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, HONGTAO (JASON) QIAO, and BBMATRIX HOLDINGS PTE. LTD, Defendants, and BBSHARES CAPITAL MANAGEMENT LIMITED, Nominal Defendant.	Index No. 61185/2022 Hon. Linda S. Jamieson, J.S.C. Mot. Seq. # 8

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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Plaintiff Guang Huang, through his counsel, the Law Office of Judd R. Spray, respectfully submits this memorandum of law in opposition to the motion to dismiss of Defendants Jingjing Zhou and Hongtao (Jason) Qiao (together, "the Individual Defendants") (Mot. Seq. # 8).

PRELIMINARY STATEMENT

In early 2023, when Plaintiff moved for leave to file his Second Amended Complaint (the "SAC"), the Individual Defendants opposed his motion, complaining that, "After ten months of litigating, multiple complaints and sundry motions, Plaintiff now wants to drag things out further and amend his complaint yet again[.]" (NYSCEF No. 120 at 1.) The Individual Defendants further asserted that the SAC is "rife" with allegations of "imagined wrongdoing," and that Plaintiff's claims are "devoid of merit." (*Id.* at 1-3). The Individual Defendants also argued that Plaintiff had failed to state any claims against them, and they adopted by reference the arguments they had made in support of their motion to dismiss the First Amended Complaint. (*Id.* at 3.)

The Court considered the Individual Defendants' arguments in 2023 and soundly rejected them. In a Decision and Order dated May 11, 2023 (NYSCEF No. 123), the Court granted Plaintiff's motion to amend. The Court specifically held that the Individual Defendants had failed to meet their burden of demonstrating that the SAC is "palpably insufficient or patently devoid of merit." (*Id.* at 16 (citing cases).)

The Individual Defendants are now back, inexplicably moving to dismiss the SAC well over two years after the Court last found their arguments unpersuasive. It is not clear why the Defendants, who were previously vexed by Plaintiff "dragging things out," chose to wait so long before moving to the dismiss the SAC. In any event, the Court should deny the pending motion in its entirety for numerous reasons, including that:

- Plaintiff has standing to bring derivative claims against the Individual Defendants

under Cayman Islands law because the Individual Defendants have committed a "fraud on the minority" and the SAC alleges that they continue to control the vast majority of the stock of BBShares Capital Management Limited ("BBShares" or "the Company");

- The SAC states fraud claims with particularity by setting forth detailed factual allegations concerning the Individual Defendants' material misrepresentations and omissions, on which Plaintiff reasonably relied to his detriment when he left his previous employment to spend two years building BBShares, only to watch the Individual Defendants take over the company to use as a personal piggybank to fund their lifestyles and other business interests;
- The SAC states both derivative and direct claims against the Individual Defendants for breaches of their fiduciary duties under Cayman Islands law;
- The SAC States direct and derivative claims for conspiracy against the Individual Defendants under Cayman law, which applies to Plaintiff's conspiracy claim because the Cayman Islands have a greater interest than New York in protecting Cayman-registered businesses from breaches of fiduciary duty and fraud; and
- New York Law governs Plaintiff's Third, Sixth, and Seventh Causes of Action because those claims are brought against third parties for breaches of duties to the plaintiff that do not arise out of any relationship to BBShares, the nominal corporate defendant in Plaintiff's derivative claims.

These issues are discussed at length below. Where appropriate, Plaintiff's citations to the common law of the Cayman Islands are bolstered by the Affirmation of Thomas Lowe KC ("Lowe Aff.") (NYSCEF No. 70). Mr. Lowe is a barrister at law admitted to practice generally in England and Wales as well as in the Cayman Islands. (*Id.* ¶ 2.) Although the Individual

Defendants make numerous assertions about Cayman law and Commonwealth common law generally, they have not submitted the opinion of any expert on the proper interpretation of that law.

The Individual Defendants are both expected to finally sit for depositions within the next few weeks. They undoubtedly hope that the SAC will be dismissed before they are compelled to testify about their wrongdoing, which is extensively described in the well-pled allegations of Plaintiff's Second Amended Complaint. But their motion to dismiss is not supported by either New York or Cayman Islands law, the Court should deny it in its entirety.

ARGUMENT

On a motion to dismiss pursuant to CPLR 3211(a)(7), "the complaint must be liberally construed, giving the plaintiff the benefit of every favorable inference." *Cunningham v. Nolte*, 188 A.D.3d 806, 807 (2d Dep't 2020). The motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action. *Id.* The Individual Defendants' motion to dismiss must be denied if the factual allegations in the SAC, inclusive of the exhibits thereto, "manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002).

I. The Court Should Deny the Motion Because Plaintiff Has Standing To Bring Derivative Claims Against the Individual Defendants.

The Individual Defendants move to dismiss Counts I, II, III, V, VI, and VIII because Plaintiff allegedly lacks standing to bring derivative claims on behalf of BBShares. (*See* Individual Defendants' Memorandum of Law in Support of Their Motion To Dismiss ("Mot.") (NYSCEF No. 241) at 12-16.) The Individual Defendants note that Cayman Islands law "generally" prohibits derivative claims, but they acknowledge that Cayman law provides for

derivative actions where a plaintiff's claims fall within one of four exceptions to that general rule. (*Id.* at 12 (citing *Winn v. Shafer*, 499 F. Supp. 2d 390, 397 (S.D.N.Y. 2007).) The Court should deny the motion to dismiss on this ground because Plaintiff has adequately pled that his claims fall within the exception for claims against defendants who have committed a "fraud on the minority."

