UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re DRAFTKINGS INC. SECURITIES LITIGATION	:	Civil Action No. 1:21-cv-05739-PAE
	:	CLASS ACTION
This Document Relates To:	:	
ALL ACTIONS.	:	

LEAD PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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TABLE OF ABBREVIATIONS

Abbreviation	Description
AC	Plaintiff's Amended Complaint (ECF No. 52)
Baker	Defendant Eli Baker, DEAC's CFO and President
BCA	Business Combination Agreement, dated December 22, 2019, by and among DraftKings Inc., SBTech (Global) Limited, the SBT Sellers' Representative, the SBT Sellers, Diamond Eagle Acquisition Corp., DEAC NV Merger Corp., and DEAC Merger Sub Inc., as amended on April 7, 2020
Business Combination	Merger consummated between DEAC, Old DK, and SBTech which created DraftKings Inc.
BTi	BTi and/or CoreTech
B2B	Business-to-Business
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Class Period	The period between December 23, 2019 and June 15, 2021, inclusive
DEAC	Diamond Eagle Acquisition Corp.
Defendants	DraftKings, Jason Robins, Jason Park, Shalom Meckenzie, Jeff Sagansky, and Eli Baker
DraftKings, DK, or the Company	Defendant DraftKings Inc.
Exchange Act	Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.*
Hindenburg	Hindenburg Research
Hindenburg Report or Report	Hindenburg's Report titled "DraftKings: A $21 Billion SPAC Betting It Can Hide Its Black Market Operations," published on June 15, 2021 and attached to the SAC as Exhibit A
Individual Defendants	Robins, Park, Meckenzie, Sagansky, and Baker
Lead Plaintiff or Plaintiff	Lead Plaintiff Walter Marino
Meckenzie	Defendant Shalom Meckenzie, SBTech founder, Old DK director, and DK Director
MTD or Motion	Defendants' Memorandum of Law in Support of Their Motion to Dismiss the SAC (ECF No. 65)
OFAC	The Office of Foreign Assets Control of the U.S. Department of the Treasury

Abbreviation	Description
Old DK	Legacy DraftKings, a U.S.-based fantasy sports and sports betting company
Oregon	The Oregon State Lottery and/or the Oregon State Police Gaming Enforcement Division
Oregon Report or Or. Rpt.	Oregon State Police Gaming Enforcement Division's Initial Vendor Background Investigation, dated May 1, 2019, discussed in the Hindenburg Report, and attached hereto as Exhibit 1
Park	Defendant Jason K. Park, DK's CFO
PASPA	The Professional and Amateur Sports Protection Act passed by Congress in 1992, 28 U.S.C. ch. 178 § 3701 *et seq*
PSLRA	Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4 *et seq*.
Robins	Defendant Jason D. Robins, DK's CEO and Chairman of the Board
Rule 9(b)	Federal Rule of Civil Procedure 9(b)
Rule 10b-5	17 C.F.R. §240.10b-5
Rule 12(b)(6)	Federal Rule of Civil Procedure 12(b)(6)
SAC	Second Amended Complaint for Violations of the Federal Securities Laws, filed on April 5, 2022 (ECF No. 62), referenced as "¶"
Sagansky	Defendant Jeff Sagansky, DEAC's CEO and Chairman
SBT or SBTech	SBTech (Global) Limited
SCOTUS	U.S. Supreme Court
SEC	U.S. Securities & Exchange Commission
Section 10(b)	Section 10(b) of the Exchange Act
Section 20(a)	Section 20(a) of the Exchange Act
Sloan	Harry Evans Sloan, DEAC's founder
SPAC	Special Purpose Acquisition Company

I. INTRODUCTION

DraftKings began as DEAC, a SPAC or "blank check" company. By definition, its initial investors did not know anything about the business in which they were investing besides its management team. DEAC's founders told investors they would merge with a successful business in the future, and investors trusted the founders to do so. Investors eagerly awaited the details.

Those details were introduced to investors seven months later in the BCA. The BCA explained that investors' blank check would be used to merge with Old DK, a U.S.-based fantasy sports and sports-betting company, and SBT, a Bulgaria-based gambling-software company. The BCA contained statements by SBT explaining its business and representing, *inter alia*, that its clients were not using SBT's software in contravention of gaming laws. SBT touted "50+ partners in 20+ regulated markets and jurisdictions." SBT further represented that since 2016, neither it nor its subsidiaries conducted, directly or indirectly, any business with individuals who are located in any country that is subject to OFAC sanctions. Defendants wanted investors to know this information, so they filed the BCA with the SEC the next day for investors. Defendants made other statements during the Class Period attributing SBT's revenue growth to new customers in Asia.

Defendants' statements in the BCA and other SEC filings were materially false and misleading. As disclosed by Hindenburg, a research firm whose reports have been credited by numerous courts and governmental agencies, software provided by SBT – through its "front" entity BTi – was used by clients in at least six countries considered black markets for gambling, *i.e.*, countries where gambling is both prohibited by law and the law is enforced.

According to Hindenburg, SBT has a long and ongoing record of operating in black markets. However, after SCOTUS agreed to review the federal law banning sports gambling in 2017 (which it struck down in 2018), SBT sought to conceal its business activity in Asian countries where gambling

is illegal so that it would not harm its potential entry into the U.S. market. To achieve that end, SBT – owned by defendant Meckenzie, a director of Old DK and DK – transferred this activity to BTi.

Despite this attempt to distance SBT from black-market gambling operations, the separation was one of form, not substance. BTi was set up 4.5 miles away from SBT's office in Sofia, Bulgaria and 50 SBT employees were shifted across town to BTi. The relationship between SBT and BTi was so close that even BTi's CEO believed that he worked for SBT: he announced on LinkedIn that he was looking to hire employees for ***SBT*** around the time that BTi was formed. The muddled relationship is even visible through customer communications. For example, after BTi launched, it was advertised in Asian markets as being SBT.

Half of SBT's revenue continues to derive from black markets, based on Hindenburg's analysis of SEC filings, conversations with former employees, and supporting documents. Thus, SBT's efforts to conceal its black-market operations allowed SBT, and later DK, to continue profiting from the same markets. Meanwhile, DK insiders sold $1.5 billion in stock during the Class Period, with Meckenzie leading the way – having personally sold more than $600 million in shares.

Hindenburg's research is based on myriad credible, verifiable sources of information: back-end web infrastructure at illicit international gaming websites, SEC & international filings, LinkedIn research, and conversations with multiple former SBT employees. The MTD focuses exclusively on Hindenburg's conversations with former employees. But it utterly ignores the detailed facts derived from Hindenburg's other sources, which corroborate the former employees' statements. Defendants also attempt to distance themselves from their statements in the BCA by claiming they were not meant to be relied upon by investors, even though such statements were investors' first look at the subject of their investment. Defendants are wrong on the facts and the law. Their other arguments concerning falsity, scienter, and loss causation also fail. Accordingly, the MTD should be denied.

II. STATEMENT OF FACTS

A. The Business Combination Merged DEAC, Old DK, and SBT

On March 27, 2019, DEAC was formed as a SPAC for the purpose of effecting a merger or business combination. ¶33. A SPAC's management team typically has 18-24 months to identify a target company. ¶28. A target company cannot be identified before the SPAC IPO is completed. *Id*. Common shareholders of the SPAC have voting rights to approve or reject the proposed business combination. ¶29. Thus, when the management team identifies a target, a merger proxy statement must be distributed to all SPAC shareholders, which includes the target company's audited financials and the terms of the proposed business combination. SPAC shareholders depend on management to provide accurate information about any contemplated transactions. *Id*. On May 14, 2019, DEAC had its IPO, and on July 25, 2019, began to trade publicly. ¶34.

