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

In re EMPIRE STATE BUILDING ASSOCIATES, L.L.C. PARTICIPANTS LITIGATION

Index No. 654456/2013

Part 49 (Sherwood, J.)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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INTRODUCTION

Defendants' motion to dismiss completely ignores the conflict at the heart of the Complaint.[1] One the one hand, the Participants who comprise the Class only owned interests in Empire State Building Associates, L.L.C. ("ESBA"), and therefore were only interested in maximizing the value of that property in connection with any multi-property roll-up and subsequent IPO. On the other hand, the Malkins owned significant and controlling interests in the 17 other (lesser) properties rolled into the REIT along with the Empire State Building ("ESB"). The Malkins therefore stood to make ***$730 million*** in unique and personal benefits by monetizing all of these properties through the IPO. Well-financed real estate investors made a series of premium, all-cash offers for ESBA or the ESB as a stand-alone property, which provided the Participants with the potential to receive as much as $600 million more for their ESBA interests than they stood to receive in the IPO. The Malkins refused to legitimately consider these bids. In short, the Malkins put their own interests in a $730 million payday ahead of their fiduciary obligation to maximize value for the Participants. That is a textbook breach of fiduciary duty.

Unable to meaningfully address the core conflict at issue here, Defendants advance a series of technical (and incorrect) arguments seeking dismissal. Defendants' arguments ignore the Complaint's well-pled allegations, contradict the law, and lack merit. First, Defendants contend that the business judgment rule immunizes them from liability for their misconduct as a matter of law. Defendants' March 7, 2014 Memorandum of Law in Support of Motion to Dismiss the Consolidated Class Action Complaint ("Br.") at 20. New York law unequivocally rejects this argument. Where, as here, a controlling entity proposes a transaction that raises a conflict of interest with other shareholders, the "entire fairness" standard applies and precludes pre-discovery dismissal. *See Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 570 (1984). Even if the entire fairness standard of review did not apply at the outset, which it does, New York law

[1] All references to the Complaint or "¶__" refer to the Consolidated Class Action Complaint filed on February 7, 2014, Index No. 654456/2013, NYSCEF No. 13. All capitalized terms have the same definition as in the Complaint.

is clear that where, as here, "corporate fiduciaries [] make decisions affected by [an] inherent conflict of interest," the protection of the business judgment rule evaporates and "the burden shifts to defendants to prove the fairness of the challenged acts." *Wolf v. Rand*, 258 A.D.2d 401, 404 (1st Dep't 1999). In all events, Plaintiffs' allegations of disloyal and bad faith conduct rebut any presumption that the business judgment rule insulates Defendants' illicit actions at the pleading stage. *See Ackerman v. 305 E. 40th Owners Corp.*, 189 A.D.2d 665, 667 (1st Dep't 1993) (denying motion to dismiss where "pleadings suggest that the directors did not act in good faith").

Second, Defendants contend that Plaintiffs' claims are derivative instead of direct, asserting that the harm alleged in the Complaint is merely a decline in the market value of ESBA. Br. at 18. Defendants misconstrue Plaintiffs' claim. Plaintiffs allege that Defendants' breaches of fiduciary duties ***caused Plaintiffs to exchange their personally-held shares*** for hundreds of millions of dollars less than the per share price contemplated by the offers for the ESB as a standalone property. As courts routinely hold, receiving an unfair or inadequate price for one's share is a prototypical direct claim based on harm to the individual shareholder. *See, e.g.*, *Higgins v. New York Stock Exch., Inc.*, 10 Misc.3d 257, 272-273 (Sup. Ct. N.Y. Cnty. 2005) (holding claim was direct because "insofar as the…complaints allege injuries that result in harm to NYSE seatholders' ***equity*** interests, as opposed to the NYSE's ***assets***, plaintiffs have standing to assert direct causes of actions for breach of fiduciary duty") (emphasis in original).

Third, Defendants argue that Plaintiffs cannot prove causation because the Participants might not have approved any of the offers or a sale might not actually have closed. Br. at 23-24. This is not only misplaced at the pre-discovery stage, it is factually nonsense. The Complaint alleges – and Defendants do not meaningfully dispute – that the offers were worth as much as $600 million more to the Participants than the IPO. Further, many of the offers were made by billionaire investors who own millions of square feet of real estate in New York and worldwide, precisely the type of well-financed buyers who had the ability to close the deal. As for Defendants' contention that the Helmsley Estate had "veto" power over any sale, they are improperly asking the Court to assess assertions beyond the pleadings. Moreover, it is refuted by Defendants' own documents, which expressly state that the Helmsley Estate "does ***not*** have a contractual right to approve a sale of the property," and that ESBA "has the right to sell its fee interest in the property ***without the [Helmsley Estate's] consent***." *See* April 4, 2014 Affirmation of Mark Lebovitch ("Aff.") Ex. 1, at 156 (emphasis added).

Finally, Defendants contend that the release approved by this Court in a prior litigation allows them to escape liability here. Br. at 12. Given that Plaintiffs' claims arise from misconduct that occurred nearly a full year ***after*** the release was executed (and months after final judgment was entered), this argument strains credulity. Defendants act as if the Court "ordered" Defendants to complete the REIT consolidation transaction and IPO when it approved settlement in the previous action. Of course, the Court ordered no such thing. That the previously asserted claims of self-dealing inherent in the REIT were settled with Court approval has nothing to do with the gravamen of this new action, which strictly concerns the Defendants' subsequent refusal, in derogation of their fiduciary duties, to consider the premium bids for the ESB. The previous settlement does not sanction or immunize future breaches of fiduciary duty based on acts never mentioned in the previous case, and which occurred long after its settlement.

Indeed, it is black-letter law that class action releases are subject to unique limitations to protect the rights of absent class members, and thus, such releases may bar only those claims that are based on the "identical factual predicate" as the claims in the settled action. *See TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460, 461-62 (2d Cir. 1982); *see also Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir. 1981) (release may bar only those suits "depending on the ***very same set of facts***"). Since the facts at the core of this case – *i.e.*, the Malkins' bad faith rejection of premium offers between June and September 2013 – were not even in existence at the time the Court approved the prior release, this action clearly is not based upon the "identical" factual predicate as the settled case. *See, e.g., UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 347 & n.7 (Del. Ch. 2006) ("If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action.").

In sum, Defendants' motion should be denied in its entirety, and this matter should be scheduled for a prompt trial.

