

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF 05/11/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

GUANG HUANG, individually and
derivatively on behalf of BBSHARES
CAPITAL MANAGEMENT LIMITED,

Index No. 61185/2022

DECISION AND ORDER

Plaintiff,

-against-

JINGJING ZHOU and HONGTAO (JASON) QIAO,

Defendants.
_____X

The following papers numbered 1 to 5 were read on the motion (seq. no. 3) by proposed intervenor BBShares Capital Management Limited ("BBShares") for an Order: (1) pursuant to CPLR §§ 1012(a) and 1013 permitting BBShares to intervene in this action; and (2) pursuant to CPLR § 3211(a)(7) dismissing plaintiff Guang Huang's derivative claims or alternatively requiring plaintiff to post security for the derivative claims pursuant to BCL § 627:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation and Exhibits	1
BBShares' Memorandum of Law	2
Plaintiff's Affirmation and Exhibits in Opposition	3
Plaintiff's Memorandum of Law in Opposition	4
BBShares' Memorandum of Law in Reply	5

The following papers numbered 1 to 6 were read on the motion (seq. no. 5) by plaintiff for an Order pursuant to CPLR §§ 1002, 1003 and 3025(b) granting plaintiff leave to amend and to join BBSHares and non-party BB Matrix Holdings Pte. Ltc. ("BB Matrix") as defendants in this action:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation and Exhibits	1
Plaintiff's Memorandum of Law	2
BBSHares' and BB Matrix's Memorandum of Law in Opposition	3
Defendants' Memorandum of Law in Opposition	4
Plaintiff's Affirmation in Reply	5
Plaintiff's Memorandum of Law in Reply	6

BACKGROUND

This action for, *inter alia*, breach of fiduciary duty and fraud, arises from a dispute concerning the parties' joint venture in connection with BBSHares, which is a cryptocurrency asset management firm. The action was commenced on May 31, 2022 by plaintiff, who is a member of BBSHares, both in his individual capacity and derivatively on behalf of BBSHares, naming as defendants JingJing Zhou ("Zhou") and Hongtao (Jason) Qiao ("Qiao") (together, the "individual defendants"), who are directors of BBSHares and are married to one another. The original Complaint was filed on June 30, 2022 and asserted six

claims against the individual defendants involving allegations of self-dealing and fraud in connection with their management of BBShares, namely: (1) a first cause of action for breach of fiduciary duty; (2) a second cause of action for aiding and abetting breach of fiduciary duty; (3) a third cause of action for breach of fiduciary duty; (4) a fourth cause of action for fraud; (5) a fifth cause of action for inspection of BBShares' books and records; and (6) a sixth cause of action for an accounting of BBShares.¹ See NYSCEF Doc. No. 5.

In response to the individual defendants' motion (seq. no. 1) pursuant to CPLR 3211(a)(7) for an Order dismissing the Complaint (see NYSCEF Doc. Nos. 11-17; 30-31), plaintiff filed the First Amended Complaint on October 31, 2022. See NYSCEF Doc. No. 42. The First Amended Complaint included revised allegations in the body of the pleading and asserted: (1) a first cause of action for breach of fiduciary duty under Cayman law; (2) a second cause of action for "dishonest assistance" under Cayman law; (3) a third cause of action for aiding and abetting breach of fiduciary duty under New York law; (4) a fourth cause of action for breach of fiduciary duty under Cayman law; (5) a fifth cause of action for conspiracy under Cayman

¹ As BBShares is an entity incorporated in the Cayman Islands, all six claims in the original Complaint were asserted pursuant to Cayman law. See NYSCEF Doc. No. 5.

law; (6) a sixth cause of action for breach of fiduciary duty under New York law; (7) a seventh cause of action for fraud under New York law; and (8) an eighth cause of action for an accounting of BBShares under New York law. *Id.* In light of the First Amended Complaint, the parties stipulated to the individual defendants' withdrawal of their motion to dismiss the original Complaint (see NYSCEF Doc. Nos. 40, 65), and the individual defendants promptly moved (seq. no. 2) pursuant to CPLR 3211(a)(7) for an Order dismissing the First Amended Complaint. See NYSCEF Doc. Nos. 54-59.