Old DK was founded in 2011 as a daily fantasy sports operator. ¶38. SBT was incorporated in 2007 under the laws of Gibraltar. ¶39. SBT is headquartered in the Isle of Man and its 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. *Id*. Before the Business Combination, Meckenzie was the principal owner of SBT. *Id.* SBT had a pivotal role in the Business Combination: it was the only positive contributor of operating income, accounted for 25% of DK's revenue, and helped stabilize the offering for the market. ¶42. Total consideration paid for SBT was $975 million, or 21% of the total merger consideration. *Id*.

In June 2019, DEAC's founder Sloan spoke with Robins, Old DK's CEO, about a potential business combination. ¶37. Robins revealed that Old DK was pursuing an acquisition of SBT; Old DK and its financial advisors had already performed a significant amount of due diligence on SBT, including discussions with SBT's CEO and members of SBT's management, and had visited SBT's operations in Bulgaria. ¶183. Meckenzie was a Director of Old DK at that time, and had been

serving in that capacity since December 2013. *Id.* The first meeting to discuss a combination of DEAC, Old DK, and SBT happened between Sloan, Robins, and Meckenzie on June 15, 2019. ¶68.

The BCA was signed on December 22, 2019 by Old DK, SBT, Meckenzie, DEAC, and two DEAC-created entities for purposes of the merger. ¶¶3, 102. The next day, DEAC filed the BCA with the SEC. ¶100. The BCA contained representations and warranties by the above parties. SBT specifically warranted that its "Clients are not using, and the Clients are not permitting the use by others, of the SBT Software in contravention of Laws related to gaming relevant to SBT, its Subsidiaries or the Clients[.]" ¶105. SBT also touted "50+ partners in 20+ regulated markets and jurisdictions," and listed 15 jurisdictions. ¶100. SBT further represented that since January 1, 2016, neither it nor its subsidiaries conducted, directly or indirectly, any business with individuals who are located in any country that is subject to OFAC sanctions. ¶103.

On April 23, 2020, DEAC's shareholders voted in favor of the business combination at a special meeting of shareholders. ¶41. Old DK and SBTech became wholly owned subsidiaries of the Company as a result of the transaction. *Id*.

Over the course of the Class Period, Defendants made additional statements to investors concerning countries where SBT operated (¶¶107, 117, 119, 122, 125, 131), and explained that SBT's revenue growth was mainly due to additions of new customers in Asia. ¶¶108, 113-114, 136.

B. SBT Created an Undisclosed Front Entity to Continue Its Operations in Black Markets After Entering the U.S. Market

On June 15, 2021, Hindenburg published the Report, alleging that Old DK's merger with SBT exposed the Company to dealings in black-market gambling. ¶50. Based on reliable sources, Hindenburg demonstrated that SBT has a long and ongoing record of operating in black markets. *Id.*

SBT's marketing material shows it had an expansive Asia-facing business that accepted payment in currencies where gambling was clearly illegal as early as 2014. ¶¶43, 53. SBT's Asia-

facing business was being run by its head of international business development, Tom Light. ¶¶55-56. According to the Report, a former SBT employee described Light as Meckenzie's "right hand man." ¶55. According to a former business partner of SBT and based on the events described herein, the impetus for SBT's creation of a front company to sell its software in black markets was SCOTUS's decision to review the constitutionality of PASPA, which raised the prospect of legalized sports gambling in the U.S.[1] *See, e.g.*, ¶60.

On June 27, 2017, SCOTUS agreed to review PASPA. ¶57. According to Internet archives, SBT's website removed its advertisement for Asian solutions sometime in 2017. ¶58. On December 4, 2017, oral argument occurred, and most legal experts observing the arguments agreed that PASPA would likely be repealed. ¶59. Shortly after the oral argument, on March 19, 2018, SBT announced that Light was leaving to create a "new blockchain and gambling venture." ¶¶55, 60. The venture was unnamed in the press release, but Maltese and Bulgarian corporate records show that, days later, Light began creating an entity called BTi. ¶60.[2] On May 14, 2018, PASPA was struck down, paving the way for state-sanctioned sports betting. ¶66.

The SAC, through several sources, pleads that SBT and BTi are one and the same. ¶6. BTi was set up across town from SBT's office in Sofia, per Bulgarian corporate records. ¶60. Approximately 50 SBT employees were shifted to BTi, per Bulgarian employment records and multiple LinkedIn profiles showing employees transitioning from SBT to BTi in mid-2018. ¶67. The entities were placed under the control of relatives or trusted confidantes and run by many of the same staff, according to a former business partner of SBT. ¶¶60, 83. All of BTi's business comes from SBT, according to a former employee. ¶73. And one former employee who served in a

[1] Congress passed PASPA in 1992, outlawing betting on amateur or professional sports except in four states that already had operations. ¶57.

[2] Adding to the sense of suspicious timing, two days after the first meeting to discuss a combination of Old DK, SBT, and DEAC, BTi changed its name to CoreTech, per Bulgarian corporate records. ¶68.

product development role stated that BTi was a front for SBT's illegal or unregulated markets – BTi acted as a customer of SBT, which invoiced BTi, in an apparent effort to put a layer of legal separation between SBT and its black-market end customers. ¶60.

SBT and BTi's relationship was intertwined and many BTi employees thought they worked for SBT. This includes ***BTi's own CEO*** Amir Vaknin,[3] who announced on LinkedIn that he was hiring employees for ***SBT*** around the time that BTi was formed, despite never working for SBT, according to his LinkedIn profile. ¶¶6, 69-70. Other employees were under the impression that BTi was a direct affiliate or subsidiary of SBT, according to their LinkedIn profiles or resumes.[4] ¶70.

The muddled relationship is also apparent through customer communications. After BTi launched, it was advertised in Asian markets as being SBT. An Asian white-label provider named GamingSoft described BTi as being founded in 2007 (the year SBT was founded) and ran SBT's commercial to describe BTi's services, as per GamingSoft's website. Another betting review site used BTi and SBT interchangeably. ¶71. Hindenburg also reported: "In a somewhat odd instance, we identified a site operated under a different domain that claimed to be BTi/CoreTech and identified the company as being part of SBTech Group[.]" ¶72. Hindenburg "reached out to BTi/CoreTech to ask about the site and were told it was 'an old copy of ours' and a 'fake' that they had nothing to do with. We asked how it could be both a copy and a fake. Within roughly an hour of our inquiry to BTi/CoreTech, the site was completely deleted." *Id*.

C. SBT, Through BTi, Did Business in Black Markets

The SAC adequately alleges that SBT, through BTi, did business in black markets.

[3] Vaknin was formerly an executive of a 'binary options' gambling firm raided by the FBI and subsequently charged by the SEC for deceiving U.S. investors out of over $100 million. ¶¶50, 61-65.

[4] A former BTi developer, for example, stated in his online resume that BTi is an SBT company. Another online resume shows a senior employee working concurrently as Head of Bulgaria operations at SBT and Finance Director at BTi. Yet another LinkedIn resume shows an employee who claims to have worked at both companies concurrently from July to November 2018. One online resume shows a Web Content Manager working at both companies simultaneously from 2018 through the present. And the online resume of CoreTech Bulgaria's Chief Operations Officer shows that he worked as the "Head of Delivery R and D" at CoreTech Bulgaria and the "Delivery Manager R and D" at SBT. ¶70.

