to DraftKings, which acquired SBTech in *2020*. *See Gray* v. *Alpha & Omega Semiconductor Ltd.*, 2021 WL 4429499, at *7-9 (S.D.N.Y. Sept. 27, 2021) (plaintiff must "adequately plead that the misconduct did, in fact, occur").

Plaintiff's allegations regarding SBTech's compliance with gaming laws is equally conclusory and even more divorced from his pleading. Because SBTech's contractual representation excluded conduct in "Grey Markets" (SAC ¶ 105), to allege some inaccuracy in this representation, plaintiff must plead (a) SBTech's conduct "relating to the SBT[ech]

Software," (b) in a non-"Grey" market, (c) was unlawful. Plaintiff references unspecified activities by unidentified persons at unspecified times in China, Indonesia, Iran, Malaysia and Thailand, but he does not allege *any SBTech* conduct whatsoever. None. And, as the SAC acknowledges, a "black market" is one where the relevant activities are ***both*** facially prohibited and "government authorities have taken affirmative, concrete actions to actively enforce laws that prohibit online gaming." (SAC ¶¶ 45-47.) Plaintiff alleges neither.

Notwithstanding his assertion that China has been "cracking down on gambling" (SAC ¶ 79), plaintiff concedes that U.S. gaming regulators (and DraftKings) view China as a "grey" market. (SAC ¶ 84.) Plaintiff's citation to vague and conclusory internet postings as to the law in China or other jurisdictions pleads no facts. *See Hebron Tech*, 2021 WL 4341500, at *14. Further, the unsupported snippets plaintiff extracts from those sources do not at all establish that any specific alleged conduct is flatly proscribed.[4] *In re Yukos Oil Co. Secs. Litig*., 2006 WL 3026024, at *14 (S.D.N.Y. Oct. 25, 2006) (rejecting claim unsupported by "sufficient facts demonstrating that [the] tax strategy violated" the Russian law alleged). Critically, plaintiff does not allege that these legal concepts apply at all to persons or entities, such as SBTech, absent entirely from the jurisdiction,[5] or that the laws specifically apply to internet gaming.[6] Plaintiffs

[4] *See* SAC ¶ 153 (Iran is only *currently* considering a bill that would "cover[] betting in cyberspace"); ¶ 163 (Vietnam: "citizens . . . rely on technology to access the wealth of foreign-based gambling sites"; "foreign tourists can use the country's opulent casino resorts"); ¶ 168 (Indonesia: government "would be looking at the issue from a technological standpoint, aiming to block Indonesian citizens from accessing online gambling"); ¶ 170 (Malaysia: "Some forms of gambling," including "casino games . . . are legal"); ¶¶ 172-73 (Thailand: does not allow "the vast majority of gambling activities," but Thailand merely "monitor[s] the use of online casinos").

[5] *See* I. Nelson Rose, *Gambling and the Law: The International Law of Remote Wagering*, 40 J. MARSHALL L. REV. 1159, 1169 (2007) (Because "there is often a strong presumption that lawmakers have not reached out beyond their jurisdictions' borders in enacting a statute . . . any prohibition on gambling which does expressly state that it applies to cross-border wagers will be presumed to include only activities taking place within the borders of that particular government entity."); W. Woon, *Regulation of the Securities Industry in Singapore*, 4 PAC. RIM L. & POL'Y J. 731, 754 (1995) ("Malaysian courts would lack the jurisdiction to try the case, since the offense would *ex hypothesi* have been committed outside Malaysia.").

[6] As Plaintiff acknowledges (SAC ¶ 105), the BCA defined "Grey Market" to mean a jurisdiction whose laws (a) "do not specifically prohibit or permit *internet* gaming and/or *internet* sports betting," or (b) "do

must plead "more than a generality with surface appeal." *Plumber & Steamfitters Loc. 773 Pension Fund* v. *Danske Bank A/S*, 11 F.4th 90, 100 (2d Cir. 2021).