As explained by Thomas Lowe KC in his previously-submitted affirmation, to come under the "fraud on the minority" exception to the general rule, a plaintiff must make out a *prima facie* case of (i) a breach of duty that amounts to "fraud," and (ii) "wrongdoer control." (Lowe Aff. ¶¶ 20-21; *see also Davis v. Scottish Re Group Ltd.*, 160 A.D.3d 114, 116 (1st Dep't 2018) ("In order to invoke that exception, plaintiff must plead and prove that the alleged wrongdoers controlled a majority of the stock with voting rights and that those wrongdoers committed fraud."). To succeed, a plaintiff must establish both elements against the same person. (Lowe Aff. ¶ 20.) In other words, the exception is dependent on wrongdoing by the person in control. (*Id.*) With respect to the requirement of "fraud," caselaw has established that "[f]raud includes all cases where the wrongdoers are endeavouring, directly or indirectly, to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate." (*Id.* ¶ 21 (citing *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 at paragraph 26[1]).)

In the SAC, Plaintiff has adequately pled that the Individual Defendants controlled BBShares' board and the majority of its stock, **that they continue to control a majority of the stock**, and that the Individual Defendants engaged in wrongdoing that amounts to a fraud on the

[1] The cases cited by Mr. Lowe in his affirmation can be found at NYSCEF No. 71.

minority. (SAC ¶¶ 131-145.) Plaintiff therefore has standing to bring derivative claims under Cayman Islands law.

A. The SAC Alleges that the Individual Defendants Control the Vast Majority of BBShares' Stock.

"[T]he relevant inquiry with respect to the element of control as it relates to the fraud on the minority exception is whether the alleged wrongdoers have the power to block the company from bringing a claim against them." *Renren Inc. v. XXX*, 67 Misc.3d 1219(A) at *24 (Sup. Ct. N.Y., May 5, 2020), *aff'd sub nom. Matter of Renren, Inc.*, 192 A.D.3d 539 (1st Dep't 2021) ("*Renren*"); *see also* Lowe Aff. ¶¶ 28-30. While control can be established by demonstrating that the wrongdoer holds a majority of votes or has the ability to deadlock a vote, that is not the end of the inquiry. (*See* Lowe Aff. ¶¶ 28-30.) "Practical or effective control is sufficient." (*Id.*) Thus, control embraces both *de facto* and *de jure* control, such that control might be established where the wrongdoers are able "by means of manipulation of their positions in the company" to ensure that no action was brought. *Renren*, 67 Misc.3d at 24; *see also* Lowe Aff. ¶ 27).

Plaintiff here pleads that both at the time of the challenged transactions, and at the time of the filing of the SAC, the Individual Defendants controlled BBShares, including through their ownership of an overwhelming majority of BBShares' stock. (SAC ¶¶ .) Specifically:

- Zhou was appointed as a *de jure* director to the BBShares Capital board in 2018, and Qiao exercised control as a *de facto* director, and then as a *de jure* director, when he assumed a formal role on the board. (*Id.* ¶¶ 46-51.)
- Early on, Qiao exercised control by leveraging threats of share dilution and promises of future compensation to ensure Luo, who Qiao appointed, acted at Defendants' direction in all matters relating to BBShares. (*Id.* ¶ 47.)
- Zhou assumed a *de jure* director role in 2018 and was able to deadlock the board

in the event Luo was not compliant. (*Id.* ¶¶ 48.)

- By December 2018, Defendants had amassed control of 63% of BBShares Capital's shares, using Zhou's mother as a straw-shareholder to hold most of their interests. (*Id.* ¶¶ 79-80.)
- Defendants used their control in 2019 to cut Plaintiff out of the Company, strong-arm other shareholders to transfer shares to BBMatrix (which they controlled), and remove and replace Luo as a director with Qiao. (*Id.* ¶¶ 76-98.)
- By 2020, Defendants were BBShares Capital's only directors and had consolidated shareholder control under the BBMatrix entity they formed for this purpose. (*Id.* ¶¶ 108-121.)
- By March 2020, the only remaining members of BBShares were Plaintiff, who owned 2.5% of the Company's shares, and BBMatrix, which owned the entire remainder (97.5%). (*Id.* ¶ 120.)

In short, Plaintiff has more than adequately pled control of BBShares by the Individual Defendants.

The Individual Defendants nevertheless now argue that Plaintiff has failed to adequately plead that two subsequent directors—Benjamin Joseph Pershick and Casey McDonald—were wrongdoers or benefitted from wrongful acts. (Mot. at 12-16.) The Individual Defendants assert that this is a "problem" for Plaintiff (*id.* at 14), but that is only because they are misreading the authority on which they purport to rely. In *In re Tyco Int'l, Ltd.*, 340 F. Supp. 2d 94 (D.N.H. 2004), which the Individual Defendants purportedly find "instructive," the court noted that "control," in the context of fraud on the minority, means that "the alleged wrongdoing must have 'control' over a majority of the stock with voting rights[.]" *Id.* at 98. The decision does not hold that the directors of a company necessarily control the company; rather, on the facts of that case,

the court accepted as true the plaintiff's allegation that the then-current board of directors of the company at issue had acquired de facto control. *Id.* at 99.