However, before that motion could be fully briefed, two motions were filed by the respective parties that, as set forth below, have effectively mooted the individual defendants' motion to dismiss the First Amended Complaint, which was adjourned to June 7, 2023. First, BBShares moved (seq. no. 3) for an Order: (1) pursuant to CPLR §§ 1012(a) and 1013 permitting BBShares to intervene in this action; and (2) pursuant to CPLR § 3211(a)(7) dismissing plaintiff's derivative claims or alternatively requiring plaintiff to post a \$1 million security for the derivative claims pursuant to BCL § 627. See NYSCEF Doc. Nos. 72-77. Plaintiff did not oppose this motion to the extent that it sought to permit BBShares to intervene in order to be named as a nominal party to the action, but opposed BBShares' motion

to the extent that it sought to dismiss plaintiff's derivative claims and/or to require plaintiff to post a \$1 million security for such claims. See NYSCEF Doc. Nos. 86-94.

Second, plaintiff moved (seq. no. 5)² for an Order pursuant to CPLR §§ 1002, 1003 and 3025(b) granting plaintiff leave to amend and to join BBSHares and BB Matrix as defendants in this action by way of a proposed Second Amended Complaint. See NYSCEF Doc. Nos. 100-115. In addition to further revising the body of the pleading and adding BBSHares and BB Matrix as defendants to the action, the proposed Second Amended Complaint asserts: (1) a first cause of action for breach of fiduciary duty under Cayman law against the individual defendants; (2) a second cause of action for "dishonest assistance" under Cayman law against the individual defendants, BBSHares and BB Matrix; (3) a third cause of action for aiding and abetting breach of fiduciary duty under New York law against the individual defendants, BBSHares and BB Matrix; (4) a fourth cause of action for breach of fiduciary duty under Cayman law against the individual defendants; (5) a fifth cause of action for conspiracy under Cayman law against the individual defendants, BBSHares and BB Matrix; (6) a sixth cause of action for breach

² Motion sequence number 4 was an unrelated motion to seal certain documents that was resolved by Stipulation and Order dated March 21, 2023. See NYSCEF Doc. No. 98.

of fiduciary duty under New York law against the individual defendants; (7) a seventh cause of action for fraud under New York law against the individual defendants; (8) an eighth cause of action for an accounting under New York law against the individual defendants; (9) a ninth cause of action for unjust enrichment under New York law against BB Matrix; (10) a tenth cause of action for conversion under New York law against BB Matrix; and (11) an eleventh cause of action for tortious interference with prospective business relations under New York law against BB Matrix.³ See NYSCEF Doc. No. 103-1. The individual defendants opposed plaintiff's motion, as did BB Shares and BB Matrix. See NYSCEF Doc. Nos. 119-120.

Accordingly, presently before the Court are two fully submitted motions, *i.e.*, plaintiff's motion for leave to amend by way of a proposed Second Amended Complaint that adds BBShares and BB Matrix as defendants (seq. no. 5), and BBShares' motion to intervene in this action and to dismiss plaintiff's derivative claims or alternatively to require plaintiff to post security for the derivative claims (seq. no. 3).

The Court addresses the respective motions in reverse chronological order below.

³ The eleventh cause of action seems to be erroneously referred to as the twelfth cause of action in the Second Amended Complaint. See NYSCEF Doc. No. 103-1 at ¶¶ 243-249.

PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND JOINDER

In support of his motion for leave to amend and joinder of BBShares and BB Matrix, plaintiff furnishes a copy of the proposed Second Amended Complaint along with a redlined version comparing this proposed pleading to the First Amended Complaint. See NYSCEF Doc. Nos. 103-1, 114-1. In addition to various revisions to the body of the pleading, including the incorporation of additional and/or bolstered allegations regarding, *inter alia*, the individual defendants' creation of BB Matrix to carry out their alleged scheme of "diverting investment" away from BBShares and "misappropriating BBShares Capital's value," the proposed Second Amended Complaint reflects the addition of BB Matrix as a defendant and BBShares as a nominal defendant in this lawsuit. See *id.* Based upon the bolstered allegations and the inclusion of BBShares and BB Matrix as proposed defendants, the proposed Second Amended Complaint revises the claims from the First Amended Complaint such that: (1) the second, third, and fifth causes of action are now asserted against BBShares and BB Matrix as well as the individual defendants; and (2) a new ninth cause of action for unjust enrichment, a new tenth cause of action for conversion, and a new eleventh cause of action for tortious interference

