UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREDITH BUSHER and ELLEN BUSHER as Co-Personal Representatives of the Estate of EUGENE L. BUSHER, and NANCY TUMPOSKY, Plaintiffs, v. DESMOND T. BARRY, JR., THOMAS T. EGAN, JOHN P. HEANUE, WILLIAM M. KELLY, FRANCIS P. BARRON, and WINGED FOOT GOLF CLUB, INC., Defendants. WINGED FOOT HOLDING CORPORATION, Nominal Defendant.	14 Civ. 4322 (NSR) (JCM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE RELATED TO SPECULATIVE DAMAGES AND UNRELIABLE OPINION TESTIMONY

Maeve O'Connor
David Sarratt
Susan Reagan Gittes
Laura J. Samuels
Morgan A. Davis
Aasiya F. M. Glover
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Defendants Desmond T. Barry, Jr., Thomas F. Egan, John P. Heanue, William M. Kelly, Francis P. Barron, and Winged Foot Golf Club, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Defendants Desmond T. Barry, Jr., Thomas F. Egan, John P. Heanue, William M. Kelly, Francis P. Barron and Winged Foot Golf Club, Inc. (the "Golf Club") submit this Memorandum of Law and attached exhibits in support of their motion *in limine* to exclude speculative, improper, prejudicial, and unreliable evidence related to Plaintiffs' requests for damages

PRELIMINARY STATEMENT

As Your Honor has made clear, "the only relevant occurrence remaining in this action is the 2013 lease extension." Oct. 2, 2019 Op. and Order, ECF No. 244, at 5; *see also* Mar. 12, 2019 SJ Op. and Order, ECF No. 227, at 13; Oct. 17, 2019 Order, ECF No. 256, at 1. Money damages arising from the 2013 lease extension (the "2013 Lease"), however, are too speculative to be calculated with reasonable certainty. The 2013 Lease does not go into effect until November 2050 (more than *30* years from the date of trial in this case), and it extends through October 2071 (*51* years from the date of trial). The speculation inherent in any attempt to predict the state of a rental market for a recreational property decades into the future is obvious, and New York law prohibits such speculative awards.[1]

Perhaps recognizing as much, in the alternative to these lost rental payments, Plaintiffs amended their pre-trial order to also seek the full market value of the Winged Foot Holding Corporation (the "WFHC") property *today*, claiming that the 2013 lease amounts to a "*de facto* sale." This theory has no basis in New York law, Plaintiffs' proposed expert analysis, or common sense. Plaintiffs have not even offered evidence on the rental market in 2050 (nor

[1] As discussed in further detail in Defendants' Memorandum of Law in Support of Defendants' Motion to Exclude Testimony by Plaintiffs' Proffered Experts on Damages Based on the Development of Winged Foot Property (the "Motion to Exclude Development Proposal Testimony"), Plaintiffs' damages proposal also depends in part on a conclusion that the value of the WFHC real estate includes residential development of 101 "guest suites" and "cottages" on the golf courses. Because the land is presently leased through 2050, that residential development cannot even be built (absent agreement from the Golf Club and alteration of the applicable leases) until October 31, 2050. The residential development proposal is speculative even if assessed on today's terms due to serious zoning, safety, and environmental hurdles that Plaintiffs' proposed experts failed even to consider. That speculation enters the absurd when making projections for the next 50 years. *See* Motion to Exclude Development Proposal Testimony at 6–9.

could they), much less how the loss of those future rent payments would amount to a sale.

Regardless, Plaintiffs' proposed detours regarding inherently speculative monetary damages would be especially wasteful here, given that rescission of the 2013 Lease would put Plaintiffs in precisely the same position they would occupy had it not been executed.

For similar reasons, Plaintiffs may not present evidence on unjust enrichment damages. New York law expressly prohibits recovery of purported unjust enrichment for *future* benefits not yet conferred (as is the case with the 2013 Lease), and where an unjust enrichment claim is merely duplicative of a damages claim. In all events, unjust enrichment is unavailable under New York law when the subject matter is covered by a binding contract, as here.

Finally, even if Your Honor finds that Plaintiffs' damages are not inherently speculative, the Court should exclude the testimony of Plaintiffs' proposed expert, Mr. Buddie A. Johnson. Mr. Johnson conceded he is not an appraiser but nonetheless purports to offer an opinion on the value of the WFHC property. *See* Ex. 1 (Expert Rep. of Buddie A. Johnson ("Johnson Rep.")) at 13, Apr. 2, 2017.[2] Mr. Johnson also repeatedly admitted during his deposition that he is not an expert on the subjects on which he opines and that he based his conclusions on nothing more than his personal, unsupported beliefs. For example, Mr. Johnson:

- Expressly based his conclusions on the opinions of his supervisor whose involvement was only disclosed by attaching the supervisor's resume to Mr. Johnson's report;
- Offered his opinion on value of the WFHC's real property—the definition of an appraisal—but has no license to do so, and stated that he is only "qualified to assist in [such an appraisal], but the final analysis of value for an appraisal is done by somebody who is certified" (*See* Ex. 2 (Buddie A. Johnson Dep. ("Johnson Dep.")) at 179:3-6, Apr. 3, 2017); indeed, Mr. Johnson has never valued relevant real estate on his own or signed an appraisal report;
- Premised his opinion on terminating the entire membership of the Golf Club and reconstituting a club with 650 new members at triple the current initiation fees and nearly double the current dues, even though he admitted that membership

[2] Citations to Ex. __ refer to the exhibits to the Declaration of David Sarratt in Support of Defendants' Motion to Exclude Evidence Related to Speculative Damages and Unreliable Opinion Testimony by Plaintiffs' Proposed Expert Buddie A. Johnson.

development is not his "area of expertise" (*id*. at 145:3–7) and could not think of a single example of a similar removal and reconstitution ever taking place (*id*. at 75:16-23);

- Offered an opinion on membership development, but always advises clients that "[p]robably [his] best advice was to go get a membership development company to come in and do this for you" (*id*. at 146:9–15); and
- Failed to consider the potential liabilities an investor would consider, even though he values the real estate by "look[ing] at [*himself*]" and "tr[ying] to put on an investor hat" (*id*. at 23:18–24).