The *Tyco* decision makes clear that the relevant question is not whether the defendants in a derivative action are current board members, but whether the defendants control the company, including through ownership or *de facto* control over its voting stock. That principle is frequently restated elsewhere, including in *Winn v. Schafer*, 499 F. Supp. 2d 390 (S.D.N.Y. 2007), another opinion cited by the Individual Defendants. In *Winn*, the court dismissed a derivative claim in part because "the Complaint fails to allege that these defendants hold a controlling number of the company's shares or that they exercise *de facto* control over those shares." *Id.* at 398; *see also Erie County Employees Retirement System v. Isenberg*, 2012 WL 3100463, at * 6 (S.D. Tex. July 30, 2012) (collecting cases).

Plaintiff has pled that the Individual Defendants control the vast majority BBShares stock. When those allegations are considered in light of actual Cayman Islands law, and not solely as a question of whether the current directors of BBSares are wrongdoers, it is clear that Plaintiff has met the first prong of the "fraud on the minority" exception to the general prohibition against derivative actions.

B. The SAC Alleges that the Individual Defendants Committed a Fraud on the Minority Through Their Breaches of Fiduciary Duty and Self-Dealing.

In the context of the fraud on the minority exception, "fraud" refers to "'self-dealing' at the company's expense." *Feiner Fam. Tr. v. VBI Corp.*, No. 07 CIV. 1914 (RPP), 2007 WL 2615448, at *5 (S.D.N.Y. Sept. 11, 2007); *see also* Lowe Aff. ¶ 21 ("Fraud includes all cases where the wrongdoers are endeavoring, directly or indirectly, to appropriate themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate"). The essence of the exception is an abuse or misuse of power. (Lowe Aff.

¶ 23.) Thus, fraud in this context "may be established where the wrongdoers committed a deliberate and dishonest breach of duty, or where the wrongdoers derived a personal benefit at the expense of the company's shareholders." *Renren*, 67 Misc.3d at 24; Lowe Aff. ¶¶ 21-27.

The SAC sets out detailed factual allegations concerning the Individual Defendants' deliberate and dishonest conduct and the myriad ways they personally benefited at the minority shareholders' expense. For example, the Individual Defendants formed BBMatrix (SAC ¶108), transferred ownership of all shares except those belonging to Plaintiff to BBMatrix (*id.* ¶ 110), assumed full *de jure* control of the BBShares board (*id.* ¶ 117), used that control to dilute Huang by issuing additional shares to BBMatrix for inadequate consideration (*id.* ¶¶ 118-120), and funneled BBShares Capital's investors to BBMatrix (*id.* ¶ 112). Defendants caused BBShares Capital to enter into unfavorable, lopsided transactions benefitting entities they control, and enriching themselves in the process. (*Id.* ¶ 125.) In short, the Individual Defendants have used BBShares as a personal piggybank to enrich themselves and Zhou's mother. (*See generally id.* ¶¶ 110-129.) And the Individual pushed Plaintiff out of the Company and closes of his access because they knew that he would be the only independent, conscientious objector willing to push back on their self-dealing. (*Id.* ¶ 129.) These detailed allegations easily satisfy the prerequisites under Cayman Islands law to proceed with a derivative claim.

The Individual Defendants cite a decision of the Cayman Islands Privacy Council holding that a shareholder may have a direct cause of action against a company when the directors of the company allot shares for an improper purpose. (*Mot. at 4-5* (discussing *Tianrui (Int'l) Holding Co. Ltd. v. China Shanshui Cement Grp. Ltd.*, [2024] UKPC 36, Privy Council Appeal No. 002 of 2023).) But the *Tianrui* decision does not hold, as the Individual Defendants contend, that "claims of diluted shares should be brought *against the company* and not against the directors.) (*Id.* at 4 (emphasis in original).) The truth is that *Tianrui* says the opposite. The Privy Council

unambiguously states in that opinion that a shareholder's direct claim against the company can "coexist" with a derivative cause of action by the company against its directors. (*Tianrui* ¶ 79.) As applied to this case, the *Tianrui* decision stands for the proposition that Plaintiff may have a direct cause of action against BBShares based on the wrongful actions of the Individual Defendants. The Privy Council was clear, however, that Plaintiff's direct cause of action "by no means excludes" Plaintiff from also pursuing a derivative action against the Individual Defendants for their numerous breaches of the fiduciary duties they owed to the Company. (*Id.*)

II. The Court Should Deny the Motion Because the SAC States a Direct Claim for Breach of the Individual Defendants' Fiduciary Duties Under Cayman Law.