with prospective business relations are now asserted against BB Matrix. *Id.*

In support of his motion seeking leave to amend and joinder, plaintiff first contends that joinder of BB Matrix is appropriate under CPLR §§ 1002 and 1003 at this early stage of the litigation particularly where, as here, the claims against BB Matrix arise out of the same set of facts and present the same factual and legal issues as the claims that have already been asserted against the individual defendants in the First Amended Complaint. Plaintiff further argues that leave to amend is also appropriate pursuant to CPLR § 3025(b), as the proposed Second Amended Complaint bolsters the already adequate allegations set forth in the First Amended Complaint, and that this amendment will not cause any undue delay, prejudice, or surprise at this early stage of the lawsuit and because of the nature of the relationship among the individual defendants, BBShares, and BB Matrix. Plaintiff also asserts that the proposed Second Amended Complaint adds BBShares as a nominal defendant in the action, which is consistent with the unopposed branch of BBShares' motion (seq. no. 3) to intervene as a party herein, and that as such, joinder of BBShares and BB Matrix is appropriate in the form and manner as reflected in the proposed Second Amended Complaint.

In opposition to plaintiff's motion, BBShares and BB Matrix together contend that joinder of BB Matrix should be denied as contrary to the purpose of CPLR §§ 1002 and 1003. Specifically, they assert that plaintiff has known since the inception of this litigation that BB Matrix was an entity run by Qiao, and has previously alleged that BB Matrix was involved in the transactions at issue in this lawsuit, but that plaintiff's belated request for joinder should be denied, as it comes after plaintiff has already once amended the original Complaint and after the parties have begun engaging in contentious discovery, and because it reflects a strategy of unnecessarily delaying and complicating this litigation. BBShares and BB Matrix also argue that leave to amend should be denied due to plaintiff's "inexcusable delay," as plaintiff has been aware since the lawsuit's onset of all of the allegations that he now seeks to add, and has offered no reasonable excuse for the delay in seeking to add such allegations and to bring BB Matrix into this action as a defendant.

Also in opposition to plaintiff's motion, the individual defendants contend that both joinder and leave to amend should be denied because the claims asserted against them are devoid of merit, and that plaintiff's additional/bolstered allegations neither cure this deficiency nor justify "dragging" BB Matrix

into this action. The individual defendants further argue that plaintiff has no excuse for delaying in seeking to add BB Matrix as a defendant herein, as plaintiff knew of the relationship among the individual defendants, BBShares and BB Matrix when he filed the original Complaint, and that plaintiff does not explain what he purportedly learned in discovery that led him to now seek to add BB Matrix as a defendant.

In further support of his motion, plaintiff contends that even though there has been some delay in seeking joinder of BB Matrix and leave to further amend his pleading, there has not been "undue delay" given that disclosure has just begun, depositions have not yet been scheduled, and repeated substantive motions filed by the individual defendants and BBShares aimed at the pleadings reflect that this lawsuit is in its infancy. Plaintiff further argues that even to the extent there has been some delay, such delay has been caused by the individual defendants, who have exclusive access to highly relevant and critical information, but have resisted and prolonged the discovery process at every turn. Plaintiff also asserts that the individual defendants, BBShares and BB Matrix have failed to demonstrate that the proposed Second Amended Complaint and the addition of BBShares and BB Matrix as defendants would unfairly prejudice or surprise the opposing

party, or that the proposed amendment is palpably insufficient or patently devoid of merit. Plaintiff contends that where, as here, BB Matrix admits that the allegations and causes of action set forth in the proposed Second Amended Complaint flow from the same set of transactions and occurrences, plaintiff's motion for leave to amend and joinder should be granted in its entirety.

Regarding leave to amend, CPLR § 3025(b) provides in relevant part that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." It is well-settled that "[l]eave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit." *Cirillo v Lang*, 206 AD3d 611, 612 (2d Dept 2022), citing *Caldara v County of Westchester*, 197 AD3d 607, 608 (2d Dept 2021). "The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion." *Citimortgage, Inc. v Rogers*, 203 AD3d 1125, 1126 (2d Dept 2022), citing *U.S. Bank N.A. v Singer*, 192 AD3d 1182, 1185

(2d Dept 2021); accord *Kimso Apts., LLC*, 24 NY3d at 411 (noting that “[t]he burden of establishing prejudice is on the party opposing the amendment”).