Indeed, the SAC defeats rather than supports the notion that prosecutors in any referenced jurisdiction "have taken affirmative, concrete actions to actively enforce" any internet gaming laws as might be applied to a software provider such as SBTech. Plaintiff's references to enforcement activities in these jurisdictions all concern only the enforcement of *local* laws against local residents. (*See, e.g.*, SAC ¶ 164 (arrest of individuals in Vietnam), ¶ 171 (same for individuals in Malaysia).) Plaintiff not once cites any law in any jurisdiction threatened or enforced against a foreign, online gaming operator, much less a foreign licensor of software, like SBTech. Of course, plaintiff nowhere suggests SBTech ever once was the subject of any threatened or actual assertions of unlawful gambling in any of the referenced jurisdictions. Plaintiff thus does not remotely establish that the representation in the BCA is at issue.

Most importantly, and fatal to his claims, the SAC does not even argue that *SBTech's* activities are even addressed, much less prohibited, by any law or concept plaintiff cites. SBTech is a provider of software and related services. (*See* SAC ¶¶ 39, 42, 125.) It has ***no*** operations in any of the referenced countries, and it operates no gaming business at all. Plaintiff ***nowhere even argues*** that a licensor of software is within reach of any referenced gaming laws, any more than a manufacturer of playing cards or dice. *See Gray*, 2021 WL 4429499, at *9 (rejecting allegation that "indirect" sales by defendant to a sanctioned entity through a distributor were "necessarily illegal," absent analysis in the complaint as to why *indirect* sales were covered). Where, as here, "the complaint fails to allege facts which would establish such an

specifically prohibit *internet* gaming and/or *internet* sports betting, but Governmental Authorities in that jurisdiction have not . . . (1) taken affirmative concrete action to actively enforce those Laws . . . or (2) issued unequivocal official pronouncements that *internet* gaming and/or *internet* sports betting is not legal in that jurisdiction." (Ex. 5 (BCA) at 105-06 (emphasis added).)

illegal scheme," then claims premised on its nondisclosure are "fatally flawed." *In re Axis Cap. Holdings Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 585 (S.D.N.Y. 2006).

2. Defendants' Truthful Disclosures Did Not Give Rise to Any Duty to Disclose Any Additional Details Regarding SBTech's Customers.

Plaintiff next claims that truthful statements noting that SBTech's revenues were derived from "customers in Europe and other regions (primarily Asia)" and that SBTech "relies primarily on one reseller for its Asia revenue" somehow were misleading by not identifying the reseller (and its illusory historical ties to SBTech) and volunteering that the *reseller* operated in "numerous black markets for gambling in Asia." (SAC ¶¶ 101, 110, 112, 115, 130, 137, 139.) Similarly, plaintiff contends that truthful statements regarding SBTech's licenses were misleading by not also disclosing that SBTech "operated" in "black markets for gambling in Asia." (SAC ¶ 101; *see id.* ¶¶ 110, 118-19, 122, 126, 132.) Not so.

"'[A] violation of federal securities law cannot be premised upon a company's disclosure of accurate historical data.'" *Boca Raton Firefighters & Police Pension Fund* v. *Bahash*, 506 F. App'x 32, 38-39 (2d Cir. 2012). Plaintiff does not allege SBTech lacked the referenced licenses or did not earn the disclosed revenues, which alone sinks this theory. *Ark. Pub. Empls.*, 28 F.4th at 353 ("no obligation to disclose the precise percentage" used to test efficacy in drug trial).

Further, DraftKings had no duty to comment on SBTech's revenues or operations because it did not "put the sources" of SBTech's revenue at issue through "statements falsely attributing the company's success to factors other than the [allegedly] improper conduct." *In re Marsh & Mclennan Cos. Sec. Litig.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006). Even if plaintiff established some gaming law violations by SBTech's licensees or the licensees' customers—and he has not—this Court has held routinely that "accurately reported income that is obtained from an unlawful source may not be actionable only on the grounds that the unlawful source is not disclosed." *DoubleLine Capital LP* v. *Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 442 (S.D.N.Y.

2018); *see Danske Bank*, 11 F.4th at 99 ("no obligation to self-report" revenue derived from unlawful activity); *Marsh*, 501 F. Supp. 2d at 470 (same). DraftKings' "narrative restatement of accurate financial reporting" by SBTech cannot support any securities law claim. *In re VEON Ltd. Sec. Litig*., 2017 WL 4162342, at *6 (S.D.N.Y. Sept. 19, 2017) ("references to sales and subscriber numbers in Uzbekistan" did not require comment about lawfulness of activities).