Plaintiff's Fourth Cause of Action is pled directly against the Individual Defendants for breaches of the fiduciary duties they owed directly to Plaintiff. (SAC ¶ 174.) The SAC clearly states, in the disjunctive, that fiduciary duties can arise from a special relationship of trust **or** an assumption of responsibility between, for example, a plaintiff shareholder and defendant directors and officers. The SAC then gives two distinct examples of contexts in which fiduciary duties can arise: "Such duties are found to exist in the context of small and closely-held companies where the directors and shareholders have personal relationships with each other, **as well as** where one party undertakes responsibility to act on behalf of, or for the benefit of, another." (SAC ¶ 175.) The SAC thus states that fiduciary duties can arise from a special relationship of trust, as in the context of small and closely-held companies where the directors and shareholders have personal relationships with each other, and fiduciary duties can also arise from an assumption of responsibility, as where one party undertakes responsibility to act on behalf of, or for the benefit of, another.

The Individual Defendants' entire argument for dismissing Plaintiff's Fourth Cause of Action is based on misreading the SAC to state that fiduciary duties can *only* arise where "one

party undertakes responsibility to act on behalf of, or for the benefit of, another." (Mot. at 5.) The Individual Defendants do not acknowledge that a fiduciary duty can *also* arise out of a special relationship of trust. Having thus incorrectly cut in half the number of ways that a fiduciary duty can arise, the Individual Defendants then argue that the Fourth Cause of Action should be dismissed because Plaintiff allegedly admits that "he did not rely on Defendants with respect to BBShares." (*Id.*)

The Court should deny the motion because the SAC clearly states that Plaintiff and the Individual Defendants shared a special relationship of trust—so much so Plaintiff and his wife were the best man and bridesmaid at the Individual Defendants' wedding to one another. (SAC ¶ 24.) This is exactly the kind of special relationship that can give rise to fiduciary duties under Cayman law. Mr. Lowe, who agrees that the duties directors owe as a consequence of their office are owed to the company, and the shareholders, cites several common law decisions supporting the proposition that fiduciary duties can nevertheless arise between directors and shareholders "if the particular circumstances justify the imposition of such duties." (Lowe ¶¶ 42-43.) Lowe highlights the following quote from the English Court of Appeal:

> The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case.

(Lowe ¶ 43 (citing *Peskin v. Anderson* [2001] BCC 874).)

The Individual Defendants have been in possession of Mr. Lowe's affirmation, along with copies of the common law authorities he cites, since February 2023. Yet they failed to address his analysis of Cayman law, to provide any other expert opinion on Cayman law, or even to attempt to distinguish the cases he cites. Instead, the Individual Defendants built their entire argument around a purposeful misreading of the SAC. The Court should deny their motion, as

Plaintiff has plainly stated a cause of action against the Individual Defendants for breach of the fiduciary duties they owed Plaintiff pursuant to the parties' special relationship.

III. The Court Should Deny the Motion Because the SAC States a Direct Claim for Fraud Against the Individual Defendants.

Plaintiff's Seventh Cause of Action is pleaded directly against the Individual Defendants for committing fraud. (SAC ¶ 210.) The elements of fraud are, "(1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance, and (5) damages." *Castle at Bluehill, Inc. v. Town of Orangetown*, 189 A.D.3d 980, 982 (2d Dep't 2020). A cause of action for fraud is also available where a fiduciary fails to disclose and acts with an intent to deceive. *Consol. Bus Transit, Inc. v. Treiber Grp., LLC*, 97 A.D.3d 778, 779 (2d Dep't 2012); *Kaufman v. Cohen*, 307 A.D.2d 113, 119–120 (1st Dep't 2003); *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 377 (1st Dep't 2003). To plead fraud, "the circumstances constituting the wrong shall be stated in detail." CPLR § 3016(b).

"The pleading requirements of CPLR 3016(b) are met when the facts plead are sufficient to permit a reasonable inference of the alleged conduct." *Star Auto Sales of Queens, LLC v. Filardo*, 203 A.D.3d 865, 868 (2d Dep't 2022). While 3016(b) requires factual allegations in support of each element of fraud, the plaintiff need only provide "sufficient detail to inform defendants of the substance of the claims," and CPLR 3016(b) should not be construed so strictly as to prevent an otherwise valid cause of action where, as here, the details of the fraud may be peculiarly within defendants' knowledge at the pleading stage. *Kaufman*, 307 A.D.2d at 120; *Auguston v. Spry*, 282 A.D.2d 489, 490 (2d Dep't 2001); *Grumman Aerospace Corp. v. Rice*, 196 A.D.2d 72 (2d Dep't 1993); *P.T. Bank Cent. Asia*, 301 A.D.2d at 377. Where the facts are peculiarly within the knowledge of the party against whom the claim is being asserted,

dismissing a matter "at an early stage" would work "a potentially unnecessary injustice" where such a deficiency might be cured later in the proceedings. *Hausen v. N. Fork Radiology, P.C.*, 171 A.D.3d 888, 892 (2d Dep't 2019).

The Individual Defendants move to dismiss the Seventh Cause of Action on several grounds, none of which are correct.

A. The SAC Pleads Actionable Misrepresentations by the Individual Defendants with Particularity.

The Individual Defendants argue that the SAC fails to plead fraud with particularity and fails to identify any actionable misrepresentations. (Mot. at 6-9.) They are wrong on both counts. The SAC provides sufficient detail to inform the Individual Defendants of the substance of Plaintiff's claims against them, the speakers involved, the time frame of the misrepresentations or omissions, the means by which such statements were made, and why such statements and omissions were fraudulent. *Kaufman*, 307 A.D.2d at 120; *Auguston*, 282 A.D.2d at 490.