FACTUAL BACKGROUND

By June 2013, the Malkins were poised to complete a transaction that would enrich them by hundreds of millions of dollars distinct from benefits to any other ESBA Participants. Specifically, the Malkins stood to complete the consolidation of the ESB and 17 other properties controlled by the Malkins into a REIT called the Empire State Realty Trust ("ESRT"), whose shares would then be offered to the public through an IPO. ¶1. The Malkins were slated to receive more than $730 million of ESRT stock through the IPO (¶39), which included $304 million worth of "override interests," or special equity payments that the Malkins would receive upon liquidation of the properties. ¶37. The ESBA Participants' legal challenge to the terms of the transaction had been resolved, with a final judgment and release entered by this Court on May 17, 2013. All that remained was for the Malkins to consummate their favored deal.

Beginning in mid-June 2013, however, the Malkins faced a fundamental threat to their prize. Starting on June 18, 2013, an all-out bidding war erupted for the ESB, ultimately yielding eight unsolicited all-cash premium bids for the ESB or ESBA from a host of different bidders. ¶52. Had the Malkins acted in good faith and with respect for their duties, they would have pursued any potentially superior proposals. In bad faith, the Malkins favored their personal interests over those of the Participants.

First, on or about June 18, 2013, Cammeby's International, through its president, Rubin Schron, offered to purchase the ESB for $2 billion in cash, including a $50 million non-refundable deposit. ¶53. Cammeby's offered to close the transaction in 90 days, with no due diligence, and to cover the commission of Cammeby's broker. *Id*. Cammeby's offer also granted ESBA Participants the right to either immediately cash out or exchange their Participations for an ownership interest in just the ESB, not in a homogenized mass of 18 buildings, which is what the REIT offered to investors. ¶54. By pursuing this offer, the Malkins would provide a far superior outcome for the Participants, but would be stuck with the 17 lesser properties they were hoping to liquidate through the REIT. ¶¶54-55.

Cammeby's offer set off an avalanche of other third-party all-cash offers for the iconic tower from well-known and reputable New York City real estate owners and developers. ¶55. Within days of Cammeby's offer, a $2.1 billion all-cash bid emerged from a joint venture between Philip Pilevsky, chairman of Philips International, and Joseph Tabak, CEO of Princeton Holdings. ¶56. As reported by the *New York Daily News*, Pilevsky stated that his investors were prepared to wage a bidding war. Specifically, Pilevsky stated "[t]hese people want this asset badly. If they want something, they'll get it." *Id*.

News of the multi-billion dollar offers in the press forced the Malkins to publicly respond. ¶57. However, rather than meaningfully engage with these bidders and permit a series of escalating offers, the Malkins released a terse statement to ESBA Participants on June 24, 2013. Downplaying the significance of the potentially lucrative alternatives, the Malkins advised Participants that two unsolicited bids to purchase the ESB had been received and that they would not issue a comment until after review of the offers. ¶¶57-58. The ESBA Participants did not hear from the Malkins regarding the third-party bids for another two months. ¶59.

Despite the Malkins' self-interested refusal to engage with any of the bidders for the ESB and ESBA, bidders' enthusiasm for the ESB persisted. ¶60. On June 27, 2013, Joseph Sitt, CEO of Thor Equities, upped the ante by bidding over $2.1 billion in cash for the ESB. *Id*. Thor's bid, like Cammeby's, provided Participants an option to exchange their Participations on a tax-deferred basis for a membership interest in the acquiring entity, which would own only the ESB. *Id*. Again, Participants would get a far better deal than the IPO offered, but the Malkins would not get their incentive payments and would be forced to abandon their plans to roll their 17 other properties into a publicly traded REIT.

Rather than comply with their duties, the Malkins simply ignored bidders who were only interested in the ESB or ESBA. They provided no response, asked no questions, and did not meet with the bidders or discuss the multi-billion dollar bids they had received. ¶61. Instead, on

July 2, 2013, Defendant Thomas Keltner sent identical form letters to Cammeby's, Pilevsky and Thor Equities stating, "[w]e are reviewing your proposal and will respond in due course." ¶61.

Premium all-cash offers for the ESB continued to emerge. ¶62. On or about July 3, 2013, an investor named Reuven Kahane bid $2.25 billion in cash for the ESB. *Id.* On or about July 12, 2013, Brazil-based investor Moni Shababo offered $2.3 billion all-cash for the ESB. *Id*. Trying to force the Malkins to put their investors' interests first, Thor Equities made two new offers: one for $1.25 billion for the ESBA's interest, and one for $557,812,500 for just the Helmsley estate's interest in the ESBC. ¶67.

Again, the Malkins refused to provide any substantive response. ¶67. The Malkins did not ask any questions, propose counteroffers, negotiate terms, or meet with any of the bidders. The Malkins' refusal to engage is straightforward – they faced a clear conflict of interest arising from their personal profit from the IPO, which they would not enjoy from the sale of the ESB as a standalone property. As noted above, the Malkins preferred the IPO because of the over $730 million in personal and financial benefits that were not equally shared by the Participants, who clearly preferred the sale offers. ¶64. If the Malkins sold the ESB as a standalone property, the IPO, and resulting monetization of the Malkins' 17 controlled properties, would fall apart. ¶63.

On September 6, 2013, the Malkins informed Participants that they had declined to pursue or accept any of the offers made for the ESB. ¶70. The Malkins' self-interested response failed to provide the Participants with the rationale for their rejection of the offers. ¶71. The Malkins also refused to provide critical information for Participants to make an informed choice as to whether to exercise their right to revoke consent for the Consolidation. *Id*.

Undeterred by the Malkins' refusal to enter substantive discussions, on September 9, 2013, Thor Equities extended a third offer to purchase ESBA's interest in the ESB at the increased purchase price of $1.4 billion. Significantly, this offer ***was $200 million greater*** than the $1.18 billion "exchange valuation" that the Malkins assigned the ESBA in the IPO. ¶75. Thor Equities' third offer also included the option for Participants to remain invested in the acquiring entity rather than accept a *pro rata* portion of the purchase price in cash, which was a significant benefit to Participants due to the ESB's ongoing strong financial performance. ¶¶77-78.

Again, despite the numerous premium all-cash offers that had been made, despite the fact that these offers were escalating, and despite the fact that Thor's latest offer was $200 million more than the Malkins' own exchange value for the ESBA, the Malkins did not engage substantively with any of the bidders. ¶¶80-81. The Malkins did not request meetings with the bidders, negotiate terms, or make any counteroffers. Instead, on September 19, 2013, the Malkins summarily snuffed out the bidding war for the ESB and ESBA, regardless of how value-enhancing these bids were for the Participants. That day, the Malkins filed a Form 8-K with the SEC stating that: "While it is possible that additional proposals will be made, from this point we [*i.e.* the Malkins] are fully committed to effecting the consolidation and IPO transaction and ***will not entertain any additional alternative***." ¶79; ¶¶84-85 (emphasis added). The message was unmistakable: The Malkins did not care about their fiduciary obligations; they were lining their own pockets, period.