Moreover, plaintiff does not remotely establish the truthfulness of the supposedly omitted "facts." Plaintiff has not pled that DraftKings' revenues derived from black markets, or that the revenues, if any, from proscribed markets were material. *See* pp. 10-11, *supra*; *DoubleLine*, 323 F. Supp. 3d at 447 (no misstatement where plaintiffs "fail[ed] to identify which, if any, revenue derived" from unlawful acts). Nor has plaintiff plausibly alleged that BTi/CoreTech was the unnamed Asian reseller and "was affiliated with SBTech," or why any of that is relevant to DraftKings. (SAC ¶¶ 112, 130, 139.) Instead, plaintiff says only that an unnamed "*former employee speculated*" that the reseller was BTi/CoreTech (SAC ¶ 60 (emphasis added)), but he concedes repeatedly that, to the extent there ever was any affiliation between BTi/CoreTech and SBTech, it ended *by 2018*, two years before the Business Combination.[7] And, DraftKings could not have any duty to disclose "SBTech operated in" Asian "black markets" because plaintiff has not established that any such markets were "black" or that SBTech *in any way* "operated in" them. *See* pp. 12-14, *supra*.

Finally, plaintiff may not base a securities claim on some failure to offer a "legal conclusion" about the legality of SBTech's activities. *Diehl* v. *Omega Protein Corp*., 339 F. Supp. 3d 153, 164 (S.D.N.Y. 2018). The entire premise of plaintiff's claim is that DraftKings disclosed repeatedly that SBTech's revenues derived substantially from resellers in Asia (*see*

[7] SAC ¶ 60 ("[Bti] are a separate company" and "BTI/CoreTech acted as a customer of SBTech"); ¶ 73 (following "full separation [after a] few months," "(BTi) CoreTech is not a part of SBT group.'").

SAC ¶¶ 108-115, 129-30, 136-39). DraftKings disclosed the "objective factual matters," and "the disclosure provided all the information necessary" for shareholders to make their own legal judgments about that conduct. *Kramer* v. *Time Warner Inc*., 937 F.2d 767, 776 (2d Cir. 1991).

3. Plaintiff's Catch-All Misstatement Theory Is Meritless.

Confirming his lack of any particularized misstatement theory, plaintiff next declares that *every* DraftKings statement is misleading because each comment failed to disclose in one form or another actual or potential legal risks incident to "black markets." (SAC ¶ 142.) This tactic "does not comport with [the Second Circuit's] exhortation that plaintiffs 'must demonstrate with specificity why and how' each statement is materially false or misleading." *Bahash*, 506 F. App'x at 38 (quoting *Rombach* v. *Chang*, 355 F.3d 164, 174 (2d Cir. 2004)).

In any event, this theory also is nothing more than a claim that DraftKings was obligated to speculate about nonexistent future assertions of illegality, or volunteer subjective legal judgments about its or SBTech's conduct. No duty exists. *See In re Citigroup, Inc. Sec. Litig*., 330 F. Supp. 2d 367, 377-78 (S.D.N.Y. 2004). A securities filing "is not a rite of confession," and "companies do not have a duty 'to disclose uncharged, unadjudicated wrongdoing.'" *City of Pontiac Policemen's & Firemen's Ret. Sys*. v. *UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014). "As a corollary of that rule, accurately reported financial statements do not automatically become misleading by virtue of the company's nondisclosure of suspected misconduct that may have contributed to the financial results." *Danske Bank*, 11 F.4th at 98-99; *see In re FBR Sec. Litig.*, 544 F. Supp. 2d 346, 357 (S.D.N.Y. 2008). The Second Circuit "easily rejected" a similar claim that a company's "literally true" earnings statements were actionable for not "acknowledg[ing] the long-term unsustainability of its business model." *Bahash*, 506 F. App'x at 38.