With respect to joinder, CPLR § 1003 provides in relevant part that “[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at any time before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.” Pursuant to the related provision of CPLR § 1002, defendants may be joined where the claims “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences” and where “any common question of law or fact would arise.” See CPLR § 1002(b). It is well-established that “CPLR 1003 gives a court ‘wide latitude and is to be liberally construed.’” *Maestracci v Helly Nahmad Gallery, Inc.*, 155 AD3d 401, 404 (1st Dept 2017), quoting *Micucci v Franklin Gen. Hosp.*, 136 AD2d 528, 529 (2d Dept 1988); accord *Matter of Leone v Board of Assessors*, 100 AD3d 635, 637 (2d Dept 2012). Indeed, “[t]he emphasis in the legislative and decisional history is that the joinder statute is to be accorded broad liberality and interpretation in order to avoid multiplicity of suits and inconsistencies in

determination." *Tanbro Fabrics Corp. v Beaunit Mills, Inc.*, 4 AD2d 519, 524 (1st Dept 1957); see Siegel, N.Y. Prac. § 134 (6th ed. 2022) (noting that "[t]he CPLR is generous about the joinder of multiple parties").

Having reviewed the parties' submissions, the Court determines that plaintiff is entitled to leave of court to assert the proposed Second Amended Complaint and to join BBShares and BB Matrix as defendants pursuant to CPLR §§ 3025(b), 1002 and 1003, such that his motion is granted in its entirety as set forth below.

First, viewing plaintiff's motion through the lens of a CPLR § 3025(b) request for leave to amend, the Court finds that neither the individual defendants nor BBShares nor BB Matrix have met their burden of establishing that they will be prejudiced or surprised by the Court's awarding plaintiff leave to amend his pleading by joining BBShares and BB Matrix as set forth in the proposed Second Amended Complaint. See *Citimortgage, Inc.*, 203 AD3d at 1126; *U.S. Bank N.A.*, 192 AD3d at 1185. Given that this less than one-year-old litigation is still in the pleadings stage, as reflected by the two pending motions respectively filed by the individual defendants and BBShares seeking, *inter alia*, to dismiss the First Amended Complaint pursuant to CPLR § 3211 (seq. nos. 2, 3), and because

discovery addressed to the individual defendants, BBShares and BB Matrix - which are four inter-related parties represented by the same two law firms - is expected to be somewhat overlapping with the relatively limited initial paper discovery that has already been taken, the Court does not credit the individual defendants' assertion that they will suffer prejudice due to the addition of BB Matrix as a defendant at this reasonably early stage of the litigation.⁴ See *Itzkowitz v Ginsburg*, 186 AD3d 579, 581 (2d Dept 2020) (affirming the Supreme Court's granting of leave to amend where "the defendants did not allege prejudice, and the respondents' proposed amendment was not palpably insufficient or patently devoid of merit"); *Commonwealth Land Tit. Ins. Co. v Sienna Abstract, LLC*, 136 AD3d 965, 966 (2d Dept 2016) (holding that the "branch of the plaintiff's motion which was for leave to amend the complaint was properly granted" where "the defendants failed to make a showing of significant prejudice"); see also *Katz v Bach Realty*, 192 AD2d 307, 307 (1st Dept 1993) (granting leave to amend and noting that "no prejudice" arose from the amendment as "the

⁴ Neither will the individual defendants nor BB Matrix suffer prejudice due to the addition of BBShares as a nominal defendant in this action, which relief appears to be unopposed herein, and which is in any event consistent with the unopposed branch of BBShares' prior motion (seq. no. 3) to intervene as a party herein, as discussed *infra*.

motion for leave to amend [was] made at an early stage of the action before any depositions were taken").