For all of the reasons set forth below, Plaintiffs should not be permitted to present evidence on damages; in any event, Mr. Johnson's testimony should be excluded.

STATEMENT OF RELEVANT FACTS

Over the past seven decades, the Golf Club and the WFHC have renewed and extended a lease first entered into in 1947 (the "1947 Lease") on the same material terms. Each of these extensions grants the Golf Club a lease of the land for a future period of 21 years and the resulting right to operate the WFHC's two golf courses, clubhouse, and other property. Exs. 3 (Defs.' Ex. 367); 4 (Defs.' Ex. 670); 5 (Defs.' Ex. 734); 6 (Defs.' Ex. 826); 7 (Defs.' Ex. 953) (executed leases dated 1947, 1974, 1984, 2002, and 2013). In exchange, the Golf Club pays rent to the WFHC that includes: (*i*) a $30,000 fixed annual fee; (*ii*) the WFHC's annual real estate taxes; and (*iii*) certain of the WFHC's insurance payments. *Id.* The most recent lease extension was agreed to in 2013, and grants the Golf Club a lease from November 1, 2050 through October 31, 2071. *See* Ex. 7 (Defs.' Ex. 953).

In their pre-trial materials, Plaintiffs claimed damages of $49.4 million for breach of fiduciary duty, based on a purported calculation of "lost rental profits" due to the 2002 Lease from 2029 to 2050 ($38.0 million) added to "lost rental profits" due to the 2013 Lease from 2050 to 2071 ($11.4 million). *See* Proposed Amended Pre-Trial Order ("Amended PTO"), ECF No. 257 at 11, Oct. 28, 2019. In response to the Court's October 17, 2019 Order, Plaintiffs added an alternative damages request for $345.4 million, on the theory that the 2013 Lease "may be found

to constitute a *de facto* sale of the property to the Club." *See* Amended PTO at 12, 15. For their unjust enrichment claim, Plaintiffs seek $141.7 million, adopting Mr. Johnson's calculation of capitalized net income from 2016 to 2071, which assumes a completely reconstituted and new club, with 650 new members paying nearly double the current membership dues. *See id.* at 12, 14–15. Plaintiffs seek, again in the alternative, "[d]istribution of proceeds from judicially supervised sale of property," estimated at $345.4 million. *Id.* at 12.

ARGUMENT

I. Money Damages Would Be Impossibly Speculative To Establish Here

A. Plaintiffs Should Be Precluded From Presenting Evidence on Damages Relating to Time-Barred Claims

Despite nominally framing their damages in relation to the 2013 Lease, Plaintiffs continue to seek damages related to time-barred leases. *See id.* at 11–12 (seeking damages of $38 million for "Present value of future rent loss 2029-2050" and, as alternative unjust enrichment damages, "the benefit to the Club of paying submarket rent from 2029-2071"). New York law prohibits recovery of damages arising from time-barred claims. *See Berns v. EMI Pub., Inc.*, No. 95 Civ. 8130, 1999 WL 1029711, at *10 (S.D.N.Y. Nov. 12, 1999) (where there is an "applicable . . . statute of limitations, and the absence of a justifiable reason to toll the statute, Plaintiffs are precluded from recovering damages for any alleged [injury] accruing prior to [the statute of limitations date]"). To the extent that Plaintiffs attempt to reconstitute time-barred claims as requests for unjust enrichment damages, that request is improper. *See id.* at 12 (seeking unjust enrichment damages starting in 2029 for operating the property under leases

other than the 2013 Lease).[3] Plaintiffs should therefore be precluded from offering any evidence concerning damages arising from any occurrence other than the 2013 Lease.

B. The Only Potential Damages Left in Plaintiffs' Case Are Too Speculative to Be Awarded, and Therefore All Evidence as to Damages Should Be Excluded

Plaintiffs cannot recover any of the damages they request because damages arising from the 2013 Lease are too speculative to be estimated with reasonable certainty, and because Plaintiffs have no right to duplicative damages for *future* unjust enrichment. Instead, as Your Honor noted in the October 2, 2019 Opinion and Order, if they prevail on the question of corporate purpose, Plaintiffs may have an entitlement to rescission of the 2013 Lease, which would put them in precisely the same position that they would occupy had the lease not been executed, decades before the extension would take effect. *See* Op. and Order, ECF No. 244 at 5.

1. Damages Related to the 2013 Lease Are Too Speculative to Recover as a Matter of Law

Under New York law, damages that are too speculative to be estimated with reasonable certainty may not be recovered. *See Levy v. Bessemer Trust Co., N.A.*, No. 97 Civ. 1785, 1999 WL 199027, at *5 (S.D.N.Y. Apr. 8, 1999) (a party "must be able to prove [damages] with reasonable certainty") (citing *Am. Fed. Grp., Ltd. v. Rothenberg*, 136 F.3d 897, 907–08 (2d Cir. 1998)); *see also Sea Trade Maritime Corp. v. Coutsodontis*, 744 F. App'x 721, 725–26 (2d Cir. 2018) (reversing a finding of liability on breach of fiduciary duty, one element of which is damages, for "the failure to prove non-speculative damages").

The seminal case on this issue is *Kenford Co. v. Cty. of Erie*, 67 N.Y.2d 257 (N.Y. 1986). In *Kenford*, managers of Dome Stadium, Inc. brought a breach of contract action against Erie

[3] Plaintiffs also state that "Plaintiffs may seek unjust enrichment damages measured by the benefit to the Club of paying submarket rent from 2029-2071." Amended PTO at 12 n.3. Plaintiffs' attempt to perpetually reserve their right to change their damages requests is improper and causes severe prejudice to Defendants as they prepare for trial.

