SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

GUANG HUANG, individually, and derivatively on behalf of BBSHARES CAPITAL MANAGEMENT LIMITED, Plaintiff, -against- JINGJING ZHOU and HONGTAO (JASON) QIAO, Defendants, and BBSHARES CAPITAL MANAGEMENT LIMITED, Nominal Defendant.	Index No. 61185/2022 (Jamieson, J.S.C.)

INDIVIDUAL DEFENDANTS JINGJING ZHOU AND HONGTAO (JASON) QIAO'S MEMORANDUM OF LAW IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(7)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

INTRODUCTION

Plaintiff's second amended complaint fails as a matter of law. (*See* NYSCEF No. 133 ("SAC").) This has always been so, but a recent ruling of Cayman Island's highest court further proves it. The Privy Council ruled in November 2024 that a claim that a shareholder was harmed due to his shares being diluted properly runs as an individual claim *against the company*, not against the directors of the company. Under this ruling, Plaintiff's claims against Ms. Zhou and Mr. Qiao, as they relate to dilution and any individual harms, fail as a matter of law.

Plaintiff's second amended complaint suffers many other legal errors too. Plaintiff brings breach of fiduciary duty claims under New York law, despite black letter law that fiduciary duty claims follow the law of the jurisdiction of incorporation. And Plaintiff's breach of fiduciary duty claims under Cayman fare no better: Cayman law does not impose a duty that directors owe to shareholders, unless there is a special duty, and here, Plaintiff has pled facts contradicting that any such special duty exists. Plaintiff's claims of fraud are, in whole or in part, duplicative of his breach of fiduciary duty claims, and to the extent they are not, Plaintiff fails to allege fraud with particularity as required under CPLR 3016 or articulate an actionable misrepresentation or material omission. Further, Plaintiff's conspiracy claim fails because it is a tort—which must be pled under *New York* law, not *Cayman* law—and conspiracy is not a cognizable claim under New York law. And anyway, the torts which could conceivably underlie the conspiracy claim are not themselves cognizable. Finally, Plaintiff lacks standing to assert derivative claims on behalf of BBShares because Plaintiff did not allege that wrongdoers controlled most of the board at the time that he filed an amended his pleadings.

For the reasons stated herein, Plaintiff's direct and derivative claims against the Individual Defendants fail as a matter of law and should be dismissed.

RELEVANT BACKGROUND

In 2018, Plaintiff, Mr. Qiao, and two other entrepreneurs, Shan Lin (Sam) and Xinghua Luo, together formed BBShares Capital Management ("BBShares"), an investment advisory company that would manage funds invested in publicly traded cryptocurrencies. Before forming BBShares, Mr. Qiao and Plaintiff had worked together at J.P. Morgan and BBIndex and were friends. (SAC ¶¶ 22, 31.) Each understood that all involved were free to pursue other business opportunities, and that understanding was expressly incorporated into the Articles. (*See* SAC Ex. 2 ¶¶ 23.1–23.3). From about 2017 through 2018 and into 2019, Plaintiff and Mr. Luo together managed the day-to-day operations of BBShares. (*See* SAC ¶¶ 42, 45.)

Plaintiff alleges, *inter alia*, that Ms. Zhou and Mr. Qiao breached a purported fiduciary duty that they personally owed Plaintiff (SAC ¶¶ 173–86, 197–208), breached their fiduciary duties to BBShares Capital Management (SAC ¶¶ 142–56), and made certain fraudulent misrepresentations and/or omissions (SAC ¶ 209–22). More specifically, the SAC cites the following alleged misrepresentations:

- That Ms. Zhou and Mr. Qiao "promised to leave their employment to commit themselves full-time to the business." (SAC ¶ 53.) Plaintiff does not allege that either Ms. Zhou or Mr. Qiao provided a date certain for leaving their full-time employment. Plaintiff concedes that Ms. Zhou and Mr. Qiao quit each's full-time employment between "mid-2018 through mid-2019." (SAC ¶ 64.)

- That Ms. Zhou and Mr. Qiao "repeated their assurances to Huang that they would devote significant time to raising capital for the business." (SAC ¶ 53.) Plaintiff concedes that Mr. Qiao said he did "some work to secure investors" and, subsequent thereto, "BBShares Capital [] gained momentum" from multiple investors (only *one* of which Plaintiff takes credit for). (SAC ¶¶ 57–58.)