According to former employees, SBT collected between 10-30% of its clients' revenue, but black-market operators were charged a higher fee due to the heightened risk of operating in these jurisdictions. ¶52. A gambling black market is a jurisdiction: (a) that has laws prohibiting online gambling; and (b) where governmental authorities have taken affirmative, concrete actions to actively enforce those laws or have issued unequivocal official pronouncements that online gaming is not legal in the jurisdiction. ¶45. Conversely, a "grey market" is a jurisdiction whose: (a) laws do not specifically prohibit or permit internet gaming and/or internet sports betting; or (b) laws do specifically prohibit internet gaming and/or internet sports betting, but governmental authorities in that jurisdiction have not, or had not at the relevant time: (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. ¶48.

Hindenburg identified numerous BTi clients located in black-market jurisdictions through searches on social media and back-end web infrastructure. ¶¶50, 75. The SAC alleges that the following countries in which SBT, through BTi, did business are black markets for gambling: Iran (¶¶150-153); China (¶¶154-162); Vietnam (¶¶163-167); Indonesia (¶¶168-169); Malaysia (¶¶170-171); and Thailand (¶¶172-173).

According to a former employee, China and Southeast Asia are the two biggest markets for BTi. ¶73.[5] Although SBT claimed to Oregon that its customer 10Bet did not derive revenue from China using SBT's software, Hindenburg found multiple Chinese-facing 10Bet sites where backend

[5] BTi's sportsbook is advertised through a site linked to a recent raid on an alleged illegal operator in Thailand. Hindenburg found BTi's sportsbook running on a Betway-branded gaming site targeting Thai and Chinese players. ¶76. The Thailand-facing Betway-branded operator displays BTi's logo on its website, and its backend web infrastructure makes multiple references to BTi. *Id.* In February 2021, Thai authorities raided an alleged illegal gambling operation; the operators administered four websites facilitating Thai gambling, including a site called "betway88." *Id.*

In addition, 12Bet – an Asia-focused site tied to a triad gang kingpin, at the center of a Swiss money-laundering investigation, and recently linked to a police raid in Vietnam – advertises its use of BTi technology and displayed open communications with BTi's site, as shown in the developer tools depicted in the Report. ¶77. Gaming site Fun88, linked to an illegal online gaming raid in Vietnam, also advertises its use of BTi's platform. ¶78.

web infrastructure demonstrates SBT's involvement. ¶¶79-83. Indeed, 10Bet was actually founded and run by Meckenzie since its inception, according to UK corporate records. ¶83. Meckenzie stepped down as a director in 2018, then transferred the rights and everything related to 10Bet's brand to an entity owned by Water Tree Limited, whose sole owner is Meckenzie's brother, per a former employee and DK's SEC filings. *Id.* The relationship is ongoing, per DK's SEC filings. *Id.*

SBT also operated in Iran for years. ¶¶85-87. Despite its statement in the BCA that, since 2016, SBT did not have any dealings with anyone in a country that is subject to "any of the sanctions programs of the [U.S.] administered by OFAC," which includes Iran, (¶¶103-104), SBT told Oregon that in 2018, it "became aware one of SBTech's contracted B2B distributors accepted wagers from one of the said distributor's end use operators in Iran." ¶86. Moreover, a "former employee estimated that SBTech had done business in Iran for ***4-5 years***, but later dispensed with the business around early 2019 when facing scrutiny around the deal with the Oregon state lottery." ¶87.[6]

Hindenburg found subdomains for sports betting sites linked to more than 25 operators who appear to be targeting black markets, based on the languages supported, including China, Vietnam, Thailand, Indonesia, and Korea. ¶89. Most sites had BTi branding, along with source code that shared the same labeling system as SBT's. Hindenburg accessed each subdomain using a VPN through jurisdictions like Thailand, China, and Vietnam. *Id.* Hindenburg also spoke with former employees who said SBT operated in Vietnam, Thailand, and Malaysia. ¶54.

D. The Truth Begins to Emerge

On June 15, 2021, Hindenburg published the Report, and DK's stock priced declined 4.17% in response. ¶143. DK's reaction to the Report is telling because it implies that the Report is true:

> This report is written by someone who is short on DraftKings stock with an incentive to drive down the share price. Our business combination with SBTech was completed in 2020. ***We conducted a thorough review of their business practices and we were comfortable with***

[6] Unless otherwise indicated, emphasis is added and internal quotations and citations are omitted.

the findings. We do not comment on speculation or allegations made by former SBTech employees. ¶144.

A writer for *The Motley Fool* investment website wrote that DK's response raises more questions than answers:

> Rather than a definitive denial that Hindenburg's report is true, it instead hints that DraftKings management investigated those "business practices" and doesn't believe they will materially impact its operations. That's hardly a stinging rebuke. . . . To be honest, I'd have preferred DraftKings issue a blanket denial of the allegations. I think the nuanced response leaves room for believing the veracity of what Hindenburg said could actually withstand scrutiny. ¶145.

On August 6, 2021, DK disclosed that it received a subpoena from the SEC on July 9, 2021 for documents concerning certain of the allegations raised in the Report. ¶146.

III. ARGUMENT

On a Rule 12(b)(6) motion, a Court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007). "[F]act-specific question[s] cannot be resolved on the pleadings." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). To state a Section 10(b) claim, a plaintiff must allege: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011). Securities fraud actions are subject to the pleading requirements of the PSLRA, 15 U.S.C. §78u-4, and Fed. R. Civ. P. 9(b).

A. The SAC Adequately Alleges Material Misstatements and Omissions

Plaintiff has adequately alleged the falsity of Defendants' statements and material omissions. A plaintiff need not plead "detailed evidentiary matter," *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001), but merely sufficient facts "to support a reasonable belief" that defendants'

statements were materially false or misleading. *Novak v. Kasaks*, 216 F.3d 300, 314 n.1 (2d Cir. 2000). Whether a statement is misleading is "evaluated not only by 'literal truth,' but by 'context and manner of presentation.'" *Singh v. Cigna Corp.*, 918 F.3d 57, 63 (2d Cir. 2019).

1. The SAC Adequately Alleges that BTi Was a Front Entity for SBT

The SAC adequately alleges that Meckenzie formed BTi as a front for SBT to continue doing business in black markets. *See supra* at 4-6. Defendants argue that the SAC "does not contain any 'independent [well-pled] factual allegations' that support or in any way corroborate" the Report. MTD at 9. Defendants ignore the particularized facts. Courts will credit short-seller reports where "the allegations in the complaint, taken as a whole, state a claim. And where there is a basis to view the short seller's factual allegations as reliable as opposed to fabricated based on self-interest—for example, where facts are cited that tend to substantiate these allegations or reveal the basis for the short-seller's factual assertions—those allegations are more apt to be viewed as reliable." *In re Hebron Tech. Sec. Litig.*, 2021 WL 4341500, at *13 (S.D.N.Y. Sept. 22, 2021). Where a short seller relies on anonymous sources, courts have sustained complaints based on "well-pled independent and particularized facts [that] corroborate those attributed to anonymous sources[.]" *Long Miao v. Fanhua*, 442 F. Supp. 3d 774, 801 (S.D.N.Y. 2020). The Report and the SAC satisfy this standard.

While Hindenburg relied on unidentified former SBT employees for certain facts, the bulk of the Report is based on additional, verified sources, specifically: (1) SEC filings by DK; (2) LinkedIn profiles; (3) back-end infrastructure at illicit international gaming websites; (4) internet archives of SBT's website; (5) Maltese, Bulgarian, and UK corporate records; (6) Bulgarian employment records; (7) websites of SBT customers; (8) a betting review website; (9) a site that claimed to be BTi; and (10) a report investigating SBT's background by Oregon. Defendants, however, do not challenge these additional factual sources at all, thereby conceding their veracity at this stage. *See*

Thomas v. Roach, 165 F.3d 137, 145 (2d Cir. 1999).