The gravamen of Plaintiff's fraud claim, which is supported by detailed factual allegations, is that Qiao persuaded Plaintiff to leave his employment, forgoing other business opportunities, to purse the formation and development of BBShares; that Qiao promised Plaintiff that he and Zhou would leave their employment to devote themselves full-time to building the company and raising investment capital; that Zhou (but really Qiao) took a 25 percent interest in BBShares based on Qiao's promise to leave his job at JPMorgan and devote significant time and effort to marketing the company; that Qiao and Zhou repeatedly made excuses for their delays in leaving their jobs; that Plaintiff made extraordinary contributions to BBShares for over two years in reliance on the Individual Defendants' promises; that all along, Qiao and Zhou purposefully withheld from Plaintiff the material fact that they were simultaneously building a competing venture at Youbi Capital, an entity that they formed just six days after the formation of

BBShares; and that Plaintiff was harmed by the Individual Defendants' fraudulent misrepresentations about their activities and intentions because, had Plaintiff known that the Individual Defendants were actually working to build a competing cryptocurrency investment manager at the time they were telling him that they intended to devote their full-time efforts to BBShares, he would not have agreed to devote nearly two years of his time and effort toward that endeavor, and would instead have focused his time and energy on other employment and entrepreneurial activities. (SAC ¶¶ 20-75.) Plaintiff also would not have entrusted the Individual Defendants with responsibilities at BBShares, nor would he have failed to take earlier action to protect and vindicate his rights in the company and preserve the value of his significant investment of time and member shares. (SAC ¶ 221.)

Again, Plaintiff supports his fraud claim with detailed factual allegations throughout the SAC. Specifically, Plaintiff alleges that he "communicated frequently—often daily—with Qiao and Zhou, using informal, familiar channels of communication such as WeChat, phone calls, and other text platforms," "[t]hroughout the time period when Huang was working full-time to launch BBShares and continuing on through…July 2019." (SAC ¶¶ 24-29, 44.) Qiao, in particular, made numerous direct misrepresentations regarding how and in what ways he and Zhou would be involved with BBShares, along with promises to Plaintiff concerning how we would be awarded for his efforts. (SAC ¶¶ 24-27, 40-44.) Zhou affirmed and repeated those assurances while she, in particular, failed to disclose that she sat on the board of directors and held significant shares in Youbi Capital, a direct competitor to BBShares. (SAC ¶¶ 49, 52, 61-65.) Despite being a named director, holding herself out as an officer, and opening the Company's bank accounts in her name, "she [Zhou], too, cited compliance excuses (she was still working for KPMG full time) as the reason she could not contribute the promised, substantial time to the endeavor." (SAC ¶¶ 47-49, 199.) When BBShares was formed in January 2018,

"[o]nce again, Zhou and Qiao repeated their assurances to Huang that they would devote significant time to raising investment capital for the business and promised to leave their employment to commit themselves full-time to the business." (SAC ¶¶ 51-52, 61, 200.)

The SAC makes clear that the things the Individual Defendants were telling Plaintiff during this time were simply not true. "[D]uring the time periods when each [Qiao and Zhou] represented to Haung that they were going to quit their jobs to work full-time for BBShares Capital (late 2017 through mid-2018)," and then later when they were supposed to be "devoting significant time and efforts to BBShares (mid-2018 through mid-2019), Zhou and Qiao…were, [according to them], shareholders, directors, and/or key executives heavily involved in the launch of another Cayman Islands based crypto asset management business…" (SAC ¶¶ 63, 201.) Zhou's duplicity, in particular, is underscored by the fact that "Youbi Capital was formed just six days after BBShares." (SAC ¶ 64.) As the SAC makes clear, many of these detailed factual allegations are taken directly from the Individual Defendants' pleadings in their own pending lawsuit against Youbi.[2] (*See*, *e.g.*, ¶ 64.)

In purported support of their motion, the Individual Defendants describe these detailed allegations as vague and conclusory, but they are not. The SAC satisfies New York pleading standards by alleging time periods during which misrepresentations were made, the mode of such misrepresentations (WeChat, text, phone calls), and the substance of those misrepresentations. (SAC ¶¶ 24-27, 39-42, 49-52.) Moreover, the SAC specifies the time period over which the Individual Defendants withheld material information about their simultaneous efforts to launch Youbi Capital. (SAC ¶¶ 60-72.) Accordingly, the SAC meets New York's requirements for pleading fraud by putting the Individual Defendants on notice of the timing and substance of

[2] *Zhou, et al. v. Youbi Capital (Cayman) GP, et al.*, Index No. 62808/2021 (Westchester Co. N.Y. 2021).

their alleged misrepresentations and omissions. *McDonnell v. Bradley*, 109 A.D.3d 592, 593 (2d Dep't 2013) (CPLR 3016(b)'s pleading requirement "should not be confused with unassailable proof of fraud," and "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct") (citing cases); *Caravello v. One Mgmt Grp*, 131 A.D.3d 1191, 1193 (2d Dep't 2015) (fraud claim upheld where the "allegations adequately informed [defendant] of the 'complained-of incidents'").