According to the SAC, Ms. Zhou was a director of BBShares from 2018 to 2022, while Mr. Qiao served as a director from 2019 through 2022 and was a "de facto or shadow director" during other periods. (SAC ¶¶ 14–16, 47.) BBShares also had two independent directors during the relevant period, Benjamin Joseph Pershick and Casey McDonald. (SAC ¶ 138.) By September

2022, when Plaintiff initiated this suit, Pershick and McDonald were the only remaining directors. (SAC ¶ 138.) Plaintiff does not allege that he made any demand on Pershick, McDonald, or any of the directors to bring a lawsuit on behalf of the Company against Ms. Zhou and Mr. Qiao.[1] Nor does Plaintiff allege that Pershick and McDonald had any interest—financial or otherwise—in the transactions that purportedly gave rise to Plaintiff's claims, or that Pershick or McDonald were controlled by Ms. Zhou or Mr. Qiao.

STANDARD OF REVIEW

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction, the court is to determine only whether the facts as alleged fit within any cognizable legal theory, and the facts pleaded are presumed to be true and are to be accorded every favorable inference." *Nofal* v. *Yousef*, 228 A.D. 3d 772, 773 (2d Dep't 2024), *appeal dismissed*, 42 N.Y.3d 1026 (2024). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)." *Eurycleia Partners, LP* v. *Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).[2]

Cayman law governs the fiduciary obligations of a Cayman company's directors and officers. *See Dragon Inv. Co. II LLC* v. *Shanahan*, 49 A.D. 3d 403, 404 (2008); *Medical Self Care, Inc. ex rel. Dev. Specialists, Inc.* v. *National Broadcasting Co.*, 2003 WL 1622181, at *7 (S.D.N.Y. Mar. 28, 2003) ("Under New York law, a claim for breach of a fiduciary duty owed to a corporation is governed by the law of the state of incorporation.").

[1] Plaintiff alleges he "demanded additional information" on September 28, 2022. (SAC ¶ 139.)

[2] "A motion based upon [CPLR 3211(a)(7), among others,] may be made at any subsequent time." CPLR 3211(e).

ARGUMENT

I. The Allegations Against Individual Defendants Fail As A Matter Of Law

A. Plaintiff's Fiduciary Duty Claims Based on New York Law Fail as a Matter of Law (Counts III, VI, VIII)

The Court should dismiss Plaintiff's claims under New York law for breach of fiduciary duty and for accounting, brought both individually and derivatively, because New York law does not apply. Under this state's laws "a claim for breach of a fiduciary duty owed to a corporation is governed by the law of the state of incorporation." *Medical Self Care*, 2003 WL 1622181, at *7. Cayman law therefore controls, since BBShares is a Cayman company, and Plaintiff cannot maintain such claims under New York law. *See, e.g.*, *Dragon Inv.*, 854 N.Y.S.2d at 117 (applying British Virgin Islands law to analyze fiduciary relationships concerning a company incorporated in the British Virgin Islands).[3]

B. Plaintiff's Alleged Individual Fiduciary Duty Claim Fails as a Matter of Cayman Law (Count IV)

Plaintiff has failed to plead that the Individual Defendants owe him any cognizable legal duty. For one, the Cayman Islands Privy Council held on November 14, 2024, that claims of diluted shares should be brought *against the company* and not against the directors. *See* *Tianrui (Int'l) Holding Co. Ltd.* v. *China Shanshui Cement Grp. Ltd.*, [2024] UKPC 36, Privy Council Appeal No. 0002 of 2023, ¶¶ 66, 72 ("It is an actionable harm because the impropriety in the exercise of the power contravenes the corporate contract binding [a plaintiff shareholder] and the company, even though the relevant fiduciary duty breached by the directors is not owed to him.");

[3] The accounting claim is pegged to purported "fiduciary dut[ies] owed to Huang." (SAC ¶ 226.) This claim, too, must be decided under Cayman Law, as any obligations for an accounting arise from Cayman corporations law. *Cf. LoGerfo* v. *Trs. of Columbia Univ. in City of New York*, 97 A.D.3d 547, 548 (2d Dep't 2012) ("[T]he right to an accounting is premised upon the existence of a fiduciary relationship.").