County in New York for the county's failure to construct an athletic stadium, seeking damages over a 20-year period. *Id.* at 260. The New York Court of Appeals held that, "despite the massive quantity of expert proof," damages 20 years into the future were too speculative as a matter of law. *Id.* at 262. The court explained that "the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty." *Id.* Notably, in *Kenford*, the court reached its holding because the "economic facts of life, the whim of the general public and the fickle nature of popular support for professional athletic endeavors must be given great weight in attempting to ascertain damages 20 years in the future." *Id.* at 262–63.

Courts have repeatedly followed this rule, rejecting requests for speculative damages to be put before a jury. *See, e.g.*, *Summit Tax Exempt L.P. II v. Berman*, No. 88 Civ. 5839, 1989 WL 152796, at *5, *7 (S.D.N.Y. July 19, 1989) (holding that a request for lost profits "over the thirty year life of the loan" was not only "'speculative, possible or imaginary,' but can best be described as utterly fanciful"); *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 333 (2d Cir. 1993) (refusing to permit damages estimates that "depended entirely on speculation of a particularly dubious kind"); *Robin Bay Assoc., LLC v. Merrill Lynch & Co.*, No. 07 Civ. 376, 2008 WL 2275902, at *8 (S.D.N.Y. June 3, 2008) (finding that a damages award for a new development would be too speculative because the court would have to assume, among other things, that the plaintiff obtained the "necessary funding to purchase the land, secured the proper zoning and casino licenses, completed construction of the casino, and operated a profitable business for 5 years thereafter"); *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F. Supp. 1051, 1068 (S.D.N.Y. 1996) (finding damages too speculative where the plaintiff

presented no market evidence that it could sell a product in the future "at the purported prices and in the predicted quantity").

In this case, the 2013 Lease grants the Golf Club the right to operate on WFHC land from November 1, 2050 to October 31, 2071. *See* Ex. 7 (Defs.' Ex. 953) (letter from Winged Foot Golf Club to the WFHC, enclosing lease renewal option, dated July 29, 2013). Potential damages would therefore not even begin to accrue until the end of the year 2050—more than 30 years from the date of trial in this case. Thus, Plaintiffs are not seeking damages *extending* 20 years into the future, which the *Kenford* court found too speculative as a matter of law, but seeking damages *starting* 30 years in the future, and then extending another 21 years after that. *See* Ex. 9 (Expert Rep. Prepared by Eric P. Haims ("Haims Rep.")) at 109, Dec. 23, 2016; Johnson Rep. at 13. Moreover, Plaintiffs seek damages in the exact athletic and entertainment industry that, as *Kenford* explained, New York has long found too difficult to predict. *Kenford*, 67 N.Y.2d at 262 ("New York has long recognized the inherent uncertainties of predicting profits in the entertainment field in general.").

Estimating the state of the golf course rental market 30 years into the future is a fool's errand. As just one example, Plaintiffs' appraisal expert Mr. Haims explained that in the past 20 years, the golf market has suffered a serious decline, losing 5.7 million players in just 12 years. *See* Haims Rep. at 43. Thirty years ago, the golf market was ramping up to peak saturation in 2000 and 2001, and the present decline lay over an invisible horizon. *Id*. As another example particular to this case, the founders of the Winged Foot Golf Club and the WFHC did not know in 1921 that the bottom would fall out of the U.S. markets in 1929, and that Winged Foot would be so devastated by the subsequent Great Depression and World War II that it would have to fundamentally change its membership structure. To assess damages on Defendants based on a

guess at the state of the golf course rental market 30 years in the future would be patently speculative and unfair.

For all of these reasons, damages at law and from unjust enrichment cannot be calculated with reasonable certainty and are too speculative as a matter of law, and therefore all evidence and testimony on damages must be excluded.[4] This is particularly so given that the equitable remedy of rescission would afford Plaintiffs complete relief and put Plaintiffs in precisely the same position they would occupy had the 2013 Lease not been executed.

2. Any Evidence for Damages Arising from Future Unjust Enrichment Should Also Be Precluded Because Plaintiffs' Claim Is Duplicative And Covered By A Binding Contract

The submission of any evidence of damages related to Plaintiffs' unjust enrichment claim is precluded for three additional reasons.

First, New York law prohibits recovery of damages for *future* unjust enrichment. *See Axel Johnson, Inc. v. Arthur Andersen & Co.*, 830 F. Supp. 204, 212 (S.D.N.Y. 1993) ("To be actionable, a claim for unjust enrichment requires that the defendant already has been enriched.").

Second, Plaintiffs cannot seek recovery on their unjust enrichment claim because, according to Plaintiffs' own pre-trial materials, their unjust enrichment claim is duplicative of

[4] Plaintiffs also have no evidence of damages flowing from the 2013 Lease to offer. Plaintiffs' pre-trial materials misleadingly state that their requests for damages relating to the 2013 Lease are based on calculations performed by Mr. Haims and Mr. Johnson, *see* Amended PTO at 13–15, yet neither expert attempted to determine damages starting in 2050. Rather, damages were estimated based on a purportedly appropriate "market" rent starting in 2016, based on 2016 data. *See* Haims Rep. at 106; Johnson Rep. at 4, 7. Plaintiffs mischaracterize anticipated changes to their damages requests as an "update[]," *see* Amended PTO at 12; this is a gross misstatement. Bringing the 2016 data to the current year would not be an "update"; Plaintiffs apparently contemplate seeking to introduce for the first time estimates of a "market" rent in 2050. The assumptions in the experts' calculations performed to date cannot be blindly applied to estimate damages 30 years into the future, or "updated" for the year 2050. These assumptions include: (*i*) the competitive rates of return for "traditional financial investment instruments"; (*ii*) golf and country club "market data," including the Golf Club's own revenues and expenses; (*iii*) demand, legality, and feasibility for a proposed development of 101 cottages and guest suites on the WFHC golf courses; (*iv*) demand for membership in the Golf Club and resulting prices for initiation fees and dues; and (*v*) the growth rate of the golf market. *See* Haims Rep. at 41, 56, 71–73, 106; Johnson Rep. at 5–7.