The Individual Defendants also cite the well-worn proposition that "promissory statements as to what will be done in the future are not actionable . . . unless such a statement of future intent is made with a preconceived and undisclosed intention of not performing it." (Mot. at 8 (citations and internal quotation marks omitted).) What the Individual Defendants ignore entirely is that the SAC specifically alleges that at the time the Individual Defendants made their misrepresentations and omissions, "they knew they were false and misleading, and understood that [Plaintiff] was acting in reliance upon those representations." (SAC ¶ 217.) The SAC further alleges that the Individual Defendants "also did not actually intend to honor the duties and obligations as directors of BBShares Captial, and knew, at the time they assumed such roles, that they were already engaged in disloyal, dishonest, and conflicted conduct that was harmful to BBShares Capital and [Plaintiff]'s interest in the Company." (SAC ¶ 218.) These allegations should put to rest any dispute over whether the SAC adequately pleads that the Individual Defendants' misrepresentations were false when made.

In the face of these detailed factual allegations, Defendants urge the Court to adopt a "no harm, no foul" approach, on the grounds that they did, eventually, leave their prior employment and start working with BBShares. (Mot. at 8-9.) The Court should reject this gross simplification of Plaintiff's fraud claim. The SAC pleads that the Individual Defendants made knowingly false misrepresentations to induce Plaintiff to leave his employment and devote himself full-time to

BBShares. The SAC further pleads that when the Individual Defendants finally assumed roles as directors of BBShares, they did so as "part of a scheme to usurp and consolidate control of BBShares Capital through straw-shareholders they controlled and take control of the Board of Directors to freeze [Plaintiff] out of the Company." (SAC ¶ 219.) There is no merit whatsoever to the Individual Defendants' contention that Plaintiff is merely upset that they took longer than he had hoped to leave their prior employment. (*Cf.* Mot. at 9.)

B. The SAC Pleads Fraudulent Omissions by the Individual Defendants with Particularity.

The Individual Defendants further argue that the SAC fails to plead that they owed any duty to Plaintiff giving rise to an obligation to disclose material facts to Plaintiff. (Mot. at 9-10.) Thy do not seem to contest that they failed to inform Plaintiff that they were simultaneously making promises and representations to him about BBShares while simultaneously devoting their actual time and efforts to Youbi, nor could they. Defendants lied about why they could not devote time to BBShares to induce Plaintiff to contribute his time, effort, and know-how to BBShares, and to conceal their involvement with Youbi. (SAC ¶¶ 52-53, 62, 72, 201.)

Defendants' own words put the lie to the excuses they told Huang to induce him to bear the brunt of the workload. (SAC ¶ 70.) Defendants claim they began working to launch Youbi Capital in 2017, at the same time they misrepresented to Huang that their jobs at KPMG and JP Morgan prevented them from working to build BBShares. (SAC ¶¶ 60, 63). They allege they were key executives heavily involved with Youbi Capital, "personally solicit[ing] investors for [Youbi Capital] by traveling abroad" and working "zealously. . .to help grow [Youbi Capital] by leveraging her network to identify investors and by helping out a variety of sponsors," to benefit the competing crypto company. (SAC ¶¶ 24-26, 52, 57, 62-70, 67.) These allegations reveal the excuses the Individual Defendants fed Plaintiff were false, meant to conceal that they were

actually spending significant time on an undisclosed, competing venture. (SAC ¶¶ 61-68.)

The Individual Defendants' only argument with regard to their material omissions, therefore, is that they did not share a "confidential or fiduciary relationship" with Plaintiff, so that they could not have defrauded Plaintiff by omission as a matter of law. (Mot. at 10.) Defendants are wrong again, as this argument disregards numerous detailed factual allegations concerning the parties' special relationship of trust and confidence. The SAC describes a uniquely close relationship between Plaintiff and the Individual Defendants, spanning more than a decade, that encompassed friendship, professional mentorship, and Plaintiff's role as the best man in the Individual Defendants' wedding to one another in 2011. (SAC ¶¶ 19-24.) The Individual Defendants encouraged Plaintiff's reliance on that special relationship and exploited it to persuade Plaintiff to leave his employment to launch BBShares. (SAC ¶¶ 25-28.) The Individual Defendants continued to exploit their special relationship with Plaintiff after BBShares was formed, as they persuaded him to continue working with the expectation and promise that he would be compensated through his membership interest in the Company. (¶¶ 19-32, 37-39, 163.) All the while, the Individual Defendants failed to disclose that they were devoting their time and efforts to building a competing venture. (*Id.* ¶¶ 61-75)

Because the Individual Defendants owed Plaintiff fiduciary duties arising from a special relationship of trust and confidence, they each had a duty to act with candor and disclose material information to Plaintiff. *Penato v. George*, 52 A.D.2d 939, 942 (2d Dep't 1976). Yet Plaintiff alleges that the Individual Defendants failed to disclose their parallel roles and activities building a competing crypto fund, and they made false statements to conceal those activities. These allegations, accepted as true, are more than sufficient to plead fraud based on Defendants' omission or concealment of their involvement with the Youbi Capital venture. *P.T. Bank Cent. Asia*, 301 A.D.2d at 377.