The same day that the Malkins announced that they would not consider any of the premium all-cash offers for the ESB or ESBA, they also announced that ESRT shares would be priced between $13 and $15 in the IPO. ¶87. The $13 price point resulted in valuations of the ESB and ESBA interests far below the value of the offers they had rejected. Specifically, the $13 price point resulted in a value of the ESBA interest of approximately $800 million – or nearly ***$600 million*** less than the Thor offer they had rejected that very day. *Id.* The $13 per share IPO price meant that the entire ESB was valued at only $1.59 billion – or ***$700 million less*** than the highest all-cash offer that the Malkins rejected. ¶90.

Despite the fact that the offers provided far greater value to Participants, the Malkins went ahead with the IPO. On October 1, 2013, the Malkins' quest for a public listing came to fruition. That day, the REIT was priced at $13 per share – the bottom of the range – which, as noted above, yielded valuations of the ESB and ESBA that were $700 million and $600 million, respectively, below the offers that the Malkins had largely ignored. ¶93. Notwithstanding this disparity, the IPO was conducted, allowing the Malkins to successfully reap more than $730 million in ESRT stock – a windfall that would not have been possible if they had accepted any of the premium bids at issue in this case.

ARGUMENT

I. MOTION TO DISMISS STANDARDS

A complaint will not be dismissed for failure to state a claim under CPLR 3211(a)(7) if the plaintiff alleges facts that "fit within any cognizable legal theory." *Collins v. Telcoa Int'l Corp.*, 283 A.D.2d 128, 131 (2d Dep't 2011) (internal quotation omitted). If a plaintiff is entitled to relief on any reasonable view of the allegations, then the motion must be denied. *See Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995).

When assessing the adequacy of a complaint, the court must construe the pleadings liberally, accept the complaint's allegations as true, and provide the plaintiff with the benefit of "every possible favorable inference." *Goshen v. Mutual Life Ins. Co. of NY*, 98 N.Y.2d 314, 326 (2002) (reversing grant of dismissal pursuant to 3211(a)(1) and (a)(7) after according plaintiffs "every possible favorable inference" and finding that defendants' documentary evidence did not "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law"). Whether a plaintiff can ultimately establish its allegations "is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19 (2005).

Further, a motion to dismiss under CPLR 3211(a)(1) will only prevail where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Similarly, on a motion to dismiss under CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party. *Weill v. East Sunset Park Realty, LLC*, 101 A.D.3d 859 (2d Dep't 2012); *see also Johnson v. Fischer*, 38 Misc.3d 1217(A) (Sup. Ct. N.Y. Cnty. 2013) ("It is settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action.”).

II. THE MALKINS’ CONFLICT MEANS THIS TRANSACTION IS SUBJECT TO THE ENTIRE FAIRNESS STANDARD

To state a claim for breach of fiduciary duty, a plaintiff must only allege the existence of a fiduciary relationship, misconduct by the fiduciary, and damages. *Phillips Gold & Co., LLP v. Speiser*, 2011 WL 4707074 (Sup. Ct. N.Y. Cnty., Sept. 28, 2011) (citing *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699 (1st Dep’t 2011)). Plaintiffs are only required to plead facts with “sufficient detail” so as “to inform the defendants of the substance of the claims.” *Limmer v. Medallion Group*, 75 A.D.2d 299, 302 (1st Dep’t 1980). Plaintiffs have surpassed this modest burden here.

Plaintiffs have alleged that the Malkins, faced with a stark conflict of interest, refused to consider numerous premium all-cash offers for the ESB and ESBA that would have yielded the Participants as much as $600 million more for their interests than the IPO – solely in order to reap more than $730 million in personal benefits through the IPO. Allegations of such bad faith self-dealing state a classic breach of fiduciary duty claim. *See, e.g.*, *Phillips Gold*, 2011 WL 4707074 (denying motion to dismiss where plaintiffs alleged facts that showed defendant fiduciary acted in his own financial interest); *Gray & Assocs., LLC v. Speltz & Weis LLC*, 2009 WL 416138, at *8 (Sup. Ct. N.Y. Cnty., Feb. 2, 2009) (denying motion to dismiss where plaintiff alleged that the defendant fiduciary acted in its own economic interests, thus stating “facts, which, if proven to be true, demonstrate bad faith [and] self-dealing”); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 589 (2d Dep’t 2007) (breach of fiduciary duty where defendant “placed his own personal interests above the interests of the plaintiff”).

In response to these allegations, Defendants principally contend that they are immune from liability under the business judgment rule. Br. at 19. For numerous reasons, Defendants are wrong. ***First***, under New York law, where “there is an inherent conflict of interest, the burden shifts to the interested [fiduciary] to prove good faith and the entire fairness of the [challenged decision]." *Alpert*, 63 N.Y.2d at 570. This is true not only for a decision to complete a corporate transaction, but also for a decision to not engage in a corporate transaction – such as Defendants' decision to spurn the premium all-cash offers for the ESB and ESBA. *See Stilwell Value Partners v. Cavanaugh*, 41 Misc.3d 1216(A) at *3 (Sup. Ct. N.Y. Cnty. 2013) (holding that a plaintiff's challenge to directors' potentially conflicted decision not to pursue a corporate transaction triggered entire fairness review). Accordingly, Defendants bear the evidentiary burden to prove "good faith and the entire fairness" of their decision. *Id*. (citing *Alpert*, 63 N.Y.2d at 570).

To satisfy this burden, a defendant must develop detailed evidence on a host of highly fact-intensive issues.[2] *Alpert*, at 570-72. It is axiomatic that a trial court cannot weigh or assess such evidence on a motion to dismiss. *See, e.g.*, *Stilwell*, 41 Misc.3d 1216(A), at *4 (applying *Alpert* and holding fact-dependent analysis of the alleged conflict and "determination of the entire fairness" of the directors' decision "cannot be made at this stage of the litigation"). Moreover, here, Defendants have not even attempted to proffer the required evidence on the numerous factors required to show entire fairness.

Second, even if the "entire fairness" standard does not apply at the outset under *Alpert*, Defendants still have a burden to prove the "reasonableness" and "fairness" of their decision in light of the alleged facts. *See Wolf*, 258 A.D.2d at 404. In *Wolf*, the First Department held that allegations of an inherent conflict of interest render the business judgment rule inapplicable and shift the burden to defendants to prove the "fairness" and "reasonableness" of the transaction. *See id*. Here, as explained above, there is a clear conflict of interest, and Defendants have not even attempted to carry their evidentiary burden of proving the "fairness" and "reasonableness" of the transaction.