their breach of fiduciary duty claims. *See* Amended PTO at 19 ("[T]he facts necessary to decide Plaintiffs' equitable claims [including unjust enrichment] and Defendants' equitable defenses overlap with the facts necessary to decide Plaintiffs' legal claims, and will have already been decided by the jury.").[5] Plaintiffs underline the duplicative nature of their claims by seeking unjust enrichment damages in the alternative, requesting the same "lost profits" "measured by the benefit to the Club of paying submarket rent from 2029-2071." *Id.* at 12 n.3, 15. New York law prohibits duplicative unjust enrichment claims, preventing parties from seeking a double recovery for the same alleged wrong. *See Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (N.Y. 2012) ("An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim."); *In re Fyre Festival Litig.*, No. 17 Civ. 3296, 2019 WL 3006629, at *13 (S.D.N.Y. July 10, 2019) (dismissing plaintiffs' unjust enrichment claim because "plaintiffs have offered no distinction for how the unjust enrichment claim differs from their tort claims").[6]

Third, it is black-letter law in New York that unjust enrichment claims are not available where "the parties have entered into a contract that governs the subject matter." *Pappas v. Tzolis*, 958 N.Y.2d 656, 660 (N.Y. 2012). *See also Ingham v. Thompson*, 88 A.D.3d 607, 609

---

[5] Defendants dispute Plaintiffs' assertion that Defendants' equitable defenses overlap with the facts necessary to decide Plaintiffs' breach of fiduciary duty claims, and Defendants point the Court to their equitable defenses in the Amended PTO. *See* Amended PTO at 21–23.

[6] Plaintiffs further mischaracterize a conclusion by Mr. Johnson to claim $141 million for unjust enrichment damages, describing that amount as a "disgorgement" of the value of the property derived from Mr. Johnson's proposal of increased membership dues. Plaintiffs suggest that this number is based on the *actual* benefit conferred to the Golf Club, and *not* based on "the establishment of a reorganized golf club." Amended PTO at 15. That is false. Mr. Johnson's report explicitly calculates the $141 million by estimating the difference in membership dues assuming "a hypothetical sale" of "a reform[ed] membership structure." Johnson Rep. at 5. As a result, Plaintiffs have no evidence for unjust enrichment damages, or that the $141 million reflects "disgorgement" of any benefit the Golf Club actually received—Mr. Johnson simply did not calculate "disgorgement" as Plaintiffs claim he did. Mr. Johnson cannot, therefore, testify to that conclusion, as it is outside the opinions he already disclosed. *Sandata Tech., Inc. v. Infocrossing, Inc.*, Nos. 05 Civ. 09546, 06 Civ. 01896, 2007 WL 4157163, at *6 (S.D.N.Y. Nov. 16, 2007) ("Put simply, experts are not free to continually bolster, strengthen, or improve their reports by endlessly researching the issues they already opined upon, or to continually supplement their opinions. If that were the case, there would never be any closure to expert discovery, and parties would need to depose the same expert multiple times.").

(N.Y. App. Div. 1st Dep't 2011) ("Plaintiff's unjust enrichment claim against Wellington also fails, inasmuch as a valid and enforceable contract governs the subject matter of the [breach of fiduciary duty] claim."). The 2013 Lease governs the Golf Club's purported wrongdoing—as again demonstrated by Plaintiffs' alternative request for unjust enrichment damages measured by the "lost profits" under the 2013 Lease. *See* Amended PTO at 12 n.3, 15.

C. Plaintiffs Cannot Seek Damages Based On A Purported "De Facto Sale" Arising From A Single 21-Year Lease

Nor can Plaintiffs avoid the inherent speculation involved in seeking damages from far in the future by characterizing the 2013 Lease as a "*de facto* sale." Indeed, Plaintiffs' belated revision to their pre-trial materials, adding this alternative request for damages, appears to be nothing more than a late-stage invention of counsel. Plaintiffs' experts never offered an opinion that just one lease for the term of 21 years resulted in a "*de facto* sale" of the land, or that damages for that *one future lease* would equal the full value of the WFHC real estate today. This theory finds no support in New York law—not only have Defendants been unable to find any case in support, but Plaintiffs have not offered one. It also disregards the reality that long-term leases are commonplace in commercial transactions and do not constitute sales of the leased land. Plaintiffs' "*de facto* sale" theory causes severe prejudice to Defendants, the Court, and the jury, who should not be required to spend the time and effort either to defend against or consider such a brazenly groundless request. Discovery in this matter has long since closed, and Plaintiffs should not be permitted to seek damages for which they have no expert evidence and which Defendants have never been able to assess. *See* Fed. R. Civ. P. 26(a)(2)(B)(i) (an expert's report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them").

II. Plaintiffs Cannot Introduce Evidence Relating Solely To Their Jurisdictionally-Barred Request For Common Law Judicial Dissolution

In yet another attempted end-run around Your Honor's summary judgment decision, Plaintiffs now seek to introduce evidence on their time-barred claims under the umbrella of their jurisdictionally improper, alternative claim for common law dissolution of the WFHC. Notably, in their amended pre-trial materials, Plaintiffs *added* facts and issues unrelated to the 2013 Lease and occurring prior to the time-bar as purportedly relevant to their request for common law dissolution. *See* Ex. 10, ("Redline of Amended PTO") at 4, 6 (moving language regarding "entrench[ment]," Golf Club purchases of WFHC shares, transfer restrictions, and purportedly misleading statements to shareholders).