C. Plaintiff Reasonably Relied on the Individual Defendants' Misrepresentations and Omissions.

Finally, the Individual Defendants argue that the SAC fails to plead reliance on their material misrepresentations and omissions, at least for the period after Plaintiff left his prior employment to build BBShares. (Mot. at 10-11.) But the SAC explicitly alleges that Plaintiff would not have left his job in the first place, nor would he have continued building BBShares for two years, if he had known the truth. Specifically:

> Had [Plaintiff] know that [the Individual Defendants] were, in fact, working to build a competing cryptocurrency investment manager at the time he was working full-time to launch BBShares, he would not have agreed to devote nearly two years of his time and effort towards that endeavor, and would instead have focused his time and energy on other employment and entrepreneurial opportunities.

(SAC ¶ 73; *see also id.* ¶¶ 216-217.)

In short, there is no question that the SAC pleads reliance on the Individual Defendants' misrepresentations and omissions. Whether that reliance was reasonable is a question of fact, not suitable to resolution at this stage, such that "it does nothing to impair the complaint." *Auguston*, 282 A.D.2d at 490.

* * *

For all of the reasons set forth in this Section III, the SAC easily meets New York's standards for pleading fraud and the Court should deny the Individual Defendants' motion to discuss Plaintiff's Seventh Cause of Action.

IV. The Court Should Deny the Motion Because the SAC States Direct and Derivative Conspiracy Claims Against the Individual Defendants Under Cayman Islands Law.

Plaintiff's Fifth Cause of Action is pleaded directly by Plaintiff, and derivatively, on behalf of BBShares, against the Individual Defendants under Cayman law. (SAC ¶ 188.) A conspiracy to injure by unlawful means is actionable under Cayman Islands law where the

plaintiff has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between a defendant and one or more persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so. (*See* Lowe ¶ 49.) Because this cause of action arises from a breach of fiduciary duties owed under Cayman law, the law of the state of formation governs. *See Mason-Mahon*, 166 A.D.3d at 758; *see also Lerner v. Prince*, 119 A.D.3d 122, 128 (1st Dep't 2014) (the internal affairs doctrine requires application of state of incorporation's law to issues that raise substantive questions regarding corporate governance). Plaintiff pleads both facts and the legal elements required under Cayman Islands law to state a claim for conspiracy. (SAC ¶¶ 187-196.)

The Individual Defendants move to dismiss Plaintiff's Fifth Cause of Action on the grounds that conspiracy is a tort, and should therefore be governed by New York law, which does not recognize civil conspiracy as an independent cause of action. (Mot. at 11-12.) In making this argument, the Individual Defendants condense all of New York's choice-of-law principles into the statement that, "Here, the alleged tortious conduct occurred in New York, meaning New York law applies." (*Id.* at 11 (citing *Rose v. Arthur J. Gallagher & Co.*, 87 A.D.3d 733 (2d Dep't 2011).) This conclusory statement of the law is not supported by *Rose v. Arthur J. Gallagher & Co.*, a case in which "the allegedly negligent quote was requested by the plaintiffs, and provided by the defendants, through e-mail communications that were sent from and received in New York." *Rose*, 87 A.D.3d at 734. The facts of this lawsuit are different and more complicated than in *Rose*, and to the extent it is necessary to conduct a choice-of-law analysis, New York's choice-of-law rules point to the application of Cayman law to this claim.

The crux of this claim is that the Individual Defendants abused a Cayman Islands company to enrich themselves at the expense of that company and its minority shareholder. (SAC ¶¶ 5-10.) Second, unlike New York, the Cayman Islands recognizes conspiracy to injure as

an independent tort, (Lowe ¶ 48), and Cayman Islands law has a greater interest in enforcing conduct regulating laws against tort-feasors who would avail themselves of Cayman Islands corporate laws to form the Company, and then abuse the corporate form of a Cayman Islands company to enrich themselves and intentionally injure a minority shareholder. *See A&G Research, Inc. v. GC Metrics, Inc.*, 19 Misc. 3d 1136(A), 20 (Sup. Ct. N.Y. May 21, 2008). Thus, the Cayman Islands, not New York, has the greater interest in regulating the conduct at issue here. Additionally, while the determination of which law applies is a question for the court, dismissal at this juncture would be improper because the "cluster of significant facts required to establish the applicable law must be developed factually." *Id.* at 21 (citing *Wheeler v. Stevensville Hotel & Country Club*, 103 A.D.2d 945 (3d Dep't 1984)). As noted above, the Individual Defendants have not yet been deposed, although their depositions are expected to take place within the next few weeks.

V. The Court Should Deny the Individual Defendants' Motion To Dismiss Because New York Law Governs Plaintiff's Third, Sixth, and Seventh Causes of Action.

The Individual Defendants seek dismissal of three of Plaintiff's causes of action based on New York law because, according to the Individual Defendants, claims for breach of fiduciary duty owed to a corporation are governed by the laws of the state of incorporation. (Mot. at 4.) Although the Individual Defendants correctly state New York's "internal affairs" doctrine, that doctrine is not so broad as to compel the application of Cayman law to Plaintiff's direct and/or derivative claims against the Individual Defendants for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and fraud. To the contrary, the doctrine does not apply to claims against third parties whose duty to the plaintiff does not arise out of any relationship to the nominal corporate defendant in a derivative action.