see also Sandra L. Musumeci Declaration ("Musumeci Decl.") ¶ 2, Ex. A. The Council's reasoning is consistent with prior Cayman law, which does not recognize a general independent duty that directors owe to shareholders. *See Feiner Fam. Tr.* v. *VBI Corp.*, 2007 WL 2615448, at *7 (S.D.N.Y. Sept. 11, 2007) ("[U]nder Cayman Islands law, majority shareholders do not owe fiduciary duties to the company or to minority shareholders," and "a director does not owe any fiduciary duties to minority shareholders solely based on his or her relationship to the company."). Plaintiff's allegations concerning alleged improper dilution fail for that reason alone.

Plaintiff seeks to skirt that limitation with conclusory allegations that Defendants owe him a personal fiduciary duty through the "special relationship" between BBShares's members and Zhou and Qiao, as "directors and officers," (SAC ¶¶ 175–77). Yet Plaintiff's allegations undermine his own theory. Such a duty only exists under Cayman law when "one party undertakes responsibility to act on behalf of, or for the benefit of, another." (*Id.* ¶ 175.) But Plaintiff admits that he did not rely on Defendants with respect to BBShares; he alleges that ***he himself*** undertook "the burden of the day-to-day operations." (*Id.* ¶¶ 42–45.) Indeed, Ms. Zhou and Mr. Qiao were living in New York and, according to Plaintiff, purportedly not devoting sufficient time to the operation of BBShares up until approximately July 2019. (SAC ¶ 41.) And, as of July 2019, Plaintiff was allegedly "frozen out" and "kick[ed] out." (SAC ¶¶ 12, 97.) In other words, Plaintiff alleges that Individual Defendants failed to undertake any responsibility prior to July 2019, and that after July 2019, they effectively ejected him—which is the opposite of "act[ing] on behalf of, or for the benefit of" Plaintiff. Because such a relationship cannot legally give rise to a fiduciary duty owed to Plaintiff, Plaintiff, personally, does not have a viable breach of fiduciary duty claim as a matter of Cayman law. *Tianrui*, [2024] UKPC 36, ¶ 35 ("A breach by a director or by the board of

directors of a duty which is owed to the company is a wrong done to the company, and the general rule is that only the company has a remedy for that breach.").

C. Plaintiff Fails to State a Fraud Claim Under New York Law (Count VII)

Fraud requires (i) "a material misrepresentation of a fact," (ii) "knowledge of its falsity," (iii) "intent to induce reliance," (iv) "justifiable reliance by the plaintiff" and (v) resulting damages. *Eurycleia Partners*, 12 N.Y.3d at 559. Alleged misrepresentations must concern presently existing *fact*s; "future intentions or expressions of hope" do not suffice and "are not actionable." *Lincoln Place LLC* v. *RVP Consulting, Inc.*, 16 A.D.3d 123, 124 (1st Dep't 2005). Plaintiff's fraud claim lacks requisite particularity, is contradicted by the pleadings, and merely recycles ill-pled allegations of breached fiduciary duties, and thus fails as a matter of law for any of these reasons.

1. Plaintiff Fails to Plead Fraud With Required Particularity

Frauds claims require allegations with particularity. CPLR 3016(b). That means *detailed* allegations, including the specific persons making the challenged statements and the dates on which those statements occurred. *See Casano* v. *New 19 West LLC*, 2010 WL 4630269, at *5 (N.Y. Sup. Ct. Oct. 18, 2010) (citing *Liling* v. *Segal*, 633 220 A.D.2d 724, 726 (2d Dep't 1995)). Fraud allegations cannot survive without such detail. *See, e.g.*, *Michaan* v. *Gazebo Horticultural, Inc.*, 117 A.D.3d 692, 603 (2d Dep't 2014) (dismissing under CPLR 3016(b) allegations that asserted "in conclusory terms that the estimates provided by the defendants were too low, and failed to adequately plead facts from which it could be inferred that the defendants knew their estimates were false at the time they were provided"); *Cedar Capital Mgmt. Grp. Inc.* v. *Lillie*, 79 Misc.3d 1238(A), *15 (N.Y. Sup. Ct. 2023) (failing to specify which defendant made the purported misrepresentation renders the claim inviable); *McGovern* v. *T.J. Best Bldg. & Remodeling Inc.*, 245 A.D.2d 925, 927 (3d Dep't 1997) (affirming dismissal when "the record as a whole generally fails to identify which of the named defendants made the alleged misrepresentations and/or

establish when such representations were made"); *Barlow* v. *Skroupa*, 217 A.D.3d 482, 483 (1st Dep't 2023) (affirming dismissal when the "complaint fails to identify any specific and material misrepresentation of fact" and instead offered only "conclusory allegations that they made 'false representations' regarding [the company's] revenues and its ability to pay wage and benefits").