[2] These include: "introducing evidence of efforts taken to simulate arm's length negotiations," (*Alpert*, 63 N.Y.2d at 570); establishing that there was "complete and candid disclosure of all the material facts and circumstances of the proposed merger known to the majority," (*id.* at 571); and "demonstrating the price which would have been set by arm's length negotiations" (*id.* at 572). Defendants have made ***no*** effort to offer "conclusive" proof on these issues.

Third, at the very least, Plaintiffs have set forth a *prima facie* claim for breaches of the fiduciary duties of loyalty and good faith, precluding a pleading-stage dismissal under the business judgment rule. *See Wolf*, 258 A.D.2d at 404 ("the business judgment rule does not protect corporate officials who engage in…self-dealing"). Defendants' duties of loyalty and good faith required them to act solely in the interests of the Participants. *See Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989). Indeed, the duty of loyalty required Defendants to avoid not only self-dealing, but all situations where personal interests could "possibly conflict[]" with those of the Participants. *Id*. In this respect, the duty of loyalty is a "sensitive and 'inflexible' rule of fidelity" requiring fiduciaries "to single-mindedly pursue the interests of those to whom a duty of loyalty is owed." *Id*. An inference of bad faith will therefore inescapably result in a valid cause of action for breach of the duty of loyalty. *See Security Police & Fire Prof'ls of Am. Ret. Fund v. Mack*, 30 Misc.3d 663, 673 (Sup. Ct. N.Y. Cnty. 2010) (citing *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 122-23 (Del. Ch. 2009)).

Here, the essence of Plaintiffs' claim is that Defendants put their own economic self-interest above the Participants' by spurning premium bids for the ESB and ESBA in order to obtain $730 million in personal benefits through the IPO – notwithstanding the fact that they knew the premium bids would provide the Participants with as much as $600 million more value. Such conduct epitomizes bad faith and self-dealing, and is not immunized under the business judgment rule. *See Ackerman*, 189 A.D.2d at 667 (denying motion to dismiss where pleadings "suggest that the directors did not act in good faith").

Defendants' assertions that they were not conflicted fail. Br. at 20-22. First, they claim that they were not conflicted because they "owned 8% of ESBA and had a significant economic interest in its success." Br. at 20. However, their interest in ESBA was dwarfed by their interests in the other 17 properties, giving rise to a clear conflict of interest with the Participants, who had ***no*** interest in the other properties. Indeed, while the Malkins' interest in the ESB and ESBC was valued at $260 million in the IPO, their interests in the other 17 properties was valued at a staggering ***$454 million – nearly two times greater***.

Next, Defendants claim that they would have received their ESB override interests regardless of whether they consummated the IPO or a stand-alone sale of the ESB. Br. at 20-21. This argument obviously ignores the fact that, had the Malkins sold the ESB or ESBA individually, the Malkins would not have received the $143 million in additional override interest on the 17 other properties – a windfall they could reap ***only by proceeding with the IPO***. While the Malkins contend they were "contractually entitled" to these additional override interests (Br. at 21), this argument badly misses the point. Regardless of whether the Malkins were contractually entitled to the overrides in the event of a sale, if the Malkins sold the ESB or ESBA in a stand-alone transaction, they would never have been able to liquidate their other properties through the Consolidation and IPO.

Defendants also assert that the ESB did not enhance the value of the other properties included in the REIT because "each building was valued individually by Duff." Br. at 21. The mere fact that Duff supposedly appraised the value of each property individually is irrelevant. It is beyond dispute that the ESB was the primary driver of ESRT's stock price as a whole. Indeed, the ESB was clearly the most iconic and significant property in the REIT. The REIT was named for the ESB, and without the ESB at its core, the REIT could not have formed and the IPO would not have been possible. ¶¶63, 65. Given that the value of all the properties in the REIT was determined by the stock price, and the ESB was the principal driver of the stock price, it is clear that the ESB's inclusion in the REIT positively impacted the value of the other properties.[3]

Completely disregarding the procedural rules of a motion to dismiss, Defendants assert that they acted in good faith by hiring Lazard to "consider[] the various indications." Br. at 20. This argument fails because the existence of a conflict, by itself, rebuts the business judgment rule. *See Gray & Assocs.*, 2009 WL 416138, at *8. Moreover, Defendants' reliance on the

[3] Defendants also argue that the large amount of their ERST holdings diminishes any potential conflict caused by the millions of dollars they will receive in employment and other related benefits. Br. at 21-22. This hardly ameliorates their outsized economic interests in seeing that their 17 other properties were liquidated through the IPO.

Lazard report makes a mockery of the concept of good faith consideration for numerous reasons, including:

- the Lazard report was issued ***before*** the offer at the heart this case – namely, Thor's $1.4 billion all-cash offer for the ESBA made on September 9, 2013 – and ***does not even address*** this critical offer (March 7, 2014 Dewey Affirmation ("Def.") Ex. S) ;
- Lazard flatly admitted that the bidders "may be ***credible***," yet never contacted a single bidder to determine their interest or negotiate terms, and did ***not*** opine on the actual credibility or true value of any offer (Def. Ex. S at 8) (emphasis added);
- in fact, Lazard communicated only with ***Defendants or their counsel*** and relied exclusively on information ***supplied by them***, without making "***any*** independent verification of such information or any independent valuation" of the transactions at issue – a far cry from good faith consideration of the true facts (Def. Ex. S at Disclaimer);
- Lazard did ***not*** actually opine on whether the IPO or the offers would maximize value for the Participants (Def. Ex. S at 8-10, 15); and
- with respect to the offers, Lazard provided "Selected Notes," nearly all of which appear intended to point out potential deficiencies, hardly the type of independent analysis necessary to demonstrate good faith. (Def. Ex. S at 11-15).

In short, even ignoring that the Lazard Report cannot be considered on this motion, the Report itself is, on its face, a thinly-disguised whitewash, so lacking in substantive support and independence that the Malkins did not even disclose it to the Participants on whose behalf it was supposedly commissioned. Far from "conclusively" establishing good faith as a matter of law, this document will ultimately (*i.e.* when the Court can actually weigh the evidence) strongly support Plaintiffs' claims.

Finally, in asking this Court for business judgment protection, Defendants seek factual findings that: (1) the "indications of interest" were somehow "deficient;" (2) the time frames imposed by the offers were "impractical;" (3) the window for consummating the IPO was "closing" by the time they received the offers; (4) the Helmsley Estate would "likely" reject the proposals; and (5) all 17 properties consolidated with the ESB in the ESRT were capable of receiving premium bids in light of the premium bids received by two of the properties. Br. at 20-

22. Defendants have failed to cite a single document "conclusively" establishing any of these "facts," and even if they had, none of these contentions establish good faith as a matter of law.[4]

III. PLAINTIFFS' CLAIMS ARE DIRECT, NOT DERIVATIVE

Defendants' assertion that Plaintiffs did not suffer direct harm from Defendants' misconduct (Br. at 18) ignores the Complaint's well-pled allegations and contradicts controlling law. Plaintiffs' claims are plainly direct, not derivative.