Moreover, these additional sources corroborate the former employees' statements, permitting Plaintiff to rely on those statements.[7] For example, the statement by a former SBT business partner that the prospect of doing business in the U.S. was the trigger for Meckenzie to spin out certain of his gambling operations to at least two separate entities (¶60) is corroborated by the timing described above. *Supra* at 5. The same source's statement that the entities were placed under the control of relatives or trusted confidantes and run by many of the same staff (¶60) is corroborated by allegations concerning Tom Light and Meckenzie's brother, along with numerous LinkedIn profile pages. ¶¶60, 83; *supra* at 5-6. Another former employee's statement that SBT had done business in Iran for 4-5 years is corroborated by SBT's admission to Oregon that in 2018, SBT became aware that one of its contracted distributors accepted wagers from an end use operator in Iran. ¶86.[8]

In addition, Hindenburg itself is a credible source. Numerous courts have credited Hindenburg's research in securities-fraud cases.[9] Hindenburg has also written short-selling reports about companies that have been investigated and substantiated by federal authorities. ¶50 n.11. Further, DK's "nuanced response" to the Report "leaves room for believing the veracity of what Hindenburg said could actually withstand scrutiny." ¶145. And the fact that the SEC is conducting

[7] Defendants claim Plaintiff has "no clue" of the truth of the Report's allegations. MTD at 6. Defendants mischaracterize what it was that Plaintiff was unable to confirm with Hindenburg itself; they imply that it was everything in the Report, but it was only the former employees' statements. *See* ¶51 n.13. In fact, Plaintiff confirmed the well-sourced facts in the Report, which are highly detailed and based on verifiable sources.

[8] Because of the detailed, particularized facts contained in the Report, *Long Miao* is readily distinguishable. In *Long Miao*, unlike here, the complaint did "no more than recapitulate the [short-seller report's] characterization of purported interviews with anonymous sources," and the complaint did "not allege any independent corroborative facts[.]" 442 F. Supp. 3d at 802. Although Plaintiff did not speak with the former employees interviewed by Hindenburg, that is not for lack of effort. *Compare* ¶51 n.13 (describing Plaintiff's attempts to speak with Hindenburg's founder) *with Long Miao*, 442 F. Supp. 3d at 804 ("plaintiff's counsel in this case appear to have done nothing whatsoever to confirm the identities or statements of the confidential sources cited in the JCap Report.").

[9] *See, e.g.*, *Bond v. Clover Health Invs., Corp.*, 2022 WL 602432, at *16-*18 (M.D. Tenn. Feb. 28, 2022); *Behrendsen v. Yangtze River Port & Logistics Ltd.*, 2021 WL 2646353, at *1 (E.D.N.Y. June 28, 2021); *Hunt v. Bloom Energy Corp.*, 2021 WL 4461171, at *2 (N.D. Cal. Sept. 29, 2021); *Garcia v. J2 Glob., Inc.*, 2021 WL 1558331, at *1 (C.D. Cal. Mar. 5, 2021); *In re Eros Int'l PLC Sec. Litig.*, 2021 WL 1560728 (D.N.J. Apr. 20, 2021); *In re Aphria, Inc. Sec. Litig.*, 2020 WL 5819548, at *1 (S.D.N.Y. Sept. 30, 2020).

an investigation concerning the allegations raised in the Report adds credibility to the Report. ¶146.

2. The SAC Adequately Alleges Black-Market Jurisdictions

For each of the jurisdictions discussed in the Report, the SAC adequately alleges that: (1) online gambling is prohibited; and (2) the law is enforced. ¶¶149-173. Defendants cite no facts to the contrary.[10] These jurisdictions fail DK's own definition of "Grey Market" on its face. ¶48.

On May 1, 2019, Oregon issued a report stating that China was a grey market.[11] That Oregon may have viewed China as a grey market more than six months prior to the start of the Class Period says nothing about the enforcement landscape in China at the time the Class Period began.[12] Importantly, the SAC pleads facts showing that in 2019, China began an unprecedented three-year plan to crackdown on online gambling. ¶159.[13] The SAC raises a reasonable inference that at the time the Class Period began on December 23, 2019, China had taken affirmative, concrete actions to

[10] Defendants complain about Plaintiff's changes to the SAC. *See* MTD at 1-2. The SAC alleges that SBT exposed DK to dealings in "black market gambling," as opposed to "black and/or grey market gambling." *Compare, e.g.*, SAC ¶8 *with* AC ¶8. Plaintiff made this change upon review of Defendants' motion to dismiss the AC, in which Defendants pointed to the Proxy warning that DK's business was subject to "a variety of U.S. and foreign laws, many of which are unsettled and still developing[.]" ECF No. 60 at 5. Such a change is precisely the reason the Court provided an opportunity to amend. *See* ECF No. 49 at 2. This edit did not diminish Plaintiff's allegations in both complaints that six Asian jurisdictions in which SBT did business are black markets, and it certainly did not "contradict[] the central thesis" of the Report. MTD at 10. The SAC adds numerous facts buttressing those allegations. In any case, "[i]t is well established that an amended complaint ordinarily supercedes the original, and renders it of no legal effect." *Dluhos v. Floating & Abandoned Vessel, Known as "New York,"* 162 F.3d 63, 68 (2d Cir. 1998).

[11] The Oregon Report is attached hereto as Ex. 1. Because the Oregon Report is discussed in the Hindenburg Report, the Court can consider it on this motion. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

[12] Defendants argue that Hindenburg "begrudgingly bur[ies] the lede in a footnote" by stating, "At the time, China was classified as a 'grey' market by the [U.S.] regulator." MTD at 6. However, Defendants fail to quote the critical final sentence of the same footnote: "Since then, China has arrested over 11,500 people for gaming offenses." ¶84.

[13] The SAC explains that online gambling is illegal in China and that the Chinese government enforces that ban. ¶¶154-162. Under Article 303 of the Criminal Law of the PRC, examples of prohibited activities include a person who "establishes online gambling websites" or "acts as a conduit for online gambling websites, and accepts bets on behalf of online gambling websites." ¶156. The Chinese government has been cracking down on gambling since at least 2004, but dramatically stepped up its enforcement in 2019. That year, Chinese authorities launched a three-year campaign against online betting codenamed "Operation Chain Break." ¶159. The impetus for the crackdown is to prevent massive capital flight out of China. *Id.* Illegal betting represents approximately a fifth or more of total capital outflows from China. "Operation Chain Break is broader in scope compared to previous anti-illegal betting campaigns, targeting overseas entities and countries, and involves various government stakeholders[.]" *Id.* In 2019, Chinese law enforcement investigated more than 7,200 illegal betting cases and arrested more than 25,000 people. ¶160. China has also notified foreign governments that it will not tolerate solicitation of its citizens for online gambling from outside China. ¶162. Indeed, Chinese President Xi Jinping raised the issue directly with Philippine President Rodrigo Duterte during a meeting in August 2019. *Id.* Accordingly, China is a black market for gambling.

actively enforce its laws that prohibit online gaming – actions that may not have been apparent to Oregon on May 1, 2019, but were certainly known, or recklessly disregarded, at the end of 2019 to someone (like Defendants) making public statements to investors on the matter. *See Gauquie v. Albany Molecular Rsch., Inc.*, 2016 WL 4007591, at *2 (E.D.N.Y. July 26, 2016) ("Actively communicating with the public about [an] issue demonstrates defendants' sensitivity to it" and supports the inference that defendants had knowledge of information contradicting such statements).

The Oregon Report belies the speciousness of Defendants' position. It quotes a letter from SBT's CEO explaining SBT's understanding, purportedly based on legal advice regarding the legal status of online gambling in China, that:

> the Chinese laws prohibiting gambling do not apply to the provision of online gambling services originating from outside China's territorial borders (i.e. from operators supplying inward gambling services on a remote point of supply basis with no local nexus). In other words, as it pertains to the remote inward supply of gambling services form [*sic*] outside China, China is a "grey" jurisdiction, and such activities are not specifically outlawed.