Take *CBH Medical, PC* v. *Merit Sys., LLC*, where the plaintiff alleged that, on a series of phone calls, defendants misrepresented having prior "substantial experience writing professional grade proposals" and turning such proposals around on a rush timeline. 2022 WL 16963754, at *2 (N.Y. Sup. Ct. Nov. 16, 2022). The court dismissed claims pursuant to these misrepresentations because "[v]ague references to phone calls without identifying what was said and when simply is not enough." *Id.* at *4; *see also Pace* v. *Raisman & Assoc., Esq., LLP*, 95 A.D.3d 1185, 1189 (2d Dep't 2012) (dismissing, as insufficiently pled, fraud allegations comprised of the "conclusory allegation that . . . defendants knowingly made false representations to the decedent with respect to the decedent's ability to make conveyances to the trust").

Plaintiff's fraud claim is likewise lacking. For example, he alleges the following vague and conclusory purported misrepresentations and omission:

(i) Plaintiff stated that Ms. Zhou and Mr. Qiao "falsely represented to Huang that each would leave their full-time employment." (SAC ¶ 213.)

(ii) Plaintiff asserted that Mr. Qiao and Ms. Zhou promised to "devote their efforts and leverage their networks to raise investment." (SAC ¶ 214.)

(iii) Plaintiff alleged that Ms. Zhou and Mr. Qiao "deliberately withheld any information from Huang regarding conflicts of interest." (SAC ¶ 215.)

None of these could plausibly be actionable statements based on their content (*see infra* Sections I.C.2 and I.C.3), but they also fail because they lack the detail demanded of claims sounding in fraud. Plaintiff does not specify when each alleged misrepresentation happened or the context in which those alleged misstatements occurred, nor does he provide any factual basis to support that

these statements or omissions were knowingly false or misleading. *CBH Med.*, 2022 WL 16963754, at *4 (claims deficient without "identifying what was said and when"). He does not even identify *who*—Ms. Zhou or Mr. Qiao—said what, and such group pleading cannot suffice. *Cedar Capital*, 79 Misc.3d 1238(A), at *13 ("A complaint that fails to differentiate between the defendants is an improper group pleading."). Any of these failures independently require dismissal, and together, they render Plaintiff's claim incomprehensible.

Moreover, the context of each of these allegations is crucial: for example, without further detail, Plaintiff has not pegged any reliance allegations to a particular conversation, communication, or time. Similarly, without such details, Plaintiff has not alleged any facts to support that—if Plaintiff did so rely—that he did so justifiably. Nor has Plaintiff pled any facts to support that either Individual Defendant intended Plaintiff to rely on the purported misrepresentations or omission. Plaintiff has not pled this claim with the level of detail mandated by CPLR 3016(b)—and thus, Plaintiff's fraud claim should be dismissed.

2. Plaintiff Does Not Identify Any Actionable Misrepresentations

At best, Plaintiff's fraud allegations could be understood as allegations of fraudulent inducement to take shares in and/or employment with BBShares Capital. But Plaintiff's claims fail even under that charitable reading.

First, Plaintiff's own allegations establish that the supposed misrepresentations were not false. Second, Plaintiff cites only forward-looking statements, and such "promissory statements as to what will be done in the future are not actionable," *Adams* v. *Clark*, 239 N.Y. 403, 410 (1925), unless such a statement of future intent is "made with a preconceived and undisclosed intention of not performing it," *Sabo* v. *Delman*, 3 N.Y.2d 155, 160 (1957). And a promise of future success—*e.g.*, the ability to obtain investors—is not a material fact (and cannot be the basis for a fraud claim). *Lincoln Place*, 16 A.D.3d at 124 (fraudulent inducement claims properly dismissed as they

"cite[] nothing more than statements of future intentions or expressions of hope, which are not actionable").