As a threshold matter, this Court has no subject matter jurisdiction to consider—much less grant—equitable dissolution of a New York corporation.[7] The most basic research on common law dissolution in federal courts would have revealed that this Court may not consider the request for that relief; and moreover, Defendants have long raised this defense in materials

[7] Federal courts have no discretion to judicially dissolve a state corporation. *See, e.g.*, *Codos v. Nat'l Diagnostic Corp.*, 711 F. Supp. 75, 78 (E.D.N.Y. 1989) ("It is well settled, with scarcely a dissenting voice, that in the absence of express statutory authority, a court of equity has no power to dissolve a corporation.") (internal quotation marks and citation omitted); *cf. Commonwealth of Pa. v. Williams*, 294 U.S. 176, 185 (1935) (explaining that federal courts should not decide claims that "involve control of or interference with the internal affairs of a domestic corporation"). Further, courts in the Second Circuit have for decades abstained from adjudicating state dissolution claims "to avoid needless disruption of state efforts to establish coherent policy in an area of comprehensive state regulation." *Kermanshah v. Kermanshah*, 580 F. Supp. 2d 247, 271 (S.D.N.Y. 2008) (quotations omitted) (citing *Friedman v. Revenue Mgmt. of N.Y., Inc.*, 38 F.3d 668, 671 (2d Cir. 1994)). *Accord Mecca v. Lennon*, No. 16 Civ. 1414, 2017 WL 1410790, at *5 (E.D.N.Y. Apr. 18, 2017); *Nutronics Imaging, Inc. v. Danan*, No. Civ. 96-2950, 2000 WL 33128504, at *1 (E.D.N.Y. July 27, 2000); *Feiwus v. Genpar, Inc.*, 43 F. Supp.2d 289, 296–301 (E.D.N.Y. 1999); *Kuo v. Kuo*, No. 96 Civ. 5130, 1999 WL 123379, at *7–8 (S.D.N.Y. Mar. 4, 1999), *aff'd*, 216 F.3d 1072 (2d Cir. 2000); *Zamer v. Diliddo*, No. 97 Civ. 32S, 1999 WL 606731, at *5 (W.D.N.Y. Mar. 23, 1999); *Boucher v. Sears*, No. 89 Civ. 1353, 1997 WL 736532, at *19 (N.D.N.Y. Nov. 21, 1997); *Langner v. Brown*, 913 F. Supp. 260, 270–271 (S.D.N.Y. 1996); *Friedman v. Revenue Mgmt. of N.Y., Inc.*, 839 F. Supp. 203, 205 (S.D.N.Y. 1993), *aff'd*, 38 F.3d 668 (2d Cir. 1994); *Gelles v. TDA Indus., Inc.*, No. 90 Civ. 5133, 1993 WL 275216, at *11–12 (S.D.N.Y. July 16, 1993), *aff'd*, 44 F.3d 102 (2d Cir. 1994); *Harrison v. CBCH Realty, Inc.*, No. 92 Civ. 434, 1992 WL 205839 at *4 (N.D.N.Y. Aug. 13, 1992); *Cuddle Wit, Inc. v. Chan*, No. 89 Civ. 7299, 1990 WL 115620, at *2 (S.D.N.Y. Aug. 7, 1990).

shared with Plaintiffs. *See* Amended Answer, ECF No. 166, dated Sept. 7, 2017, at 108; Proposed Pre-Trial Order, ECF No. 251, dated Oct. 16, 2019, at 7.

Yet Plaintiffs have indicated they intend to use their request for common law dissolution as another circumvention of Your Honor's summary judgment opinion, seeking to introduce broad categories of otherwise irrelevant evidence, including decades-old share transactions and shareholder communications, under the guise of their request for dissolution. *See* Redline of Amended PTO at 6, 35–36; *White v. Fee*, 35 Misc. 3d 1243(A), at *22–23 (N.Y. Sup. Ct. 2012) (stating that the statute of limitations for a common law dissolution claim is six years); *see also* Defs.' Cross Mot. for SJ, ECF. No. 190, at 13. Defendants therefore respectfully request that the Court preclude Plaintiffs from presenting evidence that relates solely to their jurisdictionally-barred alternative request for judicial dissolution.

III. The Testimony of Buddie A. Johnson Is Inadmissible Under *Daubert*

If the Court finds that damages arising from the 2013 Lease are not inherently speculative, Plaintiffs' purported damages expert Buddie A. Johnson should nonetheless be excluded under *Daubert*.

By way of background, Plaintiffs have offered two purported experts in support of their damages request: (*i*) Eric Haims, a licensed commercial real estate appraiser, and (*ii*) Buddie A. Johnson, a "consultant" on West Coast golf course appraisals. Mr. Haims purports to estimate damages based on the difference between a supposed "market" rent for the WFHC land, and the actual WFHC lease, a conclusion derived in part from his appraisal of the land, which he values at $67 million. Mr. Johnson, in a spare 8-page report, nonetheless offers an opinion that the land is actually worth over $338 million, based on his view of what an imaginary investor would willingly pay, with a view toward kicking out the entire current membership and reconstituting a

new club at multiple times the present fees and dues.[8] Mr. Johnson then adds his assumptions about those increases to Mr. Haims's income analysis and blindly adopts all of Mr. Haims's other calculations to reach a final appraisal value and market rent.

Mr. Johnson, however, is not an expert—having neither the qualifications nor the experience to offer any more expert opinion than a lay person. Indeed, he has repeatedly acknowledged his own lack of expertise. His report is thus riddled with arbitrary assumptions and speculation. This Court is tasked with a gatekeeping function, ensuring that a jury is presented with credible, reliable, and *expert* testimony. The Court should not permit testimony from a purported expert who turns a blind eye to available contradictory evidence and instead dresses up his own otherwise unsupported beliefs in the guise of precision by assigning arbitrary numerical values unheard-of in the market. Even if Plaintiffs were entitled to present evidence on damages to a jury—and because damages are too speculative, *any* such evidence is inadmissible—Mr. Johnson's testimony should be excluded.