Plaintiffs allege that, as a result of Defendants' unlawful conduct, they exchanged their ESBA participations – their personal property – for inadequate consideration. Specifically, as a result of Defendants' bad faith rejection of premium third-party buyout offers, Defendants compelled Plaintiffs to exchange their interests in ESBA for restricted stock in ESRT. Courts widely hold that claims stemming from an exchange of personally-held shares on unfair terms are direct. *See, e.g.*, *Higgins*, 10 Misc.3d at 272 ("the loss of seats in exchange for an unfairly low payout of shareholders' equity individually harms the seatholders and is otherwise not dependent on a harm to the NYSE"); *Craven v. Rigas*, 85 A.D.3d 1524, 1527 (3d Dep't 2011) (holding that the sale of equity securities at a price that undervalues the security is a direct harm); *Marine Midland Bank-E. Nat'l Ass'n v. Prel-Albany, Inc.*, 50 A.D.2d 996 (3d Dep't 1975) (harm occasioned by the forced purchase of equity interests is a direct harm to stockholders).[5]

Defendants have no basis to assert that a harm occasioned upon all ESBA Participants apart from the Malkins does not give rise to a direct claim. This is not, and has never been, an accurate recitation of New York law. As long recognized under New York law, a breach of a fiduciary duty owed directly to a person – precisely the type of breach alleged here – gives rise to a direct claim for liability. *See Higgins*, 10 Misc.3d at 264 ((New York law allows "direct claims

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[4] Defendants misplace their reliance on *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Investcorp, S.A.*, 137 F. Supp. 2d 502, 510 (S.D.N.Y. 2001), where the court resolved the conflict and self-dealing issues only after trial.

[5] *See also Southeastern Pennsylvania Transp. Auth. v. Volgenau*, 2012 WL 4038509, at *3, n.17 (Del. Ch. Aug. 31, 2012) (noting individual stockholders' ability to bring direct actions to challenge fiduciary misconduct in connection with corporate sale transactions: "The SRA Defendants have not suggested that shareholders' ability to sue directly for violations of those common law [corporate sale] doctrines was ever in doubt").

to be asserted against a corporation where the shareholder alleges a breach of a duty owed independent of any duty owed to the corporation").[6]

Moreover, in *Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dep't 2012), the court adopted the test for distinguishing direct and derivative harm that the Delaware Supreme Court announced in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004). That test confirms the direct nature of Plaintiffs' injury: (1) the Participants, not ESBA, "suffered the alleged harm" in that they were forced to exchange their ESBA participations for ESRT stock worth far less than the value of the offers; and (2) it is the Participants "who would receive the benefit of any recovery" because any recovery would be paid directly to them, and not ESBA.

Defendants mischaracterize the direct harm pled here as an overall diminution in ESBA's market value, and rely on inapposite cases where the alleged misconduct caused a temporary drop in a company's stock price.[7] Br. at 18-19. Plaintiffs never contended that the market value of the ESBA dropped as a result of Defendants' misconduct. Rather, Plaintiffs contend that the breaches of the duties owed directly to them compelled them to exchange their ESBA shares for less than they should have received – a prototypical direct claim.

IV. PLAINTIFFS HAVE ADEQUATELY PLED CAUSATION

Defendants next contend that Plaintiffs have not adequately pled causation. Br. at 22-24. Specifically, Defendants assert that "Plaintiffs simply allege that Malkin Holdings received indications of interest," without pleading facts to support an inference that any of the premium bids would have been approved by ESBA Participants or that, if approved, the transaction would have closed. Br. at 23. Defendants' argument not only ignores the Complaint's detailed

[6] *Id*. at 265-66 ("While never explicitly rejecting the undifferentiated harm inquiry, New York courts have implicitly dispensed with the requirement on occasion, allowing shareholders to maintain direct class action suits, which necessarily requires a finding of common issues of law and fact, and presumably, undifferentiated harm, as among shareholder class members.").

[7] *See., e.g., O'Neill v. Warburg, Pincus & Co.*, 39 A.D.3d 281, 282 (1st Dep't 2007) (dismissing direct claims that purportedly caused a diminution in the company's value). Defendants' other authorities, which concern classic derivative claims of diversion of corporate assets, are completely inapposite. *See, e.g.*, *Yudell*, 99 A.D.3d at 114 (holding that allegations of failure to collect rent payments, back taxes, and other money's owed to the joint venture are derivative); *Weidberg v. Barnett*, 752 F. Supp. 2d 301, 308 (E.D.N.Y. 2014) (holding that claims challenging wrongful diversions of company assets were derivative).

allegations about the seriousness of the premium bids, but seeks to turn the Complaint's principal allegation on its head. The key thing standing between the Participants and "a more favorable, alternative sale transaction," as Defendants put it, was the Malkins themselves.

Plaintiffs allege that Defendants ***spurned*** *bona fide* and much richer deals for ESBA Participants by refusing to give the premium bids consideration. The Complaint alleges that the premium bids were as much as $600 million greater than the value of the shares that Participants were slated to receive in the IPO. Given the enormous disparity in value between the all-cash offers and the IPO, the Participants would surely have approved the offers ***had Defendants not deprived them of the opportunity to do so***. Certainly, Defendants have not submitted any document that "utterly refutes" this inference as a matter of law.

The Complaint also amply supports the inference that the bidders were serious about closing a deal and had the ability to do so. Numerous bids came from some of the world's largest and most well-financed real estate investors who own millions of square feet of real estate worldwide – including Cammeby's International Group and Thor Equities. The opening terms of the offers (which the Malkins never even attempted to negotiate) confirm the seriousness of the bids, including down payments totaling tens of millions of dollars, waiver of any due diligence period, and agreement to pay the brokerage commission. Finally, the fact that bidders such as Thor Equities made multiple all-cash bids notwithstanding the Malkins' steadfast refusal to consider them further supports the inference that they were serious about acquiring the ESB or ESBA, and prepared to close the deal. Again, Defendants have proffered no evidence that conclusively refutes this inference as a matter of law. Accepting these allegations as true, Plaintiffs have sufficiently pled causation. *See Rioseco v. Gamco Asset Mgmt., Inc.*, 2011 WL 4552544, at *16 (Sup. Ct. N.Y. Cnty., Sept. 23, 2011) ("It is well settled that '[a] plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages. It need only plead allegations from which damages attributable to the defendant's [misconduct] might reasonably be inferred'") (*citing Rock City Sound, Inc. v. Bashian & Farber, LLP*, 74 A.D.3d 1168, 1171 (2d Dep't 2010)); *LCN Invs., Inc. v. First Fidelity Bank, N.A. New Jersey*, 173 F.3d 454, 465-66

(2d Cir. 2009) ("breach of fiduciary duty cases 'comprise a special breed of cases that often loosen normally stringent requirements of causation and damages'").