C. Plaintiff Pleads No Violation of Items 303 or 105.

Item 303 and 105 are of no help to plaintiff. (SAC ¶¶ 174-178.) Item 303 of SEC Regulation S-K requires an issuer to "[d]escribe any known trends or uncertainties" that the company "reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(b)(ii). Plaintiff's assertion that "potential liabilities" arising out of "SBTech's operations in black markets" had to be disclosed under Item 303 (SAC ¶ 177) is meaningless. Plaintiff does not establish SBTech's "operations" in any such market, or that any "potential liabilities" existed, much less were "known" to DraftKings at the time of any statement. *See In re Coty Inc. Sec. Litig.*, 2016 WL 1271065, at *7 (S.D.N.Y. Mar. 29, 2016); *Ind. Pub. Ret. Sys.* v. *SAIC, Inc.*, 818 F.3d 85, 95 (2d Cir. 2016) (Item 303 "requires the registrant's actual knowledge of the relevant trend or uncertainty."). Moreover, beyond speculating without any basis that SBTech's alleged operations could threaten DraftKings' licenses with gaming regulators (which plaintiff concedes do ***not*** share his view of "black markets"), plaintiff fails even to guess what those "liabilities" might be, or why or how any *historical* SBTech events would be material to DraftKings' "continuing operations." *See Shetty* v. *Trivago N.V.*, 796 F. App'x 31, 33-34 (2d Cir. 2019).

Plaintiff's reference to Item 105, which requires disclosure of "the most significant factors that make an investment in the registrant or offering speculative or risky," 17 C.F.R. § 229.105, is even further afield. Far from "boilerplate" (SAC ¶ 178), the Proxy contained ***39 single-spaced*** pages of "Risk Factors" (Proxy, 47-86), including specific warnings about uncertain gaming laws and the potential loss or non-renewal of gaming licenses (*see* pp. 3-5, *supra*). And this theory fails along with plaintiff's Item 103 theory. *See Hutchinson* v. *Deutsche Bank Sec. Inc.*, 647 F.3d 479, 484 n.4 (2d Cir. 2011) (omission did not violate (what is now) Item 105 for the same reasons that it was not reasonably likely to be material under Item 303).

II. Plaintiff Fails to Allege a Cogent and Compelling Inference of Fraud.

Under the PSLRA, plaintiff must, "with respect to each act or omission alleged to violate [the Exchange Act], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). To allege scienter, Plaintiff must plead "facts to show either (1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness." *ECA, Loc. 134 IBEW Joint Pension Tr. of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009). For an inference of scienter to be "strong," the Supreme Court has ruled that "a reasonable person [must] deem [it] cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324. Further, "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." *Id*. at 323. Where, as here, a "plausible, nonculpable explanation[]" is more likely than fraud, plaintiff has failed to establish scienter. *Id.* at 324.

A. Plaintiff Has Not Alleged Any Cognizable Motive to Defraud.

To plead motive, the Second Circuit requires particularized allegations of a "concrete and personal benefit to the individual defendants resulting from the fraud." *Kalnit* v. *Eichler*, 264 F.3d 131, 139 (2d Cir. 2001). Here, plaintiff attempts to establish "motive" by asserting that just *three of the five* Individual Defendants (Meckenzie, Park, and Robins) sold DraftKings stock. (*See* SAC ¶ 185.) Alone, "[t]he fact that other defendants did not sell their shares during the relevant class period sufficiently undermines plaintiff['s] claim regarding motive." *San Leandro Emerg'y Med. Grp. Profit Sharing Plan* v. *Philip Morris Companies, Inc.*, 75 F.3d 801, 814 (2d Cir. 1996). Further, "[t]he mere fact that insider stock sales occurred does not suffice." *In re Gildan Activewear, Inc. Sec. Litig.*, 636 F. Supp. 2d 261, 270 (S.D.N.Y. 2009). Plaintiff must demonstrate that the sales are "unusual." *Id.* He fails to do so here for several reasons.

First, with regard to the three Individual Defendants, plaintiff identifies 15 transactions spread across the 18-month class period, but he alleges not *a single other fact* that would support a finding that the sales were "unusual."[8] Plaintiff asserts that defendants sold shares "as soon as they could, rather than try to time the peak price of DraftKings stock" (SAC ¶ 189), and he thus concedes the sales did not "closely coincide" with the purported misstatements. *Fishbaum* v. *Liz Claiborne, Inc.*, 189 F.3d 460 (2d Cir. 1999). Further, the sales were at prices no higher than $52.66 per share (SAC ¶ 185), well below the class period high of $71.98. *See City of Omaha Police & Fire Ret. Sys*. v. *Evoqua Water Techs. Corp*., 450 F. Supp. 3d 379, 419-20 (S.D.N.Y. 2020) (sales not timed to "suggest[] that the seller is maximizing personal benefit").