Plaintiff complains that Ms. Zhou and Mr. Qiao did not quit their jobs despite assurances that they "would leave their full-time employment" at some unspecified time. (SAC ¶ 213.) But the SAC itself belies this assertion. Plaintiff pled that Ms. Zhou and Mr. Qiao ***did*** leave their full-time employment between mid-2018 and mid-2019. (*See* SAC ¶ 64 ("they finally quit their jobs").) Plaintiff, at most, alleged that Mr. Qiao and Ms. Zhou took longer to act than Plaintiff thought appropriate (although the SAC does not allege that Defendants committed to leaving their jobs by any specific date). Plaintiff does not even allege that this vague, indeterminate promise of future intent was "made with a preconceived and undisclosed intention of not performing it." *Sabo*, 3 N.Y.2d at 160. This is not a misrepresentation of fact that can constitute an actionable fraud claim as a matter of law.

And, as to the second alleged misrepresentation, Plaintiff asserted that Mr. Qiao and Ms. Zhou deceptively promised to "devote their efforts and leverage their networks to raise investment." (SAC ¶ 214.) But Plaintiff contradicts himself—again—by alleging that Mr. Qiao did exert efforts to secure investors. (*See* SAC ¶¶ 56–59.) Furthermore, a promise to raise money in the future—dependent on the actions of outside parties—is not an actionable misrepresentation. *Lincoln Place*, 16 A.D.3d at 124.

Plaintiff has not pled cognizable misrepresentations, and thus, these cannot be the basis for a fraud claim.

3. Plaintiff Pleads No Fraudulent Omission Because He Does Not Articulate Any Duty Owed by Individual Defendants

"[F]raudulent concealment" requires both the basic elements of fraud *and* "that the defendant had a duty to disclose material information and that it failed to do so." *Mandarin*

Trading Ltd. v. *Wildenstein*, 16 N.Y.3d 173, 179 (2011). Without a "confidential or fiduciary relationship," there can be no fraud by omission, *Mobil Oil Corp.* v. *Joshi*, 202 A.D.2d 318, 318 (1st Dep't 1994), and "conclusory allegations" or a "special relationship" do not create "a heightened or fiduciary duty," *Jin Chai-Chen* v. *Metro. Life Ins. Co.*, 190 A.D.3d 635, 635 (1st Dep't 2021). Here too, Plaintiff's allegations are lacking.

He does not identify any duty, contract or otherwise, that could render a (non-existent) material omission actionable. (*See* SAC ¶¶ 211, 215.) His becoming a shareholder of BBShares Capital Management did not create such a duty, and neither did his personal connection to Ms. Zhou and Mr. Qiao. (*See supra* Section I.C.4.) And even if a duty existed (it does not) Plaintiff does not even vaguely specify when, where, or how this purported omission occurred. (*See supra* Section I.C.1.) In fact, there is no transaction during the relevant period that could form the basis of a fraudulent concealment claim. (*See infra* Section I.C.4,)

Without a cognizable duty, Plaintiff has failed to plead an actionable omission, and thus any allegations so based (SAC ¶ 215) fail.

4. Plaintiff's Fraud Claims Also Fail Because They Are Duplicative of Fiduciary Duty Claims and Because He Fails to Plead Reliance

A plaintiff cannot maintain a fraud claim, where, as here his allegations are "duplicative of their cause of action to recover damages for breach of fiduciary duty." *Stein* v. *McDowell*, 905 74 A.D.3d 1323, 1326 (2d Dep't 2010).

First, the SAC's vague allegations of fraud that post-date his joining of BBShares Capital are merely repackaged fiduciary duty claims: allegedly withholding information regarding conflicts of interest (*i.e.*, an alleged breach of the duty of loyalty) (SAC ¶ 215), allegedly engaging in other business opportunities (*i.e.*, an alleged usurpation of business opportunities claim) (*id.* ¶ 214), and allegedly not "devot[ing] their time and efforts" to the business (*i.e.*, an alleged breach

of the duty of care) (*id.* ¶ 213). These allegations are duplicative of Plaintiff's breach of fiduciary duty claims and do not allege fraud against Plaintiff.