Or. Rpt. at 10. This view of China's laws regarding the legality of providing online gambling services from outside China into China is flatly contradicted by the SAC's allegations concerning China's implementation in 2019 of Operation Chain Break, which "target[s] ***overseas*** entities." ¶159. Indeed, "the key reason" for Operation Chain Break's campaign against online betting was "fear over unregulated capital flight ***out of China***[.]" *Id*. Also, the 11,500 people arrested in China for online gambling were involved in ***cross-border*** gambling. ¶160; *see also* ¶162 ("In 2019 and 2020, the Chinese government pressured the Philippines and Cambodia to stop taking online bets from players in China."). The SAC adequately alleges that the online gambling legal landscape in China changed when the Class Period began.

Defendants argue that "the unsupported snippets Plaintiff extracts" from the numerous cited sources "do not at all establish that any specific alleged conduct is flatly proscribed." MTD at 13.

To the contrary, Plaintiff's detailed sources demonstrate that these jurisdictions are black markets, and Defendants' half-hearted attempts to refute them fail.[14]

3. The SAC Adequately Alleges Material Misstatements & Omissions

Representations about clients' business activities in black markets. In the BCA, SBT represented that "SBT and each of its Subsidiaries actively monitors the use of the SBT Software by the Clients, and to SBT's Knowledge . . . the Clients are not using, and the Clients are not permitting the use by others, of the SBT Software in contravention of Laws related to gaming relevant to SBT, its Subsidiaries or the Clients (as applicable)." ¶105.[15] SBT breached this representation because its clients were using SBT software in black markets, and Meckenzie knew about it. *See supra* at 4-8, 10-11; *infra* at 21-23.[16] SBT also represented that since January 1, 2016, neither it nor its subsidiaries conducted, directly or indirectly, any business with individuals who are located in any country that is subject to OFAC sanctions, which includes Iran. ¶¶103-104. SBT breached this representation because, as SBT admitted, in 2018 it "became aware one of [its] contracted B2B distributors accepted wagers from one of the said distributor's end use operators in Iran." ¶86. Moreover, a "former employee estimated that SBTech had done business in Iran for 4-5 years." ¶87.

Statements in the BCA are actionable. Defendants argue that 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

[14] Defendants focus on the pending nature of a bill in Iran that would punish online gambling by death (MTD at 13 n.4), but they cannot seriously contend that SBT believed that Iran was a grey market for online gambling. Indeed, SBT told Oregon that it considers Iran a black market jurisdiction. *See* Or. Rpt. at 9. Moreover, all gambling has been strictly forbidden since the Islamic Republic was formed in 1979, and strict prohibitions on online gambling are enforced there. ¶¶150-152. In Vietnam, online casino operators can be sentenced to two years in prison. ¶163. In Indonesia, "online gambling is definitively illegal." ¶168. In Malaysia, "all forms of . . . online gambling are illegal." ¶170. And in Thailand, the gambling laws "remain among the strictest on earth." ¶173.

[15] Per the BCA, "Clients" means "the operators and other persons who have at any time licensed the SBT Software directly from SBT or any of its Subsidiaries." "SBT Software" means "the Software and/or any other products or services licensed by SBT or any of its Subsidiaries." ECF No. 66-5 at 33.

[16] Defendants dispute that SBT "operated" in black markets because they are a licensor of software and not an operator of any gaming business. MTD at 10, 16, 18. Yet SBT itself referenced its own "operations" in different jurisdictions. *See* ¶¶85; 105. In actuality, "operate" is simply another word for "doing business."

representations were not statements of fact nor should be relied upon as such." MTD at 11.[17] These constitute statements by DK, however, since DK published them to investors in an SEC filing. *See Sec. & Exch. Comm'n Release Notice*, Release No. 51283, 2005 WL 1074830, at *2 (Mar. 1, 2005) ("*Titan Report*") (inclusion of a representation "in a disclosure document filed with the Commission, whether by incorporation by reference or other inclusion, constitutes a disclosure to investors"). The BCA was filed with the SEC as an exhibit to a Form 8-K on the day the Company first announced the Business Combination – the day after the BCA was signed.[18] The point of doing so was to inform investors of the much-anticipated Business Combination. The context of the BCA is crucial to evaluating the importance that investors placed on the BCA: investors had written DEAC a blank check, and they were anticipating the BCA as the explanation of where their money was going to be put to use. The BCA's ultimate purpose was to convince shareholders to vote in favor of the Business Combination. Defendants cannot disclaim investors' reliance on the very same information. *See Glazer Cap. Mgmt., L.P. v. Magistri*, 549 F.3d 736, 741 (9th Cir. 2008) (describing merger as "a very significant event for the company," one that should have led it to "expect[ ] intense investor interest in the details of the merger." "[T]hat the merger agreement was a private document and included reference to a non-public disclosure schedule would not, as a matter of law, prevent a reasonable investor from relying on its terms.").

In *In re Bank of America Corp. Securities, Derivative, & ERISA Litigation*, 757 F. Supp. 2d 260 (S.D.N.Y. 2010), the court rejected an argument similar to Defendants' argument here that statements in a merger agreement constituted a private allocation of risk between counterparties:

[17] Defendants fail to include the final sentence of the paragraph of the BCA that they quote in their MTD, which stated, "Instead, such provisions or descriptions should be read only in conjunction with the other information provided elsewhere in this document or incorporated by reference[.]" ECF No. 66-2, Proxy at 112. Thus, Defendants did not tell investors to ***disregard*** these representations, but rather to read them together with the other information provided.

[18] The BCA includes language that "information concerning the subject matter of the representations and warranties . . . may have changed since the date of the BCA." MTD at 11. Yet the BCA was publicly filed the day after it was signed. Defendants cannot seriously contend that SBT's representations became untrue overnight.

> For similar reasons, the defendants' argument that the Merger Agreement merely constituted a private allocation of risk between BofA and Merrill is unavailing. According to the Joint Proxy, the Merger Agreement is "the legal document governing the merger," and shareholders were advised in the Joint Proxy to "read the merger agreement carefully and in its entirety. . . ." (Joint Proxy at 76.) A reasonable investor would have understood the Merger Agreement to constitute a statement of fact.

Id. at 298 (citing *Titan Report*, 2005 WL 1074830, at *2).[19]

> The *Titan Report*, reflecting the SEC's view, is directly on-point:
>
> In this case, ***the shareholders of Titan were not beneficiaries of the FCPA Representation as it appeared in the Merger Agreement. However, the inclusion of the FCPA Representation in a disclosure document filed with the Commission, whether by incorporation by reference or other inclusion, constitutes a disclosure to investors***. Depending on the context in which the disclosure is made (including the significance of the representation or other contractual provision and the total mix of information available to the investor), a reasonable investor could conclude that the statements made in the representation describe the actual state of affairs and the information could be material.

2005 WL 1074830, at *2.[20]

Defendants argue that Plaintiff has not alleged that SBT breached the representation because Plaintiff does not argue that U.S. sanctions laws applied to SBT, and has not pled the identity of the SBT sub-licensee that accepted wagers in 2018 from Iran or the customer that placed the wager. MTD at 11-13. This is a red herring; the statements in ¶103 are false because SBT's client(s) did business with an Iranian national(s). The additional information Defendants would have liked Plaintiff to plead is unnecessary because Plaintiff does not – and need not – allege that SBT engaged in illegal conduct; rather, Plaintiff alleges that Defendants failed to disclose their business activities in black markets, which is a material omission. *See City of Sterling Heights Police & Fire Ret. Sys. v. Reckitt Benckiser Grp. PLC*, 2022 WL 596679, at *16 (S.D.N.Y. Feb. 28, 2022) ("Of course, for a

[19] Defendants attempt to distinguish *Bank of America* as involving an issuer's unqualified contractual representation about its own business, and they argue that "no court has held an issuer responsible for a counterparty's representations[.]" MTD at 11 n.3. Defendants mischaracterize the relationship between the parties to the Business Combination. SBT and Old DK were on equal footing in the Business Combination in the sense that they were both merging with the issuer DEAC (a blank check company); SBT was not simply merging into Old DK.