Given these allegations, Defendants' reliance on *Giuliano v. Gawrylewski*, 40 Misc.3d 1210(A) (Sup. Ct. N.Y. Cnty. 2013), is misplaced. In *Giuliano*, this Court determined that "damages are too attenuated" because the complaint contained no allegation that could support the inference that a high-yield debt alternative would have been approved by the company's lender or, if approved, would have avoided the company's bankruptcy filing. *Id*. at *10. Here, as explained above, the Complaint's allegations support an inference that Participants would have eagerly embraced a transaction providing them with $600 million more value for their interests, and that well-established investors who made the offers had the ability to close on the deal.

At best, Defendants' speculation about whether a sale would have been approved and closed raises issues of fact that cannot be decided now. That Defendants' motion is premature is demonstrated by the fact that they rely on numerous cases decided at summary judgment or after trial. *See, e.g., Laub v. Faessel*, 297 A.D.2d 28, 32 (1st Dep't 2002); *RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840 (1st Dep't 2010); *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996); *Greenberg v. Malkin*, 39 Fed. Appx. 633, 635 (2d Cir. 2002).

Defendants also incorrectly argue that the Helmsley Estate's letters of July 22, 2013 and August 20, 2013 "rebut" causation. Br. at 24. Contrary to Defendants' assertion that the Helmsley Estate had an "effective veto" by virtue of its majority ownership in ESBC, Defendants' own documents (which go outside the pleadings in all events) confirm that the Helmsley Estate could not block a sale of ESB or Plaintiffs' interests in ESBA. The Registration Statement specifically states that the "operating lessee," *i.e.*, the Helmsley Estate, "does ***not*** have a contractual right to approve a sale of the property," and that ESBA, "has the right to sell its fee interest in the property ***without the operating lessee's consent***." *See* Aff. Ex. 1, at p. 156. Moreover, the Helmsley Estate's letters ***pre-date*** Thor's September 9, 2013 bid, and thus have no bearing on that critical offer. Defendants cannot demonstrate irrefutably, and as a matter of law, that the Helmsley Estate actually would have voted against any of the higher priced, *bona fide* bids. Defendants implicitly acknowledge as much in saying that the Helmsley Estate was only "likely" to vote against a sale. Br. at 20. That too is an issue of fact precluding dismissal.

Finally, Defendants assert it is supposedly "doubtful" that Participants would have approved a sale because ESRT investors previously declined to authorize the Malkins to explore a potential "Third Party Transaction," *i.e.*, the potential sale of all the properties as a portfolio. This sheer conjecture falls woefully short of conclusively establishing an absence of causation as a matter of law, and is entirely inappropriate on a pre-answer motion to dismiss.

V. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE RELEASE IN A DIFFERENT CASE

Unable to undermine the substantive merit of Plaintiffs' claims, Defendants assert a technical and legally flawed argument that Plaintiffs' claims are barred by the resolution of the prior litigation (the "ESRT Litigation"). Defendants' position borders on the absurd. Plaintiffs' claims here arise from conduct that occurred ***after*** the release of that case was effectuated, and are materially different from the claims raised in the prior action. In making these arguments, Defendants are suggesting that this Court approved a release that extends far beyond the permissible confines of applicable New York law. Unless Defendants got away with deceiving the Court in the ESRT Litigation, this simply cannot be the case.

Specifically, Defendants contend that Plaintiffs' claims are extinguished by (i) the release and covenant not to sue in the prior case, which were executed on September 28, 2012, or nearly a year before the conduct giving rise to this case occurred, and (2) the Court's final judgment in the prior litigation, which merely reiterated the terms of the release, and was entered on May 17, 2013, months before the conduct at the heart of this action took place. Br. at 12-17. In essence, Defendants are contending that this Court's prior approval of the settlement immunized them from liability for any ***subsequent*** conduct having any connection with the Consolidation and IPO – no matter how illegal their conduct may be. Defendants are wrong.

Defendants' argument that the release applies to all claims that relate to the "consummation, or failure to consummate" the Consolidation (Br. at 13), mischaracterizes Plaintiffs' claims and ignores controlling law. Plaintiffs' claims do not relate to the decision to consummate the Transaction in the abstract, and are based on events not related to the claims subject to the release. Plaintiffs' claims challenge the Malkins' bad faith and self-interested refusal to entertain bona fide offers for the ESB and ESBA, which took place ***after*** the release in the prior case was effectuated.

More fundamentally, Defendants ask the Court to adopt an impermissibly broad reading of the release. Br. at 12, 15. However, it is black-letter law that class action releases are subject to special limitations, and may bar only those claims that are based on the "identical factual predicate" as the claims in the settled action. *See TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460, 461-62 (2d Cir. 1982); *see also Cox v. Microsoft Corp.*, 48 A.D.3d 215 (1st Dep't 2008) ("Claims based on a factual predicate different from the factual predicate of this action are not barred by the release, because the release does not bar claims relating to conduct that was not alleged and could not have been alleged in this action."); *Con. Edison v. Northeast Util.*, 332 F. Supp. 2d 639, 648, 652 (S.D.N.Y. 2004) (applying New York law and holding that the scope of a release "must be interpreted" to exclude "claims resting on a separate factual predicate"); *Cahill v. Regan*, 5 N.Y.2d 292, 299 (1959) (recognizing, even in an individual action, that the "meaning and coverage [of a release] necessarily depend, as in the case of contracts generally, upon the controversy being settled").

When a later claim, such as those raised here, requires proof of "further facts" in addition to those at issue in the settled action, then it does not arise from the identical factual predicate as the settled claims, and is ***not*** barred by the release. *TBK Partners*, 675 F.2d at 462; *see also Nat'l Super Spuds*, 660 F.2d at 18 n.7 (release may bar only those suits "***depending on the very same set of facts***"). This is true regardless of how broadly a release is worded. *See In re WorldCom, Inc. Sec. Litig.*, 2005 WL 2319118, at *18, n.36 (S.D.N.Y. Sept. 21, 2005) ("It is . . . a given that the Release will only be applied insofar as its application conforms to the law[.]").