Plaintiff purportedly relied upon Ms. Zhou's and Mr. Qiao's alleged misrepresentations or omissions by "forego[ing] other employment and entrepreneurial opportunities," "devot[ing] significant time and effort to the operation and marketing of BBShares Capital," and accepting an allocation of 20 percent of BBShares's shares. (SAC ¶ 216.) Of course, once Plaintiff accepted shares and an employment position at BBShares, he was under an independent duty to "devote significant time and effort to attaining key operational milestones for BBShares." (SAC ¶ 54.) Thus, there is no change in position or reliance pled on account of any purported conduct that occurred after Plaintiff accepted shares in BBShares Capital Management. These claims can only properly be asserted as breach of fiduciary duty claims. *Cf. Stein*, 905 A.D.3d at 1326.

* * *

Ultimately, Plaintiff's fraud claim fails because he does not plead with particularity, contradicts his own allegations of misrepresentations, attempts to (improperly) rely on future outlook statements as purported misrepresentations, pleads an omission without a duty, and seeks to recycle his breach of fiduciary duty allegations into a fraud claim.

D. Plaintiff Fails to Allege a Cognizable Conspiracy (Count V)

Plaintiff's purported claim of a "conspiracy to injure by unlawful means" also fails. (SAC ¶ 190.) Under Cayman Law, an unlawful "conspiracy" is a tort. *See, e.g.*, *OBG* v. *Allen*, [2007] UKHL 21, ¶¶ 13–14 ("unlawful means tort"); *see also* Musumeci Decl. ¶ 3, Ex. B.[4] Here, the alleged tortious conduct occurred in New York,[5] meaning New York law applies. *See Rose* v.

[4] "[T]he Cayman Islands . . . look to the common law of Great Britain as persuasive." *In re Adelphia Commc'ns Corp.*, 2009 WL 4928806, at *3 (S.D.N.Y. Dec. 21, 2009).

[5] While Plaintiff includes a conclusory allegation that Individual Defendants "engag[ed] in conduct that amounted to breach of fiduciary duties to the Company," a conspiracy to commit

Arthur J. Gallagher & Co., 87 A.D.3d 733, 733 (2d Dep't 2011) (explaining that when alleged tortious conduct occurs in New York it "is governed by New York law.").

In New York, civil conspiracy "is not an independent cause of action," *Snyder* v. *Puente De Brooklyn Realty Corp.*, 746 297 A.D.2d 432, 435 (3d Dep't 2002), because "[t]here is no substantive tort of conspiracy' under New York law," *Charney* v. *Sullivan & Cromwell LLP*, 2007 WL 2822423, at *3 (N.Y. Sup. Ct. Sept. 27, 2007) (quoting *SRW Assocs.* v. *Bellport Beach Prop. Owners*, 129 A.D.2d 328, 332–33 (2d Dep't 1987)). Rather, conspiracy allegations "are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Snyder*, 297 A.D. 2d at 435. Plaintiff does not identify which ill-pled tort supposedly animates his conspiracy claim. Insofar Plaintiff contends that the Individual Defendants collaborated to breach fiduciary duties or defraud him (*see* SAC ¶ 194), those claims fail for the reasons explained (*supra* Sections I.A–I. C). His conspiracy claim fails too.

II. Plaintiff Lacks Standing For Derivative Claims Because He Does Not Allege That Current Directors Committed Fraud on the Minority (Counts I, II, III, V, VI, VIII)

Plaintiff has failed to allege—in any of his complaints—that the *then current* directors of BBShares engaged in "fraud on the minority." He thus lacks standing for his derivative claims.

Cayman law generally prohibits derivative claims "because the proper plaintiff for a wrong done to [a] company is the company itself," not an allegedly aggrieved shareholder. *Winn* v. *Schafer*, 499 F. Supp. 2d 390, 397 (S.D.N.Y. 2007). A "fraud on the minority" is among the few narrow exceptions where a plaintiff may bring a derivative action. *See id.* To show "fraud on the minority," Plaintiff must establish that: (i) the alleged "wrongdoers are guilty of dishonest conduct or attempting to appropriate or having appropriated to themselves property or opportunities to

this conduct is, itself a tort under Cayman Law. (*See* SAC ¶ 194.) Furthermore, at the very least, this conclusory allegation is limited to Plaintiff's *derivative* claim, and does not extend to Plaintiff's direct claims against the Individual Defendants.