Second, plaintiff acknowledges that each of the Individual Defendants owned significantly more stock at the end of the class period than they sold during it.[9] Indeed, by plaintiff's calculation, defendants Baker and Sagansky sold none of their stock, while defendants Park and Robins sold at most 11.4% and Meckenzie approximately 37% of their stock in the class period. *See City of Coral Springs* v. *Farfetch Ltd*., 2021 WL 4481119, at *5 (S.D.N.Y. Sept. 30, 2021) (defendants' sale of 4%, 20% and 50% of stock "within the range that Courts have found to be insufficient to plausibly allege motive and opportunity"). Moreover, all but one sale was made either (a) pursuant to 10b5-1 plans (discussed below) or (b) in a June 2020 underwritten DraftKings public offering. The public offering (representing 34.6% of all shares sold by the Individual Defendants) facilitated the sale of stock immediately following expiration

[8] Courts in the Second Circuit typically consider a number of facts to determine whether sales are unusual or suspicious, including: "(1) the amount of net profits realized from the sales; (2) the percentages of holdings sold; (3) the change in volume of insider defendant's sales; (4) the number of insider defendants selling; (5) whether sales occurred soon after statements defendants are alleged to have known were misleading; (6) whether sales occurred shortly before corrective disclosures or materialization of the alleged risk; and (7) whether sales were made pursuant to trading plans such as Rule 10b5-1 plans." *Gagnon*, 368 F. Supp. 3d at 772-73.

[9] Following the last stock "sale" identified by plaintiff (SAC ¶ 185), Messrs. Meckenzie, Park and Robins each still owned, respectively, (a) 21,068,204, (b) 288,542, and (c) 5,213,063 shares of DraftKings stock. Plaintiff ignores that Park and Robins also owned 379,688 and 7,139,439 vested options, respectively (Ex. 9).

of a "lock-up" in the BCA that prohibited insiders' stock sales for six months (Ex. 5 (BCA, Ex. E) § 3.01), which further "cuts against an inference of scienter." *Evoqua Water*, 450 F. Supp. 3d at 420; *Farfetch*, 2021 WL 4481119, at *4 (shares sold upon lock-up expiration).[10]

"Finally, the vast majority of the sales were conducted pursuant to a 10b5-1 trading plan or were executed for procedural purposes, and therefore could not be timed suspiciously." *Ark. Pub. Empls.*, 28 F.4th at 355. Plaintiff ignores that 10 of the 15 stock sales by Individual Defendants—including sales by Meckenzie shortly before publication of the Hindenburg Editorial (SAC ¶ 189)—were made pursuant to non-discretionary 10b5-1 trading plans, which "do not give rise to a strong inference of scienter." *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 585 (S.D.N.Y. 2014). This remains true where, as here, the 10b5-1 trading plans were entered during the class period, but plaintiff pleads no facts suggesting the plans were entered into "'strategically' so as to capitalize on insider knowledge." *Id.*; *see Ark. Pub. Empls.*, 28 F.4th at 356 n.4 (plaintiff does not allege "the purpose of the plan was to take advantage of an inflated stock price"). Moreover, *more than half* of the shares "sold" by Messrs. Park and Robins were not stock sales at all but shares surrendered to cover the "exercise price or tax liability using portion of securities received from the company." (*See* Ex. 9 (chart summarizing Form 4s.) These "procedural" transactions plead no motive. *Ark. Pub. Empls.*, 28 F.4th at 355-56.[11]

B. Plaintiff Fails to Plead Strong Circumstantial Evidence of Fraud.

"Where motive is not apparent . . . [a plaintiff must] plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the

[10] The SEC Forms 4 detailing the Individual Defendants' stock transactions are included as Exhibits 6-8. A chart summarizing the Forms 4 is included as Exhibit 9, which provides information from the Forms 4 omitted from the SAC, including option ownership and transactions made pursuant to 10b5-1 plans or for procedural purposes.