The core facts at issue in this case could not – by definition – be the "very same facts" at issue in the prior action. Indeed, the facts at the heart of this action ***were not even in existence*** at the time the ESRT Litigation was resolved. As set forth in the ESRT Complaints and discussed at the ESRT fairness hearing, that action challenged the terms, structure and allocation of value in the Consolidation, and the disclosures in the IPO materials. At issue in that case were: (1) whether the Malkins were entitled to the override interests; (2) the 50/50 allocation of property values between the owners and managers in the IPO; (3) the change the Malkins made to their ability to collect supervisory fees in 2010; (4) the allocation in the IPO of $16 million worth of value to the Malkins' Supervisor and management companies; (5) the adequacy of the disclosures issued in connection with the IPO; and (6) the tax structure of the IPO. *See, e.g.*, Def. Ex. F at ¶ 9; Def. Def. Ex. G. at ¶3; Def. Ex. H at ¶3. At the ESRT Litigation fairness hearing, the Court stated that these were the "key claims" being settled. *See* Aff. Ex. 2 at 59:26-62:10.

This action does ***not*** challenge these or any other aspects of the Consolidation or IPO. This action accepts those terms as a given. Instead, it alleges that against that factual backdrop, no good faith fiduciary could refuse to entertain ***subsequent*** offers that, on their face, provided ESBA Participants a better outcome than the IPO. Because this action is based on the Malkins' failure to meaningfully consider, and bad faith rejection of, the premium offers received between June and September 2013, it will necessarily turn on proof of "further facts" beyond those at issue in the ESRT Litigation. These unique facts include, for example, what the terms of the offers were; the value of the offers to the Malkins and the Participants, respectively; whether the value of the offers exceeded what the Participants received in the IPO; whether the Malkins were conflicted in assessing the offers; whether the Malkins knew or had reason to know that the Participants would receive more value through the offers than the IPO; and whether the Malkins rejected the offers in bad faith. Not a single one of these core facts was, or could have been, at issue in the ESRT Litigation.

Where, as here, a claim is based on "further facts" that were not part of the prior class action, courts routinely hold that broad language in a release cannot bar the subsequent claim –

and this is especially true where the facts at issue in the later action ***did not exist*** at the time the release was executed. *See Cahill*, 5 N.Y. 2d at 299-300 (general release executed "more than a year before the patent was issued" could not bar patent claim because the "release covered and barred only those matters about which there had been some dispute" and "no patent [was] then in existence"); *UniSuper,* 898 A.2d at 347 & n.7 ("[A] release is overly broad if it releases claims based on a set of operative facts that will occur in the future. If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action."); *Hill Stores Co. v. Bozic,* 1997 WL 153823, at *5 (Del. Ch. Ct., Mar. 25, 1997) (because the "alleged breaches of fiduciary duty…occurred after the Weiss judgment," "the plaintiffs' claims … do not arise from the same set of operative facts," and "the Weiss judgment does not bar plaintiffs' claims"); *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, 2005 WL 5678842, at *7 (C.D. Cal. Apr. 26, 2005) (same). [8]

The mere fact that this action and the ESRT Litigation both relate to the Consolidation, or mention some of the events at issue in that action, does not change the analysis. So long as this action requires proof of "further facts," which it clearly does, it cannot be barred by any release that became effective before the facts giving rise to this case even took place. *See also In re Lehman Bros. Sec., & ERISA Litig.*, 2012 WL 2478483, at *6 (S.D.N.Y. June 29, 2012) (existence of "some common factual elements" does not mean subsequent claim is barred where later claims "require proof of numerous additional facts"); *In re Digital Music Antitrust Litig.*,

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[8] The cases on which Defendants rely are inapposite. The vast majority concern individual rather than class actions, which are not subject to the identical factual predicate doctrine. *See e.g., Global Ins. & Metal Corp. v. Home*, 35 A.D.3d 93 (1st Dep't 1998); *Calavano v. N.Y.C. Health & Hosps. Corp.*, 246 A.D.2d 317 (1st Dep't 1998); *Hack v. United Capital Corp.*, 247 A.D.2d 300 (1st Dep't 1998); *Skluth v. United Merch. & Mfrs., Inc.*, 163 A.D.2d 104 (1st Dep't 1990); *Centro Empresarial Cempressa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269 (2011); *McMahan & Co. v. Bass*, 250 A.D.2d 460 (1st Dep't 1998).

The remainder concern releases in class actions where the subsequent actions were barred because the claims were based on the identical factual predicate as the release, which is not the case here. *See e.g. Mosberg v. Nat'l Prop. Analyst, Inc.*, 217 A.D.2d 482, 484 (1st Dep't 1995) (holding that claim was barred because at the time plaintiff signed the release, he knew or should have known that his claims were within the terms of the release); *Hotel 57 LLC v. Tyco Fire Prods.*, 2007 WL 4241917 (Sup. Ct. N.Y. Cnty., Nov. 13, 2007) (holding that plaintiff's claims were barred because plaintiff had all the information upon which it based its claims when it received notice of the proposed settlement, and failed to opt-out); *see also In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 136, 139 (2d Cir. 2011); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107-08 (2d Cir. 2005); *In re Gen. Electric Co. Sec. Litig.*, 2014 WL 534970, at *8 (S.D.N.Y. Feb. 11, 2004).

812 F. Supp. 2d 390, 400 (S.D.N.Y. 2011) ("That this complaint, like the complaint in *Ottinger*, also alleges anticompetitive effects in the CD market or a motive to maintain higher CD prices is insufficient" to bar the claim).[9]

Further, the language of the release undermines Defendants' contention that Plaintiffs' claims are barred. To start, nothing in the release even mentions claims based on the refusal to consider subsequent offers for the ESB or ESBA. *See Con. Edison*, 332 F. Supp. 2d at 648 (The "settlement's failure to refer specifically to claims arising out of the merger's termination shows that the settlement simply was not intended to address those claims.").

Critically, the only term in the ESRT Litigation case that even arguably references claims related to the failure to pursue an alternative transaction is the defined phrase "Third Party Transaction." But as defined, this term specifically ***excluded*** the offers at issue here. The term "Third Party Transaction" refers ***only*** to hypothetical offers for ***all the consolidated properties "as a portfolio."*** *See* Def. Ex. E at 3; Def. Ex. F at ¶53. At issue here, however, is Defendants' decision to ignore offers solely for the ESB and ESBA, which, by definition could ***not*** constitute a "Third Party Transaction." The fact that the only term in the release addressing an alternative transaction excludes the claims at issue here is further confirmation that these claims are not barred.