which the company is entitled or in which others shareholders are entitled to participate," and (ii) the alleged "wrongdoers are themselves in control of the company." *See Tianrui*,[2024] UKPC 36, ¶ 37; *see also* Musumeci Decl. ¶ 2, Ex. A. Most of the current board must have either been the purported wrongdoers or been controlled by the purported wrongdoers. *In re Tyco Int'l, Ltd.*, 340 F. Supp. 2d 94, 98, 100 (D.N.H. 2004). This is because, under Cayman law, the limited exception turns on whether the ***current*** board is prevented from acting on the claims. *See id.* Plaintiff fails to plead that any wrongdoers controlled most of the board.

Tyco International is instructive. There, the plaintiff alleged in her second amended complaint that certain Tyco directors engaged in wrongdoing. *Tyco Int'l.*, 340 F. Supp. 2d at 95–96. But those directors left the board by March 2003, *between* the filing of her initial complaint and her second amended complaint. *See* Verified Stockholders' Second Consolidated and Amended Derivative Complaint, ¶ 437(e), *In re Tyco Int'l, Ltd.*, 340 F. Supp. 2d 94 (D.N.H. 2004) (No. 02-352-B). The court found that, even if the plaintiff had made sufficient allegations of wrongdoing against the former directors, allegations against the *current* directors were lacking. *See Tyco Int'l*, 340 F. Supp. 2d at 100. Applying English law,[6] the court held that plaintiffs can only maintain a derivative suit based on "allegations that the ***current*** directors have engaged in fraud on the minority." *Id.* (emphasis added). This is true "because it is the current board's litigation judgment that [plaintiff] seeks to displace" in bringing a derivative claim. *Id.*; *see also Levin ex rel. Tyco Int'l Ltd.* v. *Kozlowski*, 13 Misc. 3d 1236(A) (Sup. Ct. 2006) (derivative standing exists, *inter alia*, when an entity "is prevented from taking action because the alleged wrongdoers are in control"), *aff'd sub nom. Levin* v. *Kozlowski*, 45 A.D.3d 387 (1st Dep't 2007).

[6] The *Tyco* court looked to English law when interpreting the Bermudian law, which applied in that case. That same English precedent is directly applicable to the issues of Cayman Island law here. "[T]he Cayman Islands . . . look to the common law of Great Britain as persuasive." *In re Adelphia*, 2009 WL 4928806, at *3.

Here, Plaintiff failed to allege that the purported wrongdoers had control over the company when he filed the operative, Second Amended Complaint, or, for that matter, any of his complaints. Plaintiff identified two additional Directors— Benjamin Joseph Pershick and Casey McDonald— and did not plead that either were "wrongdoers" or that they benefited from any allegedly wrongful act (or even that they were controlled by a purported wrongdoer). (*See* SAC ¶¶ 138–39.) This is a problem for Plaintiff, because, when he filed his initial complaint (on June 30, 2022), he alleged that Pershick and McDonald comprised fifty percent of the board of directors. (*See id.* ¶ 138 (when Ms. Zhou and Mr. Qiao resigned, only Pershick and McDonald remained).) And, Plaintiff alleged that, as of at least September 2022 (before the First Amended Complaint and operative Second Amended Complaint), Ms. Zhou and Mr. Qiao were ***not*** directors of BBShares, but rather, that Pershick and McDonald were the sole directors. (SAC ¶ 138.)

Pleading	Date	Alleged Board Members (SAC ¶ 138)
Initial Complaint	June 30, 2022	Mr. Qiao, Ms. Zhou, Pershick, and McDonald
First Amended Complaint	October 31, 2022	Pershick and McDonald
Second Amended Complaint	May 18, 2023	Pershick and McDonald

Plaintiff has thus not pled that when he filed his initial complaint, the controlling board members benefited from a wrongful act. (NYSCEF No. 5.) And when Plaintiff amended his complaint (both times), there were admittedly *no* purported wrongdoers on the board of BBShares, such that Plaintiff could assert that they were committing fraud on the minority. (*See* SAC ¶ 138.)