A. Standard of Review Under *Daubert*

Fed. R. Evid. 702 governs the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 597 (1993); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002). Rule 702 requires that to be admissible, a witness offered as an expert must be qualified "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Further, the witness's offered testimony must meet three criteria for admissibility. *Id.* It must be (*i*) "based on sufficient facts or data," (*ii*) "the product of reliable principles and

[8] Plaintiffs appear to have hired Mr. Johnson only after Mr. Haims returned a number far lower than Plaintiffs' early descriptions of their damages requests. *See* Ex. 12 at 2 (in March 2015, seeking damages for just six years in the range of "$70 million to $216 million"). Mr. Johnson was not in Plaintiffs' original disclosures on November 14, 2016. *See* Ex. 13. On December 6, 2016, Plaintiffs requested an extension to the deadline for serving expert reports on the purported basis that the damages analysis had become more involved than anticipated. Defendants were then notified of Mr. Johnson's report when Plaintiffs served their reports on December 23, 2016, *see* Ex. 14.

methods," and (*iii*) the product of reliable application of "the principles and methods to the facts of the case." *Id.* The proponent of expert testimony bears the burden of showing that the testimony is admissible. *See R.F.M.A.S., Inc. v. So*, 748 F. Supp. 2d 244, 253 (S.D.N.Y. 2010) (citing *Zaremba v. GMC*, 360 F.3d 355, 358 (2d Cir. 2004)).

Courts in the Second Circuit first determine, as a "threshold question," whether the expert is qualified "'to offer the opinions' on which litigants rely." *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 304 (S.D.N.Y. 2015) (quoting *Zaremba*, 360 F.3d at 360). Courts in this district assess the qualifications of an expert in two parts, deciding whether the witness has "knowledge, skill, experience, training or education" (*i*) in a field relevant to the litigation and (*ii*) applicable to the particular subject matter of the testimony offered. Fed. R. of Evid. 702; *Washington*, 105 F. Supp. 3d at 304; *Arista Records LLC v. Lime Grp. LLC*, No. 06 Civ. 5936, 2011 WL 1674796, *2 (S.D.N.Y. May 2, 2011).

If the court finds that a witness qualifies as an expert, the court will then determine whether the testimony is reliable. *See Washington*, 105 F. Supp. 3d at 305; *523 IP LLC v. CureMD.Com*, 48 F. Supp. 3d 600, 643–44 (S.D.N.Y. 2014); *Daubert*, 509 U.S. at 597. To be found reliable, the expert's testimony must be based on "more than subjective belief or unsupported speculation," *Daubert*, 509 U.S. at 599; the testimony must provide "some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion." *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 127 (2d Cir. 2006), *aff'd on other grounds*, 552 U.S. 312 (2008). A bare conclusion supported only by the *ipse dixit* of the expert is not admissible. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also Amorgianos*, 303 F.3d at 266; *Washington*, 105 F. Supp. 3d at 307.

B. The Testimony of Plaintiffs' Purported Expert Mr. Johnson Should Be Excluded Because Even He Admits that He Is Not an Expert and Based His Conclusions Solely On His Mere "Belief"

It is rare that a party's own proposed expert himself denies having the expertise, experience, or underlying data to form his opinions, but such is the case with Plaintiffs' proposed expert Mr. Buddie A. Johnson. Plaintiffs rely on Mr. Johnson to request upwards of $100 million in damages premised on Mr. Johnson's mere "belief" that the Winged Foot golf course land is worth over $338 million. *See* Johnson Dep. at 143:25–144:1-7; *see also* Johnson Rep. at 3–4, 7. Mr. Johnson bases this "belief" on his untested and unsupported opinion that the "historic" and "iconic" Winged Foot Golf Club membership could be kicked off the land and replaced with an entirely new, unknown club with a reconstituted membership of 650 individuals, each willing to pay triple the current initiation fees and nearly twice the current membership dues. *See* Johnson Rep. at 3. In defending his opinion, Mr. Johnson repeatedly disclaimed having the expertise, the licenses, the qualifications, the experience, the market data, or even the basic familiarity with Winged Foot Golf Club itself, necessary to appraise the land or estimate increases to initiation fees and membership dues. Mr. Johnson's testimony should therefore be excluded in its entirety.

1. Mr. Johnson Repeatedly Stated that He Is Not an Expert on the Assignment He Was Given, and That He Is Not Licensed or Qualified to Conduct Such an Assignment

Mr. Johnson's eight-page report (the "Johnson Report") describes Mr. Johnson's assignment as follows:

> The purpose of my review was to perform a highest and best use analysis concerning certain factors relating to the subject property identified by Jerome Haims Realty, Inc. as not within the scope of its assignment, including consideration of the additional value that could reasonably be expected to result from (i) modification of the membership structure following sale of the subject golf course, and

(ii) increased membership dues to reflect a more reasonable level of what members would be willing to pay.

Id. at 2. For each of the tasks listed in his report, Mr. Johnson confirmed that he has no expertise or experience.

a. Mr. Johnson Admitted That He Is Not an Expert at Performing a Highest and Best Use Analysis

During his deposition, Mr. Johnson admitted that he has neither the qualifications nor the experience to conduct a highest and best use analysis, even though that was precisely what he was assigned to do. *First*, Mr. Johnson admitted during his deposition that, although his report is "partially" a highest and best use analysis, he is not qualified to conduct such an analysis. *See* Johnson Dep. at 175:11-13, 178:20–179:9.[9] (To the extent that Mr. Johnson's report addresses other topics, he is not qualified to opine on them. *See infra* Section III.B.1.b.) Mr. Johnson further admitted that, in fact, he has *never* "previously undertaken highest and best use analyses." *Id.* at 175:25–176:5.

Second, Mr. Johnson acknowledged that while he offered an appraisal of the land, he is not an appraiser and is not qualified to conduct an appraisal. Mr. Johnson confirmed that he "opined on a value of the golf course," and that he was aware that the applicable Universal Standards of Professional Appraisal Practice ("USPAP") defines an appraisal as the "act or process of developing an opinion of value"—that is, exactly what he purported to do. *Id*. at 172:2-23. However, Mr. Johnson stated that he currently has no appraisal license and has never held an appraisal license qualifying him to appraise property of greater value than $250,000. *Id.* at 40:9-11, 44:10-22.