Defendants cannot contend that claims arising from the failure to consider these offers are somehow covered by the release of claims relating to the "Consolidation" generally. In addition to the fact that such an argument is foreclosed by the identical factual predicate doctrine, as noted above, the language of the release itself refutes it. If alternative proposals for the ESB or ESBA were included in the scope of the "Consolidation" generally, there would have been no need to include any reference to a potential "Third Party Transaction." *VKK Corp. v. NFL*, 244

[9] Defendants also contend that this case and the ESRT Litigation share an identical factual predicate because "[t]he [ESRT Litigation] plaintiffs repeatedly asserted that the Malkins had failed to consider allegedly superior alternatives," and this action purportedly "enumerates additional instances of that same conduct." Br. at 14. This is nonsense and revisionist history. Nowhere did the prior Complaints address ***any*** offers for the ESB or ESBA, let alone offers similar to those at issue here. Indeed, none of the offers at issue in this action had even made at the time the settlement in the ESRT Litigation was approved.

F.3d 114, 129 (2d Cir. 2001) (holding under New York law and the principals of *expressio unius est exclusion alterius* that a release could not apply to entities not in existence at the time it was executed).

Moreover, it is "well settled" law that "the general words of a release are limited by the recital of a particular claim." *Herman v. Malamed*, 110 A.D.2d 575, 576-77 (1st Dep't 1985). Significantly, the definition of "Released Claims" references claims that "can or might be asserted in the Action," *i.e.*, the ESRT Litigation. Def. Ex. E at 11. Clearly, "the Action" could not have included claims related to the offers at the heart of this case given that the offers ***were not made until nearly a year after the parties agreed to settle it***. Accordingly, any general words of the release – including the reference to claims based on the "consummation, or failure to consummate the Consolidation" – must be "limited" to the claims recited, which do not and could not include those based on the offers at issue here. *See Con. Edison*, 332 F. Supp. 2d at 648 ("The general phrase 'potentially arise out of or relate in any way to the Merger Agreement,' must thus be interpreted in light of the reference to the claims in Federal Litigation[.]"); *Mangini v. McClurg*, 24 N.Y.2d 556, 562-63 (1969) ("[T]he cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form.") (collecting cases).

Defendants also make several arguments contending that the release bars this case because it supposedly releases "future" claims. Br. at 14. These arguments miss the mark. A release can only bar future claims based on the identical factual predicate as the prior litigation, which is not the case here. *See TBK*, 675 F.3d at 460 (release may cover claims that were "not presented and might not have been presentable in the class action" but only when such claims are "based on the identical factual predicate as that underlying the claims in the settled class action"); *Digital Music Antitrust Litig.*, 812 F. Supp. at 399 (Defendants "fail to appreciate that a release applies 'only as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.' In other words, a settlement may be framed to prevent future suits 'depending on the very same set of facts,' but future claims are barred only 'where there is a realistic identity of issues' between the former and future cases and 'where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members.'") (citations omitted). Moreover, as argued above, notwithstanding the release's express coverage of claims that "could have been or in the future can or might be asserted" in the ESRT Litigation, there is no provision in the release for claims based on future and distinct misconduct by Defendants. *See Bushkin, Gaims, Gaines, Jonas & Stream v. Garber*, 677 F. Supp. 774, 776 (S.D.N.Y. 1988) (holding under New York law that a release governing one type of diversion of assets in a prior action would not bar claims based on other diversions of corporate assets by the same party though different means).

Defendants also contend that the covenant not to sue and the Judgment separately bar Plaintiffs' claims. Br. at 14-17. This argument fails for all the same reasons set forth above. The covenant not to sue and the Judgment are no broader than the release. Indeed, by their own terms, they extinguish only "Released Claims" (Def. Ex. E at 16; Def. Ex. R at 5-6), and thus, are subject to the same limitations as the release.

Finally, Defendants' argument that res judicata bars Plaintiffs' claims is wrong. Br. at 16-17. Res judicata applies only to suits that are based on the same "transaction" as a prior litigation. Like the identical factual predicate doctrine, the transactional test looks to "whether the same transaction or series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second [action] were present in the first." *Sweeper v. Tavera*, 2009 WL 2999702, at *3 (S.D.N.Y. Sept. 21, 2009).

For all the reasons explained above, this test is plainly not met here. The facts at the core of this suit – *i.e.*, the Malkins' bad faith rejection of offers made between June and September 2013 – are distinct from the subject matter of the ESRT Litigation and, indeed, arose after the Judgment in the ESRT Litigation. *See IDT Corp. v. Tyco Grp., S.A.R.L.*, 104 A.D.3d 170, 178 (1st Dep't 2012) (action "not barred by res judicata" because the "current claims arise from the alleged actions and omissions of the defendants *after* the Court of Appeals decision" and therefore "the conduct complained of now could not have been the basis for the breach of contract action previously dismissed") (emphasis in original).

VI. PLAINTIFFS HAVE STATED A CLAIM FOR UNJUST ENRICHMENT

Defendants assert that Plaintiffs' unjust enrichment claim must be dismissed because the benefits they received in the IPO were "fully disclosed, exhaustively vetted by the SEC, litigated with Class counsel and re-litigated with Applicants in their challenge to the Settlement." Def. Br. at 24-25. Defendants entirely miss the point. Plaintiffs do not challenge the existence or amount of the benefits themselves, but rather assert that the premium offers were made, and Defendants acted improperly to preserve those benefits at the expense of Participants, in derogation of their fiduciary obligation. Said differently, it is Defendants' self-interested refusal to consider value-maximizing alternatives that now makes them unjustly enriched.

Defendants' remaining arguments also fail. Br. at 25. Contrary to Defendants' assertion, Plaintiffs' claims are not based in or governed by contract, but are grounded in common law breach of fiduciary duty principles. Further, Plaintiffs have clearly pled how Defendants were unjustly enriched "at their expense" – namely, Defendants deprived Participants of the opportunity to maximize the value of their interests, forcing them to receive less value than the offers provided, so that Defendants could reap more than $730 million through the IPO of a REIT with the ESB as its centerpiece. Finally, as explained above, Plaintiffs' breach of fiduciary claims are not "flawed," and thus, there is no basis to dismiss the unjust enrichment claim as "duplicative" of an inadequate claim.[10]

CONCLUSION

For the reasons set forth herein, Defendants' motion should be denied.

[10] Defendants' cited cases are inapposite. In *Pollak v. Moore*, 85 A.D.3d 578, 579 (1st Dep't 2011), the defendant retained no benefit in the property at issue, whereas here, Defendants have retained an estimated $730 million in benefits from the IPO at Plaintiffs' expense. In *N.Y.C. Educ. Constr. Fund v. Verizon N.Y. Inc.*, 2014 WL 591046 (1st Dep't Feb. 18, 2014), the unjust enrichment claims were duplicative of the breach of contract claim because the "whole concept of [the claim] depends on the contracts," whereas here, no breach of contract claim has been brought and, in any event, the breach of fiduciary claims are not governed by the participation agreement. The same is true of *Weir v. Holland & Knight, LLP*, 34 Misc.3d 1207(A) (Sup. Ct. N.Y. Cnty. 2011).

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