[11] Plaintiff cannot establish scienter by pointing to the trades of 10 *non-defendants*, none of whom are alleged to have known if the disclosures were false or misleading. *See AK Laborer Emp'rs Ret. Fund* v. *Scholastic Corp.*, 2010 WL 3910211, at *7 (S.D.N.Y. Sept. 30, 2010). And, like sales by the Individual Defendants, plaintiff has not alleged anything "unusual" about these trades.

circumstantial allegations must be correspondingly greater." *Kalnit*, 264 F.3d at 142 (2d Cir. 2001). At a minimum, the requisite state of mind is "conscious recklessness." *S. Cherry St., LLC* v. *Hennessee Grp.*, 573 F.3d 98, 109 (2d Cir. 2009). Here, however, plaintiff challenges exclusively opinions about compliance with laws and Regulation S-K that, by their terms, apply only to "known" circumstances, all of which only "can be actionable under the securities laws if the speaker knows the statement to be false." *Shields* v. *Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1131 (2d Cir. 1994) (opinions); *Ind. Pub. Ret. Sys*., 818 F.3d at 95 (Item 303).

Under either standard, plaintiff must set forth detailed "allegations that [1] *specific* contradictory information was available to the defendants [2] *at the same time* they made their misleading statements." *In re PXRE Grp., Ltd., Sec. Litig*., 600 F. Supp. 2d 510, 536 (S.D.N.Y. 2009). He "'must *specifically identify* the reports or statements that are contradictory to the statements made,' or must 'provide specific instances in which Defendants received information that was contrary to their public declarations.'" *Glaser* v. *The9, Ltd.*, 772 F. Supp. 2d 573, 588 (S.D.N.Y. 2011); *see also Novak* v. *Kasaks*, 216 F.3d 300, 308-9 (2d Cir. 2000) ("Where plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.")

Here, plaintiff does not reference a single, contemporaneous internal report or communication that contained information that contradicted DraftKings' public statements. He could not possibly do so, because plaintiff nowhere contends that anyone at DraftKings or SBTech (or even U.S. gaming regulators) shares his view that the referenced Asian nations were "black markets." *Ark. Pub. Empls.*, 28 F.4th at 356 (defendant did not disregard facts because "no such consensus definition existed"). SBTech made clear that it viewed Asian markets from which it derived revenues to be "grey markets," and plaintiff "present[s] no reason to doubt the reasonableness of [d]efendants' view." *Lehman* v. *Ohr Pharm., Inc.*, 2021 WL 5986761, at *2

(2d Cir. Dec. 16, 2021); *Ark. Pub. Empls.*, 28 F.4th at 356 (defendants "made clear . . . they were not using [plaintiff's] definition"). Indeed, ***even if*** plaintiff had shown (a) that online gambling was prohibited in markets from which SBTech derived revenues, ***and*** (b) that SBTech actually knew so—and he has not—this still would fall miles short of alleging scienter. Plaintiff would still need to establish each defendant's knowledge that SBTech's alleged "indirect sales" in those regions "necessarily means that [SBTech] violated the law," and that such a violation contradicts the alleged misstatements. *Gray*, 2021 WL 4429499, at *11. Nothing remotely of this sort is alleged. *Hebron Tech.*, 2021 WL 4341500, *22 (no "blatant" violation of rules).

Beyond this, plaintiff relies only on scienter theories that are untethered to the facts or to his misstatement theories. Plaintiff may not rely on the Individual Defendants' "associations" with DraftKings or conclusory pronouncements that they must have been "privy to confidential proprietary information." (SAC ¶ 180.) "Courts in this Circuit have long held that accusations founded on nothing more than a defendant's corporate position are entitled to no weight." *Lipow* v. *Net1 UEPS Techs.*, 131 F. Supp. 3d 144, 163 (S.D.N.Y. 2015); *see also Hebron Tech.*, 2021 WL 4341500, at *22-23. Plaintiff's attempt to avoid his scienter pleading burden by referencing assurances by SBTech to undertake "appropriate due diligence" on clients (SAC ¶ 181), or noting that DraftKings engaged in transaction-related due diligence (SAC ¶¶ 183-84), fares no better. The Second Circuit has squarely rejected attempts to infer scienter from "pre-acquisition due diligence," *Town of Davie Police Officers Ret. Sys.* v. *Nat. Gen. Hldgs. Corp.*, 2021 WL 5142702, at *2 (2d Cir. Nov. 5, 2021), or by claims about what a defendant "would have learned" had it "performed the 'due diligence' it promised." *In re Advanced Battery Techs., Inc.*, 781 F.3d 638, 646 (2d Cir. 2015).