[9] "Q. Are you qualified to do a highest and best use analysis, if that were what you were asked to do? A. Well, I'm not licensed. Q. Are you qualified to do a formal appraisal, if that had been the – the request? A. I think I'm qualified to assist in it, but the final analysis of value for an appraisal is done by somebody who is certified. Q. Are you qualified to do an appraisal review or update? A. Same answer."

Third, Mr. Johnson admitted that while the report was "just" his opinion, he does not have the experience to opine on the value of Winged Foot because all his prior work—and the preparation of the Johnson Report itself—has been conducted under the supervision of an actual appraiser. In a misguided attempt to rehabilitate his testimony, Mr. Johnson stated that his report is "just [his] opinion," and that he acted "not as an appraiser," but "as a consultant." *Id.* at 172:2-23. This caveat, however, does not save his report because, beyond the admission that the report is his mere say-so, Mr. Johnson later admitted he is not qualified to provide even that consultation on his own.

In the past 40 years—including in this very case—Mr. Johnson has almost *never* provided his own opinion on the value of anything without the oversight and supervision of another man, Arthur Gimmy. Mr. Johnson explained that "for over 40 years," he has "really act[ed] just as a basic consultant to" Mr. Gimmy and that Mr. Gimmy "forms the final opinions and so on" in Mr. Johnson's work. *Id.* at 33:22–34:22. On every appraisal listed in Mr. Johnson's attachment of purported credentials, Mr. Johnson was "in support" of Mr. Gimmy, and the appraisal itself depended on *Mr. Gimmy*—not Mr. Johnson—having an appropriate license. *Id.* at 45:11-21. Mr. Johnson signed none of the appraisal reports listed in his attachment of purported credentials. *Id.* at 42:24–43:2.

Finally, Mr. Johnson did not even form the opinions in his report. Despite failing to disclose any record of conversations or materials connected to his conversations with Mr. Gimmy, Mr. Johnson admitted during his deposition that he asked Mr. Gimmy for "[h]is ideas of about how we would approach --- how I would approach" the report. *Id.* at 33:22–34:22. Mr. Johnson continued that he conferred with Mr. Gimmy "in general terms of valuing a prestigious club," and "conferred with him, as I would on any normal type of thing." *Id.* at

36:15-24. As explained above, Mr. Johnson's "normal" relationship with Mr. Gimmy is to provide "support" for Mr. Gimmy to reach a final conclusion. And, according to Mr. Johnson, that is exactly what happened here. It is worth reproducing this remarkable exchange:

> Q. So Mr. Gimmy formed the final opinions in your report?
> MR. HALEBIAN: Objection.
> A. No, ***not all of them***.
> Q. But some of them, he did?
> A. No. I ***contributed*** my thinking.

Id. at 34:23–35:6 (emphases added). Mr. Johnson cannot be permitted to testify as an expert's assistant.

b. Mr. Johnson Admitted That He is Not an Expert at Developing the Membership Plan He Proposes in His Report

The Johnson Report purports to perform two tasks in addition to a highest and best use analysis: consider additional value from (*i*) a modification of the membership structure following sale; and (*ii*) increased membership dues. Mr. Johnson again admitted that he is not an expert with respect to the two tasks, and further, that he has no relevant experience.

As an initial matter, Mr. Johnson assumes that an "investor" would buy the Winged Foot land and improvements, *id*. at 126:10–127:17; "reform the membership structure" by terminating all current memberships in the Golf Club and reconstituting the membership from scratch, Johnson Rep. at 5; charge more than triple the initiation fees currently charged at Winged Foot, *id*. at 6; and increase annual membership dues by 80%. *Id*. at 6–7. These assumptions should be summarily rejected for a number of reasons—the most important of which is that Mr. Johnson himself admitted that he has neither the expertise nor the experience to make them.

Although Mr. Johnson purports to give an opinion on a modification of Winged Foot's membership structure following a hypothetical sale, he admitted that membership development

plans are not his "area of expertise." *Id.* at 144:22–145:7, 145:22-25. In fact, when approached with questions about membership development, he advised that "[p]robably [his] best advice was to go get a membership development company to come in and do this for you." *Id.* at 146:13-15. Instead of relying on expertise and experience, Mr. Johnson instead came up with numbers he personally believed that he would find reasonable, if he were an investor. Mr. Johnson is not a golf course investor. Rather, according to Mr. Johnson, he "looked at [*himself*]" and "tried to put on an investor hat." *Id.* at 23:18-24. However, Mr. Johnson also stated that although investors *would* consider certain information, that he expressly did not consider that information when wearing his "investor hat," and had no opinion on it. *Id.* at 117:7-23.[10] In fact, Mr. Johnson admitted that he had never actually advised such an "investor" on purchasing a property on the assumptions he made. *Id.* at 80:2-20, 81:3-21.[11]

c. Mr. Johnson Does Not Have the Expertise to Opine on Winged Foot Specifically

In addition to his general lack of expertise or experience on either highest and best use analyses or membership reconstitution, Mr. Johnson does not have the expertise to opine on

[10] "Q. So if I understand correctly what you're saying, an investor would want to own Winged Foot, would look at the potential revenue side, and would decide what they could then pay without looking at the potential liabilities side, correct? MR. HALEBIAN: Objection. A. They would consider the liabilities side. Q. Where in your report is the liabilities side considered? MR. HALEBIAN: Objection. A. I didn't talk about it. Q. You didn't talk about it. You didn't have any opinion on what the potential liability might look like, correct? A. No."