The First Department has observed that the "internal affairs doctrine, although potent, has

very specific applications," and that the doctrine only "governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders." *New Greenwich Litig. Trustee, LLC v. Citco Fund Services (Europe) B.V.*, 145 A.D.3d 16, 22 (1st Dep't 2016 (quoting *In re American Intl. Group, Inc.*, 965 A.2d 763, 817 (Del. Ch. 2009) (italics in original)). In *New Greenwich Litig. Trustee*, the First Department rejected the application of the internal affairs doctrine to claims against defendants who were not officers, directors, and shareholders of the corporate funds at issue, but rather were contractual agents or third parties to those funds. *Id.*

The Court here should reject the Individual Defendants' motion to dismiss Counts III, VI, and VII of the SAC because they are explicitly—and only—brought against the Individual Defendants to the extent they are found not to have owed any duty to BBShares at the time of their tortious actions.

Plaintiff's Third Cause of Action is brought derivatively against all defendants for aiding and abetting breach of fiduciary duty. (SAC ¶ 167.) Plaintiff clearly alleges that the claim is only brought against the Individual Defendants "to the extent that either . . . is found to not have owed a duty to the Company at the time that various disloyal conduct and conflicted transactions took place[.]" (SAC ¶ 168.) Accordingly, if the Court ultimately determines that either of the Individual Defendants did not owe a duty to BBShares when he or she allegedly aided or abetted the other in furtherance of the other's breach of his or her fiduciary duty to BBShares, then under *New Greenwich Litig. Trustee*, the Court should apply New York law, rather than Cayman law, to Plaintiff's claim for aiding and abetting. 145 A.D.3d at 22.

Plaintiff's Sixth Cause of Action is pleaded directly against the Individual Defendants for breaches of fiduciary duties they owed to Plaintiff that did not arise out of any formal

relationship between the Individual Defendants and BBShares. (SAC ¶ 198.) Under New York law, a fiduciary relationship arises where there exists a special relationship of trust and confidence among two persons. *See*, *e.g.*, *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 21-22 (2d Dep't 2008); *Penato v. George*, 52 A.D.2d 939, 942 (2d Dep't 1976). "Such a relationship might be found to exist, in appropriate circumstances, between close friends or even where confidence is based upon prior business dealings." *Penato*, 52 A.D.2d at 942 (citations omitted). The question of whether a special relationship of this type exists between two persons is fact-sensitive and generally not amenable to resolution on a motion to dismiss. *See*, *e.g.*, *Eurycleia Partners v. Seward & Kissel*, 12 N.Y.3d 553, 561 (2009) ("Ascertaining the existence of [a fiduciary] relationship inevitably requires a fact-specific inquiry.").

In the SAC, Plaintiff pleads a special relationship of trust and confidence that gave rise to fiduciary obligations on the part of Qiao and Zhou, first when they leveraged that relationship to persuade Plaintiff to join them in building and launching BBShares (SAC ¶¶ 183-194), and continuing through when they assumed fiduciary roles as officers and directors of BBShares (SAC ¶¶ 159-172). The parties had a uniquely close relationship, spanning more than a decade, that encompassed friendship, professional mentorship, and Haung's role as the best man in the Individual Defendants' wedding in 2011. (SAC ¶¶ 19-24.) The Individual Defendants encouraged Plaintiff's reliance on that special relationship and exploited it to persuade Plaintiff to leave his employment to launch BBShares. (SAC ¶¶ 25-28.) The Individual Defendants continued to exploit their special relationship with Plaintiff after BBShares was formed, as they persuaded him to continue working with the expectation and promise that he would be compensated through his membership interest in the Company. (¶¶ 19-32, 37-39, 163.)

To be clear, Plaintiff pleads that the Individual Defendants owed him fiduciary duties that arose "prior to, or as an alternative to, any fiduciary relationship that may have been owed by

[the Individual Defendants] by virtue of their roles as directors of BBShares Capital." (SAC ¶ 199.) In other words, this claim is not brought against the Individual Defendants for any duties they later owed Plaintiff in their capacities as directors of BBShares. Accordingly, the Court should apply New York law, rather than Cayman law, to Plaintiffs' Sixth Cause of Action. *New Greenwich Litig. Trustee*, 145 A.D.3d at 22.

Plaintiff's Seventh Cause of Action, for fraud, is pleaded directly against the Individual Defendants. (SAC ¶ 210.) Like the Sixth Cause of Action, this claim is premised on the special relationship of trust and confidence between Plaintiff and the Individual Defendants. (*Id.* ¶ 211.) And again, that special relationship "arose prior to, or as an alternative to, any fiduciary relationship that may have been owed by [the Individual Defendants] by virtue of their roles as directors of BBShares. (*Id.*) Accordingly, like the Third and Sixth Causes of Action, the Court should apply New York law, and not Cayman law, to Plaintiff's Seventh Cause of Action.

CONCLUSION

For all of the reasons set forth above, the Court should deny the Individual Defendants' motion to dismiss (Mot. Seq. # 8) in its entirety.

Dated: New York, New York
September 5, 2025

LAW OFFICE OF JUDD R. SPRAY

/s/ Judd R. Spray

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