[20] Defendants cite *Jaroslawicz v. M&T Bank Corp*, 2017 WL 1197716, at *5 (D. Del. Mar. 30, 2017), but that case is inapposite because here, unlike in *Jaroslawicz*, investors knew absolutely nothing about the object of their blank-check investment prior to the filing of the BCA.

plaintiff to successfully allege a violation of section 10(b) or Rule 10b-5, the underlying misstatements or omissions need not relate to conduct that was criminal or unlawful. A plaintiff need only allege that the defendant misrepresented or omitted material information and did so with scienter.") (citing *In re Hain Celestial Grp., Inc. Sec. Litig.*, 20 F. 4th 131, 137 (2d Cir. 2021)).[21]

Defendants attempt to distract from the issue of the falsity of their statements and argue that the SAC does not allege that internet gaming laws in the subject jurisdictions have been applied to software providers like SBT, and assert that local gaming laws may only be enforced against local residents. MTD at 14-15. This is irrelevant. The BCA does not reference how the relevant laws might apply to SBT. SBT represented that its clients do not operate in black markets. The crux is that the statements are false and misleading due to the information they omitted, not because SBT violated any laws.[22] Thus, Plaintiff does not (contrary to Defendants' assertion) claim that DK "was obligated to volunteer judgments about the lawfulness of any SBTech conduct." MTD at 2. And their proclamation that none of SBT's conduct "ever has been challenged," *id*., is belied by the SEC's current investigation of DK. ¶146.

Statements concerning black markets in which SBT does business. Defendants made numerous statements about the markets in which SBT does business, but failed to disclose that those markets included six black markets. ¶¶100, 107, 117, 119, 122, 125, 131. Defendants argue that 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." MTD at 12. *First*, the SAC adequately alleged that the

[21] In *Hain Celestial*, the theory of the complaint was that the defendants made statements attributing Hain's high sales volume to strong consumer demand, while omitting to state that increased competition had weakened consumer demand and that Hain's high sales volume was achieved in significant part by the offer of unsustainable channel stuffing incentives. The Second Circuit held that "[t]he success of such a complaint in alleging a violation of clause (b) [of Rule 10b-5] does not depend on whether the alleged channel stuffing practices themselves were fraudulent or otherwise illegal." 20 F.4th at 137.

[22] For this reason, *Gray v. Alpha & Omega Semiconductor Ltd.*, 2021 WL 4429499 (S.D.N.Y. Sept. 27, 2021), and *In re Axis Capital Holdings Ltd., Securities Litigation*, 456 F. Supp. 2d 576 (S.D.N.Y. 2006), are inapposite. *Cf.* MTD at 12, 14-15, 23.

six jurisdictions at issue qualify as black markets. *See supra* at 6-8. *Second*, the SAC adequately alleges that Meckenzie spun out SBT's black-market business to BTi in order to use BTi as SBT's front to continue doing business in black markets. That suffices to raise a strong inference that he viewed those jurisdictions as black markets.[23]

Defendants claim that they "disclosed repeatedly that the majority of SBTech revenues came from grey markets in Asia." MTD at 7-8. However, they did not say the markets in Asia were grey markets; rather, that DK's business was subject to "a variety of U.S. and foreign laws, many of which are unsettled and still developing." MTD at 5.[24] Defendants argue that they fulfilled their obligations by disclosing that SBT's revenues derived substantially from resellers in Asia, and shareholders thereby possessed "all the information necessary . . . to make their own legal judgments about that conduct." *Id.* at 16-17. Not so. There are 48 separate countries in Asia,[25] and investors could not ascertain which of those countries SBT conducted business in. When Defendants announced the Business Combination, they touted that SBT did business "in 20+ regulated markets and jurisdictions," but only listed 15 markets – thereby omitting any black markets. ¶100.[26]

Statements putting the source of the Company's revenue at issue. Defendants put the source of SBT's revenue at issue by attributing revenue growth "mainly [to] additions of new customers in Asia." ¶¶108, 113-115, 136. These statements were materially false and misleading because Defendants put the source of SBT's success at issue without disclosing that its business in

[23] The other Defendants' knowledge that SBT did business in black markets is discussed *infra* at 22-23.

[24] Defendants argue that the risk of changing laws was disclosed. MTD at 5. But at the time the statements were made, the laws were already enacted and being interpreted negatively. *See* ¶¶150-173. Defendants also contend that the Proxy disclosed that gaming regulators may refuse to issue or renew a gaming license based on the past or present activities of DK, SBT, or third parties with whom they have relationships. MTD at 5-6. Yet Defendants failed to disclose that, at the time of the Proxy, they knew about SBT's past and present activities in black markets.

[25] *See How Many Countries Are There In Asia?*, WORLDATLAS, https://www.worldatlas.com/articles/how-many-countries-are-in-asia.html (last visited May 10, 2022). The Court may take judicial notice of this fact because it is "not subject to reasonable dispute[.]" Fed. R. Evid. 201(b).

[26] Defendants also assert that Plaintiff claims that DK "was obligated to speculate about nonexistent future assertions of illegality[.]" MTD at 17. The SAC, however, pleads that SBT was conducting business in black markets ***at the time of the misstatements***. *See supra* at 6-8.

Asian black markets was a key driver of its revenue. "Courts in this district have held that where a company puts at issue the cause of its financial success, it may mislead investors if the company fails to disclose that a material source of its success is the use of improper or illegal business practices." *Reckitt*, 2022 WL 596679, at *15;[27] *see also Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.*, 2022 WL 889158, at *9 (E.D. Pa. Mar. 25, 2022) ("statements that attribute revenues to legitimate business factors put the source of the revenue at issue and thus mak[e] the company's failure to disclose a source of that revenue misleading").[28]

Defendants argue 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." MTD at 15. To be sure, "the securities laws do not impose a general duty to disclose corporate mismanagement or uncharged criminal conduct." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006). But "[w]hen a corporation does make a disclosure—whether it be voluntary or required—there is a duty to make it complete and accurate." *Id.* "In determining whether there is a duty to disclose omitted information, [t]he critical consideration . . . is whether the alleged omissions . . . are sufficiently connected to defendants' existing disclosures to make those public statements misleading." *Diehl v. Omega Protein Corp.*, 339 F. Supp. 3d 153, 165 (S.D.N.Y. 2018). Defendants' omissions are directly connected to their disclosures. For example, Defendants stated, "Organic revenue growth reflected mainly additions of new customers in Asia, as well as growth in Europe and the United States." ¶108. That statement (and others like it) was misleading

[27] Numerous courts in this District have held likewise. *See, e.g., Rosi v. Aclaris Therapeutics, Inc.*, 2021 WL 1177505, at *16 (S.D.N.Y. Mar. 29, 2021); *Gagnon v. Alkermes PLC*, 368 F. Supp. 3d 750, 768 (S.D.N.Y. 2019); *DoubleLine Cap. LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 441-44 (S.D.N.Y. 2018); *In re Mylan N.V. Sec. Litig.*, 2018 WL 1595985, at *6 (S.D.N.Y. Mar. 28, 2018).