[11] "Q. So I take you've never advised a potential buyer of a golf property that 19 times annual revenues was a reasonable price to pay, correct? A. That's right. Q. Have you ever advised a potential buyer that it should assume that it could reconstitute the entire membership at 3 times the then existing initiation fee? A. No. Q. Have you ever advised a potential buyer that it should assume it would be able to reconstitute the entire membership at any increase to the initiation fee? A. No.;" "Q. So what about a seller, have you advised sellers about the value of the golf course property? A. May have conversationally, but again, sellers pretty much know what they want to sell – what they want to get for a property if they're selling it. Q. So have you ever advised a seller that it should hold out for a price equal to roughly 19 times annual revenues? A. No. Q. And have you ever advised a seller that it should hold out for a price that would assume that – strike that. Have you ever advised a seller that it should hold out for a price that would assume that the new buyer could triple the initiation fees? A. No."

those subjects with regard to Winged Foot in particular. *First*, Mr. Johnson admitted he has no information about the demand for memberships at Winged Foot, yet demand for memberships underpins his land value, which itself relies on the assumption that 650 individuals (more than the current regular memberships at the Golf Club) would be willing to pay $375,000 in initiation fees and $18,000 a year in dues. *See id. at* 47:19–48:2; Ex. 13 (Defs.' Ex. 977) (2015 Member Count); *see also* Johnson Rep. at 3. The Johnson Report opines that Winged Foot would be able to charge triple the current initiation fee because of its "iconic" status, and Mr. Johnson further declared in his deposition that "in a case like Winged Foot, there has to be a pent-up demand for people that want to get into that Club." *See* Johnson Rep. at 6; *see also* Johnson Dep. at 121:21–122:2. But when pressed whether he had "any information in that regard," Mr. Johnson replied, "No, I don't. But I believe it." *Id*. He further stated that his numbers are based on his "belief anyway that [new members] would pay the numbers that I projected in this to be a member." *Id.* at 144:5-7.

Second, Mr. Johnson admitted he has no experience with golf courses comparable to Winged Foot. He stated that he has only consulted on "one or two" golf courses on the East Coast, and those were in Florida—not the Northeast. *Id*. at 42:2-7. In fact, during the deposition, Mr. Johnson had to ask Defendants' counsel where Winged Foot is located, asking, "is it Westchester County, is that where this is?" *Id*. at 50:14-17. When asked whether he had ever been to Winged Foot, Mr. Johnson replied that he had not. *Id.* at 50:18-19. Mr. Johnson therefore opined on the value of real estate—assuming, for example, that it could develop residential properties on the courses—without ever having even visited that real estate.

2. Mr. Johnson Admitted That He Relied On No Data Other Than His Own Say-So To Reach His Conclusion

As explained above, Mr. Johnson admitted that all his assumptions were based on his mere "belief" that an investor would be willing to (*i*) pay $338 million for the land and improvements on which the Winged Foot Golf Club operates; (*ii*) terminate all current Winged Foot memberships; and (*iii*) reconstitute 650 new memberships at an initiation fee of $375,000 and membership dues rate of $18,000 annually. Throughout his deposition, Mr. Johnson repeatedly acknowledged that his "belief" was unsupported by any data, and in fact that he had never seen a single example in the market of what he proposed.

As a general matter, Mr. Johnson confirmed that, as he stated in the Johnson Report, he had relied on *no* documents other than the report prepared by Mr. Haims. *See* Johnson Rep. at 2; *see also* Johnson Dep. at 10:16-23. More particularly, Mr. Johnson acknowledged that there is no actual example of his theory in the market; that he had not conducted a market study of the Westchester area for his analysis; that he did not have any data; and in some cases, did no follow-up work. *See* Johnson Dep. at 58:6-10, 141:9-11. For example, he sought no information on:

- Whether the addition of Mr. Haims's proposed residential development would harm the value to a potential "investor" purchasing the "iconic" Winged Foot (*id*. at 50:6-17);
- Whether an "investor" would purchase Winged Foot at a price equal to 19 times Winged Foot's annual revenues (*id*. at 67:25–68:7, 72:2-5);
- Whether new members would be willing to pay $375,000 in initiation fees (*id.* at 89:3-12, 90:21-24, 92:17-24);
- Whether the sources submitted prior to his deposition were based upon credible information (*id.* at 94:12-18, 98:21-25, 107:19-25);
- Whether Winged Foot's initiation fees are refundable (*id.* at 108:14-17);
- Whether the WFHC owns the trademark to the Winged Foot name (it does not) and could use it if the Golf Club were kicked off the land (it could not) (*id*. at 110:12-16);
- The size of any other club memberships (*id.* at 123:23-25);
- Whether there would be any reputational harm to terminating all of Winged Foot's memberships (*id.* at 132:15-20);

- Any of Winged Foot's financial information (*id.* at 155:17-19); and
- Whether Winged Foot was zoned to accommodate the development project in the Haims Report (*id.* at 163:8-13).

In addition to his complete failure to consider any actual data relevant to his opinion, Mr. Johnson admitted that, to the extent he considered any *concepts*, he only incorporated those that increased his conclusion of value, and excluded those that would decrease it. Again, it is useful to quote Mr. Johnson's own words:

> Q. Well, with all due respect, it feels a little bit like there's things on the upside, you're looking at. But anything that could be on the downside, you're saying would be speculation.
> MR. HALEBIAN: Objection.
> Q. It seems a little bit imbalanced. Would you dispute that?
> MR. HALEBIAN: Objection.
> A. No, I wouldn't dispute that.

Id. at 88:3-12.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an order: (*i*) precluding Plaintiffs from offering any testimony, evidence, or arguments as to damages, which are too speculative as a matter of law; (*ii*) precluding Plaintiffs from offering testimony, evidence, or arguments as to unjust enrichment; (*iii*) precluding Plaintiffs from offering testimony, evidence, or arguments as to judicial dissolution; and (*iv*) excluding the testimony of Mr. Buddie A. Johnson.

Dated: October 28, 2019

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: */s/ David Sarratt*
Maeve O'Connor
David Sarratt
Susan Reagan Gittes
Laura J. Samuels
Morgan A. Davis

Aasiya F.M. Glover
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
mloconnor@debevoise.com
dsarratt@debevoise.com
srgittes@debevoise.com
ljsamuels@debevoise.com
mdavis@debevoise.com
afmglover@debevoise.com

Attorneys for Defendants Desmond T. Barry, Jr., Thomas F. Egan, John P. Heanue, William M. Kelly, Francis P. Barron, and Winged Foot Golf Club, Inc.