In *Tyco*, the plaintiff's filing of an amended complaint while the board was admittedly not controlled by wrongdoers was enough to nullify the derivative claims, ***even though the wrongdoers were in control when the initial complaint was filed***. Here, Plaintiff has alleged that

independent directors controlled 100% of the board at the time he filed his Second Amended Complaint. And the facts here are more severe than *Tyco*, because here Plaintiff alleged that independent directors controlled 100% of the board at the time he filed his first amended complaint and 50% of the board at the time he filed his initial complaint. At no time did the purported wrongdoers have a majority, and the operative complaint was filed when there were ***zero*** purported wrongdoers on the board. Under Cayman law, Plaintiff lacks standing to bring this derivative suit.

At the very least, any derivative claim added after the initial complaint must fail. Both amended complaints tacked on various new claims *after* Ms. Zhou and Mr. Qiao allegedly left the board. (NYSCEF Nos. 42, 133.) The First Amended Complaint added:

- a derivative claim for "Dishonest Assistance" under Cayman Islands law (Count II),
- a derivative claim for "Aiding and Abetting Breach of Fiduciary Duty" under New York law (Count III),[7] and
- a derivative (and individual) claim for "Conspiracy" under Cayman Islands law (Count V).

(*Compare* NYSCEF No. 5 at 21–25 *with* NYSCEF No. 42 at 31–33, 37–38; *see also* SAC ¶¶ 157–72, 187–96.) The Second Amended Complaint added BB Matrix as a defendant as to all derivative claims. (*Compare* NYSCEF No. 42 at 31–40 *with* SAC ¶¶ 157–72, 187–96.) Plaintiff lacks standing to bring all these claims on behalf of the company because they were first asserted when, admittedly, no purported wrongdoers were on the board of BBShares Capital Management.

While Plaintiff has included conclusory allegations that Mr. Qiao and Ms. Zhou had "control," this is not enough under Cayman law. As the *Tyco* court explained, "it is the current board's litigation judgment" that Plaintiff seeks to displace with his derivative claims. Plaintiff

[7] This claim replaced Aiding and Abetting Breach of Fiduciary Duty under Cayman law. (NYSCEF No. 5 at 21.)

does not plead that Mr. Qiao or Ms. Zhou overrode the litigation judgment of the board in place at the time he filed his initial or amended pleadings.

Because Plaintiff failed to allege that a majority of the board members were both in control and benefited from wrongdoing, either prior to the filing of the complaint, or prior to the filing of either amended complaint, Plaintiff lacks standing to assert his derivative claims and those claims should be dismissed. *See, e.g.*, *In re Tyco*, 340 F. Supp. 2d at 98 (noting that a plaintiff has no standing to assert derivative suit under Cayman law when purported wrongdoers are no longer on the board). Plaintiff's derivative claims—Counts I, II, III, V, VI, and VIII—should be dismissed.

CONCLUSION

Individual Defendants respectfully request that the Court dismiss all claims asserted by Plaintiff against Individual Defendants.

Dated: New York, NY
July 14, 2025

Respectfully submitted,

By: /s/ *Sandra L. Musumeci*

Sandra L. Musumeci
Aaron J. Gold
Edwin A. Herod
KELLEY DRYE & WARREN LLP
3 World Trade Center
175 Greenwich Street
New York, NY 10007
Tel: (212) 808-7788
smusumeci@kelleydrye.com
agold@kelleydrye.com
therod@kelleydrye.com

Counsel for Individual Defendants
Jingjing Zhou and Hongtao (Jason) Qiao

ATTORNEY CERTIFICATION UNDER COMMERCIAL DIVISION RULE 17

I, Sandra L. Musumeci, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law in Support of Motion to Dismiss Counterclaims complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), because it contains 5,117 words, excluding the parts of the Response exempted by Rule 17. In preparing this certification, I have relied on the word count function of the word-processing system (Microsoft Word) that was used to prepare this Response.

Dated: New York, NY
July 14, 2025

Respectfully submitted,

By: /s/ *Sandra L. Musumeci*

Sandra L. Musumeci
Aaron J. Gold
Edwin A. Herod
KELLEY DRYE & WARREN LLP
3 World Trade Center
175 Greenwich Street
New York, NY 10007
Tel: (212) 808-7788
smusumeci@kelleydrye.com
agold@kelleydrye.com
therod@kelleydrye.com

Counsel for Individual Defendants Jingjing Zhou and Hongtao (Jason) Qiao