Finally, plaintiff's "core operations" theory (SAC ¶ 180) is of no help at all to him. The SAC concerns only an unspecified subset of SBTech's Asia revenues, which in no sense

constitutes "all or even most of [DraftKings'] business," as required to invoke this theory. *Hebron Tech.*, 2021 WL 4341500, at *23. And this concept is, at best, a "supplementary but not independently sufficient" means to plead scienter. *Cortina* v. *Anavex Life Scis. Corp.*, 2016 WL 7480415, at *7 (S.D.N.Y. Dec. 29, 2016); *Hebron Tech.*, 2021 WL 4341500, at *22.

C. Fraud Is Not Remotely the More Compelling Inference on the Facts Alleged.

"A complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324. That is not the case here.

First, plaintiff's allegations about the state of gaming laws and enforcement in Asia asserts, at most, a difference in opinions, and U.S. gaming regulators do not share his views. "However, differences of opinion . . . do not reveal scienter." *City of Austin Police Ret. Sys.* v. *Kinross Gold Corp.*, 957 F. Supp. 2d 277, 299 (S.D.N.Y. 2013). In fact, plaintiff does not even speculate that SBTech is or ever was alleged to have violated gaming laws in any jurisdiction.

Second, DraftKings made extensive disclosures about the uncertain state of gaming laws, and that the majority of SBTech revenues derived from Asian markets. "[A] defendant's decision to make significant disclosures about the exact risk he or she is purportedly trying to hide is inconsistent with" scienter. *Farfetch*, 2021 WL 4481119, at *7.

Third, plaintiff's scienter theory contradicts his misstatement theory. Plaintiff asserts that SBTech made contractual representations about the legality of its business, but then nowhere explains why DraftKings—the beneficiary of those representations—could not rely upon them.

Finally, as DraftKings made clear, the primary objective of the SBTech acquisition was to acquire technology, not to develop SBTech's Asia reseller model, which modest revenues plaintiff nowhere contends are relevant or material to DraftKings or its overall business prospects. "[T]he most likely inference from the facts alleged is that defendants did not make

certain disclosures . . . because they believed that they were under no obligation to do so, and that, from a business standpoint, there was no good reason to disclose the omitted information." *In re Hardinge, Inc. Sec. Litig.*, 696 F. Supp. 2d 309, 332 (W.D.N.Y. 2010).

III. The SAC Fails to Plead a Viable Claim Against Each Defendant.

Plaintiff's conclusory allegations are deficient for a host of other reasons. *First*, despite alleging undifferentiated claims against an entity (DraftKings) that occupied very different roles during the class period, and five Individual Defendants who were affiliated with *three different* entities, plaintiff does not establish that each defendant was the speaker of each statement, *see Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011), and each defendant's knowledge of the supposed falsity of each statement, *see In re Braskem S.A. Sec. Litig.*, 246 F. Supp. 3d 731, 762-63 (S.D.N.Y. 2017). *Second*, plaintiff's invocation of the word "scheme" (SAC ¶¶ 206-07) pleads no so-called "scheme" claim under Rule 10b-5. *Danske Bank*, 11 F.4th at 105. *Third*, plaintiff's derivative control person claims under Section 20(a) fail along with his underlying claims, *see ATSI*, 493 F.3d at 108, and because he pleads no "culpable participation" by any defendant. *Braskem*, 246 F. Supp. 3d at 771.

IV. The SAC Fails to Allege Loss Causation.

Plaintiff fails to plead loss causation, as he must. 15 U.S.C. § 78u-4(b)(4). Plaintiff relies only on the Hindenburg Editorial as a corrective disclosure (SAC ¶¶ 9, 143, 190), but that publication commented on historical SBTech activities not at issue in any DraftKings disclosure, and opines that SBTech operated in "grey or black markets," which did not "reveal[] a *fact* previously undisclosed." *In re Ideanomics, Inc., Sec. Litig.*, 2022 WL 784812, at *11 (S.D.N.Y. Mar. 15, 2022). The Hindenburg Editorial at most reflected its own, biased views of the conclusion to be drawn from facts that the document itself says were all public.

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that this Court dismiss this action in its entirety, with prejudice.

Dated: April 26, 2022

Respectfully submitted,

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