[28] Although this line of cases tends to discuss an issuer's failure to disclose illegal conduct, a plaintiff is not required to plead any underlying illegal conduct: "[A]s the case law discussed above demonstrates, it is largely immaterial whether Teva's actions were illegal because Plaintiff does not argue that Teva was required to disclose this scheme merely because it may have been illegal; rather, Plaintiff argues that Teva was required to disclose this scheme *because it is what made Copaxone so successful*." *Teva*, 2022 WL 889158, at *10 (emphasis in original).

because SBT, through BTi, was conducting business with customers in Asian black markets.

Defendants argue that Plaintiff has not pled that DK's revenues were derived from black markets, or that the revenues, if any, from proscribed markets were material. MTD at 16. They ignore the well-pled facts: (i) at the time of the merger, SBT accounted for 25% of DK's revenue and was the only positive contributor of operating income, helping stabilize the offering for the market – demonstrating the materiality of SBT to the Company (¶42); and (ii) "roughly 50% of SBTech's revenue ***continues*** to come from markets where gambling is banned." ¶50.[29] Defendants also contend that Plaintiff has not plausibly alleged that BTi was the unnamed Asian reseller and affiliated with SBT. MTD at 16. Defendants ignore the well-pled allegations: SBT's arrangements with two resellers, BTi and W88, account for over 99% of the revenue it derives from gambling services provided to end users in China. Or. Rpt. at 10-11.[30] Thus, Plaintiff raises a reasonable inference that BTi was the unnamed Asian reseller.[31]

Defendants violated Items 303 & 105. Pursuant to Item 303, DK was required to disclose the impact and/or potential liabilities regarding the known uncertainties and risks associated with SBT's business in black markets. ¶176. As alleged herein, Defendants knew SBT was operating in black markets. *See infra* at 21-24. The omitted material facts alleged herein were not disclosed, so Defendants also violated Item 105. ¶178. Rather than disclosing the risks arising from SBT's operations in black markets (*see* ¶¶46, 92-99), DK used boilerplate risk disclosures that were

[29] In addition, because reputation is crucial for U.S. gambling regulators (¶¶92-98), DK's ongoing black-market business, conducted through BTi, is material to DK because it exposes DK to the risk of losing its critically important gaming licenses. ¶99. Defendants argue that Plaintiff does not allege SBT lacked the referenced licenses to operate in the subject jurisdictions. MTD at 15. By definition, however, black markets do not issue licenses to operate.

[30] *See also* ¶60 (quoting former employee regarding the identity of the reseller: "if it's Asia it will have to be (BTi) . . . it must be through BTi"); ¶73 (according to a former employee, "All CoreTech business comes from SBT").

[31] Plaintiff has also raised a reasonable inference that BTi was, and continues to be, affiliated with SBT. *Supra* at 6, 20. Defendants claim that Plaintiff concedes that BTi "is not a part of SBT[ech]" after a "full separation" in 2018 (citing ¶73), and "all agree" BTi is not and never was (or could have been) an "affiliate" of DraftKings. MTD at 8. But in the same paragraph, Hindenburg quotes a former employee who says "[a]ll CoreTech business comes from SBT." ¶73. As explained above, numerous sources demonstrate that SBT and BTi/CoreTech are the same, or form part of the same, entity. *See supra* at 5-6. At most, Defendants have raised a question of fact that cannot be decided at the pleading stage. *See Anderson News*, 680 F.3d at 185.

themselves materially misleading.[32]

B. The SAC Adequately Alleges Defendants' Scienter

To state a claim under Section 10(b), a complaint must allege facts that, considered holistically and not in isolation, support a strong inference that defendants acted with scienter. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The inference "need not be irrefutable . . . or even the 'most plausible of competing inferences,'" but must merely be "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id*. at 324. Scienter is pled where a complaint alleges facts showing either (1) "motive and opportunity to commit fraud"; or (2) "strong circumstantial evidence of conscious misbehavior or recklessness." *Novak*, 216 F.3d at 307. "Courts routinely impute to the corporation the intent of officers and directors[.]" *In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 265 (S.D.N.Y. 2010).

1. The SAC Pleads Strong Circumstantial Evidence of Conscious Misbehavior

Meckenzie's concerted efforts to conceal SBT's black-market dealings from investors raise a strong inference of his and SBT's scienter. Prior to the Business Combination, Meckenzie was the principal owner of SBT. When Meckenzie realized that sports betting would be legal in the U.S., he shuffled SBT's illicit customer relationships into newly formed front entities to allow SBT to continue deriving revenue from black markets. These entities were placed under the control of Meckenzie's trusted confidant and his brother. *See supra* at 5-8. This constitutes circumstantial evidence of conscious misbehavior sufficient to plead scienter. But Defendants make no attempt to address the facts uniquely demonstrating Meckenzie's scienter.[33]

With respect to SBT's representation about business in Iran since 2016, the Oregon Report

[32] *See* ¶¶111, 129, 136, 138. For example, Defendants disclosed as a risk factor that "SBT relies primarily on one reseller for its Asia revenue. This reseller accounted for approximately 46% of SBT's revenue in the year ended December 31, 2019." ¶111. Defendants did not disclose that the reseller, BTi, did business in black markets.

[33] Defendants argue that Plaintiff cites no internal reports or communications that contradicted Defendants' statements. MTD at 22. Plaintiff, however, is not required to do so because the SAC is replete with allegations of Meckenzie's intentional creation of a front entity to conduct operations in black markets on behalf of SBT.

demonstrates that SBT knew the representation was untrue. *See* Or. Rpt. at 9. SBT admitted that, in 2018, it knew one of its distributors accepted wagers from an operator in Iran. ¶86. SBT also knew, or recklessly disregarded, that its clients were using SBT's software in black markets because: (1) Meckenzie intentionally shifted SBT's black-market clients to BTi; and (2) SBT admittedly undertook "appropriate due diligence on each of its Clients, and requires each of its Clients to conduct appropriate due diligence on their operators, sub-licensees and customers . . . who use the SBT Software." ¶181. SBT also told Oregon that it ensures that its distributors do not operate in illegal markets. ¶182. Thus, as a result of this extensive client due diligence, SBT – and its owner Meckenzie – knew, or recklessly disregarded, that its clients used SBT software in black markets.[34]

SBT's repeated lies to Oregon that 10Bet does not derive revenues from China using SBT's software also contribute to scienter. *See* ¶80 (SBT was "running a massive Chinese operation and BTi was the holding corp. that they had it in, and yes Shalom [Meckenzie] is still taking money out of it"); ¶81 ("Hindenburg found multiple 10Bet China-facing sites that currently contain source code indicating that they are running SBTech software."); ¶83 ("SBTech's disclosure to the Oregon state lottery described 10bet simply as 'a brand' that operated primarily in Europe, suggesting it was like any other independent company. . . . Rather than merely being an independent brand, 10Bet was actually founded and run by . . . Meckenzie since its inception"; Meckenzie transferred control of 10Bet to his brother in 2018). SBT also lied to Oregon about its Iran business: SBT told Oregon it had one instance of dealing with an Iranian national, even though a former employee "estimated that SBTech had done business in Iran for 4-5 years, but later dispensed with the business around early

[34] Old DK conducted extensive due diligence on SBT prior to the Business Combination. *See supra* at 3. This due diligence, coupled with DK's statement in response to the Report that DK "conducted a thorough review of [SBT's] business practices and [was] comfortable with the findings," contribute to a strong inference that Defendants knew about SBT's black-market dealings through the course of their due diligence. ¶¶144-145. These statements by Old DK go far beyond "allegations of the sort that [a defendant] 'would' have learned the truth about a company's fraud through due diligence," *Town of Davie Police Officers Ret. Sys. v. Nat'l Gen. Holdings Corp.*, 2021 WL 5142702, at *2 (2d Cir. Nov. 5, 2021), and instead demonstrate that Defendants actually did learn the truth about SBT's fraud.

2019 when facing scrutiny around the deal with the Oregon state lottery." ¶¶85-87. The Oregon approval was a sham, premised as it was on multiple false statements by SBT.

Holistically, the facts raise a strong inference of Defendants' scienter. After SCOTUS agreed to review the constitutionality of PASPA, Meckenzie understood that gambling would soon become legal in the U.S., so he created a front entity to handle SBT's black-market gambling business. The businesses are inextricably linked to this day. Old DK, led by Robins and Park, was privy to this information because Meckenzie was on Old DK's board of directors since 2013, and DK's statement in response to the Report tacitly confirms the allegations therein, and raises a reasonable inference that DK was comfortable with SBT's black-market business. Sagansky and Baker also knew about these facts based on their due diligence of SBT's clients and DK's statement in response to the Report. In the course of their fraud, Defendants, especially Meckenzie, reaped massive profits from sales of DK stock. Plaintiff's inference of scienter – that Defendants knew, or recklessly disregarded, that they were making misstatements to the market regarding SBT's business and revenues – is at least as compelling as Defendants' implausible explanation. MTD at 24.[35]

2. The SAC Pleads Motive and Opportunity to Commit Fraud

Plaintiff has also adequately alleged scienter via Defendants' motive to commit fraud, as evidenced by massive stock sales by Meckenzie, Robins, Park, and ten other DK insiders, who collectively reaped net profits of $1.49 billion. ¶185. Meckenzie alone profited by more than $600 million, selling 37% of his holdings. *Id.* Meckenzie also transferred more than 19 million of his DK shares to a trust for his spouse and children, paving the way for them to dispose of approximately $1 billion in stock without the same reporting requirements that he would be subject to. ¶186.

[35] Defendants reiterate their specious argument made in relation to falsity that Plaintiff is required 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." MTD at 23. To the contrary, Plaintiff does not allege violation of any laws by SBT – only that SBT did business in black markets, and the failure to disclose those facts rendered their statements misleading. The SAC alleges precisely that. *See supra* at 11-20.

Robins and Park achieved profits of $81 million and $5 million, respectively, from their stock sales during the Class Period, both selling 11% of their holdings. ¶185.[36] Cases pleading far less dramatic insider trading have been held to allege motive. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 365-66 (S.D.N.Y. 2003) ("hundreds of thousands of dollars" in stock sales "plainly satisfied" motive). In *Plumbers & Pipefitters National Pension Fund v. Tableau Software, Inc.*, the court credited the plaintiffs' insider-selling allegations where the defendants each sold between $32.5 million and $170.3 million in shares, and two of the defendants sold 13% and 27% of their holdings. 2019 WL 2360942, at *5 (S.D.N.Y. Mar. 4, 2019).

Defendants argue that they retained a large amount of stock after the Class Period ended. MTD at 20. "However, it is not dispositive that the defendants retained some of their stock, because it is possible that they were attempting to soften their losses without drawing attention to their stock sales. There were plainly substantial stock sales during the class period for a substantial amount of money, stock[] sales that could be characterized as unusual." *Tableau*, 2019 WL 2360942, at *6.[37]

Defendants' insider selling should be considered collectively with the circumstantial allegations of scienter. In *Hain Celestial*, the Second Circuit vacated judgment because the district court "failed . . . to assess the total weight of the circumstantial allegations *together with* the allegations of motive and opportunity." 20 F. 4th at 137-138 (emphasis in original).[38]

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[36] Plaintiff cannot compare Defendants' Class Period sales with sales prior thereto because there were no insider sales prior to the Class Period. There was also a lock-up in the BCA prohibiting insiders from selling stock for six months after the Business Combination. MTD at 20-21.

[37] Defendants argue that shares sold, like here, after a lock-up period ends "cuts against an inference of scienter," MTD at 21 (quoting *City of Omaha Police & Fire Ret. Sys. v. Evoqua Water Tech. Corp.*, 450 F. Supp. 3d 379, 450 (S.D.N.Y. 2020)), but that is only to the extent it suggests a generalized motive. Sales pursuant to a lock-up do not *per se* cut against an inference of scienter; to the contrary, they provide a reason for why the insiders sold when they did which actually supports scienter, *i.e.*, they unloaded massive amounts of shares ***as soon as they were permitted to do so***. Defendants also seek refuge for their stock sales behind 10b5-1 plans. MTD at 21. Defendants' 10b5-1 trading plans, however, were entered into during the Class Period, *see id.*, and "where 10b5-1 trading plans are entered into during the class period, they provide no defense to scienter allegations." *Tableau*, 2019 WL 2360942, at *6.

[38] Defendants argue that Plaintiff "does not establish that each defendant was the speaker of each statement." MTD at 25. Defendants are plainly wrong. ¶¶17-21; 100-141.

C. The SAC Adequately Alleges Loss Causation

Defendants' misconduct was revealed to the market through the Report, which led to an immediate material stock price decline. *See supra* at 8. Defendants argue that the Report did not reveal "a fact previously undisclosed." MTD at 25. But the Report is replete with previously undisclosed facts showing that BTi was a front for SBT's business in black markets. Defendants also perplexingly assert that the Report commented on "historical SBTech activities not at issue in any DraftKings disclosure," *id*., even though the SAC alleges numerous misstatements by DK specifically concerning SBT's activities. *See, e.g.*, ¶¶108, 111, 113-114, 136, 138. Courts have also found loss causation adequately pled based on disclosures contained in short-seller reports.[39] *See, e.g.*, *Lea v. TAL Educ. Grp.*, 837 F. App'x 20, 28 (2d Cir. 2020) (holding that plaintiffs adequately pled loss causation based on a short-seller report that obtained information from interviews with former employees and documents from China because those sources were not "readily accessible to investors"); *Behrendsen*, 2021 WL 2646353, at *15 (holding that "a short seller's report can constitute a corrective disclosure, if the report reveals accurate information about a company that exposes actual misstatements by the company. . . . Moreover, the veracity of the Hindenburg Report is of no consequence at this juncture, as loss causation may be grounded in disclosure couched as opinions, or in other statements that are not verifiably truthful at the time they are made.").[40]

IV. CONCLUSION

For the reasons detailed herein, Defendants' MTD should be denied in its entirety.[41]

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[39] *In re Ideanomics, Inc., Securities Litigation*, 2022 WL 784812 (S.D.N.Y. Mar. 15, 2022), cited by Defendants (MTD at 25), is inapposite because there, the short sellers' revelations simply disclosed that they were "unable to establish" certain facts – which, the court held, did not reveal any facts. *Id*. at *11. Here, on the other hand, the Report revealed previously undisclosed facts to investors about SBT's front entity.

[40] The SAC alleges that the Individual Defendants are control persons. ¶¶214-219. Defendants' sole argument regarding Section 20(a) is that Plaintiff fails to sufficiently plead a primary securities-fraud violation. MTD at 25. But because Plaintiff adequately pleads a primary violation, he has stated a claim under Section 20(a). *See City of Warren Police & Fire Ret. Sys. v. World Wrestling Ent. Inc.*, 477 F. Supp. 3d 123, 138 (S.D.N.Y. 2020).

[41] If the Court finds that the SAC contains deficiencies, Plaintiff respectfully requests leave to amend. *See* Fed. R. Civ. P. 15(a)(2). Granting leave to amend is often appropriate when granting a motion to dismiss for failure to state a claim. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015).

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CERTIFICATE OF SERVICE

I, Alan I. Ellman, hereby certify that on May 10, 2022, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

/s/ Alan I. Ellman
ALAN I. ELLMAN