Nor does the Court credit the contention by the individual defendants, BBSHares and BB Matrix that they are unfairly prejudiced by plaintiff's purported "delay" in seeking leave to amend his pleading to add BB Matrix as a defendant herein. Given that the original Complaint was filed fewer than 11 months ago, with multiple substantive motions filed by the individual defendants and BBSHares aimed at the pleadings that have understandably delayed the very recently commenced discovery process, the Court determines that plaintiff's slight delay in bringing this motion for leave to amend does not constitute the type of "unreasonable delay" that warrants the denial thereof. *See Johnson v Montefiore Med. Ctr.*, 203 AD3d 462, 463 (1st Dept 2022) (holding that "there was no unreasonable delay by defendants in seeking leave to amend, as plaintiff has not filed her note of issue nor has the case has been certified as trial-ready"); *see also Deutsche Bank Natl. Trust Co. v Kreitzer*, 203 AD3d 800, 803 (2d Dept 2022) (finding that the Supreme Court should have granted leave to amend in response to a summary judgment motion and stating that "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of

the laches doctrine"); *Moran Enters., Inc. v Hurst*, 160 AD3d 638, 640 (2d Dept 2018) (affirming the Supreme Court's granting of leave to amend even though the amendment was first sought "[a]fter motion practice on the pleadings, and related appeals").

Furthermore, the individual defendants, BBShares and BB Matrix have failed to meet their burden of demonstrating that the proposed Second Amended Complaint is "palpably insufficient or patently devoid of merit" such that denial of plaintiff's motion for leave to amend would be warranted. See *Citimortgage, Inc.*, 203 AD3d at 1126; *U.S. Bank N.A.*, 192 AD3d at 1185. Without opining as to whether plaintiff may ultimately prevail on the merits of any or all of the eleven causes of action set forth in the proposed Second Amended Complaint, a plain review of this pleading reflects that it does not represent the type of demonstrably meritless pleading for which leave to amend should be denied. See *U.S. Bank N.A. v Cuesta*, 208 AD3d 821, 823 (2d Dept 2022) (affirming the granting of leave to amend and holding that "the Supreme Court properly determined that the defendants' proposed amended answer was not palpably insufficient or patently devoid of merit"); *Recine v Recine*, 201 AD3d 830, 831-832 (2d Dept 2022) (holding that "the Supreme Court properly granted the plaintiff's motion for leave to amend the complaint,

as the amended complaint was not palpably insufficient or patently devoid of merit”).

Second, to the extent that plaintiff’s motion is also framed as one for joinder pursuant to CPLR §§ 1002 and 1003, the Court exercises its “wide latitude” and similarly determines that joinder of BB Matrix as a defendant and BBShares as a nominal defendant is warranted where, as here, the claims set forth in the proposed Second Amended Complaint “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences” and where “any common question of law or fact would arise.” See CPLR §§ 1002(b); 1003; see also *Maestracci*, 155 AD3d at 404; *Matter of Leone*, 100 AD3d at 637; *Micucci*, 136 AD2d at 529. There can be no credible dispute that the allegations set forth in the proposed Second Amended Complaint, which allege, *inter alia*, that the individual defendants created BB Matrix to carry out their alleged scheme of “diverting investment” away from BBShares and “misappropriating BBShares Capital’s value,” arise out of the same series of occurrences and present common questions of law and fact. As such, joinder of BB Matrix as a defendant and BBShares as a nominal defendant by way of the proposed Second Amended Complaint is warranted pursuant to CPLR §§ 1002 and 1003. See *Global Liberty Ins. Co. v Tyrell*, 172 AD3d 499, 500 (1st Dept 2019) (holding that

"permissive joinder was appropriate" pursuant to CPLR § 1002[b] where "plaintiff submitted a proposed amended complaint setting forth a cognizable cause of action against the proposed additional defendants, who allegedly provided the same claimant with services in connection with the same accident"); *Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 (1st Dept 2017) (noting that where claims "aris[e] out of the same transaction or occurrence," a defendant may be joined pursuant to CPLR § 1002[b]); *Stewart Tenants Corp. v Square Indus., Inc.*, 269 AD2d 246, 248 (1st Dept 2000) (stating that "[a] proper party is one against whom plaintiff asserts any right to relief jointly, severally or in the alternative, arising out of the same set of transactions or occurrences").

Accordingly, plaintiff's motion (seq. no. 5) for leave to amend the First Amended Complaint in the form and manner as reflected in the proposed Second Amended Complaint is granted pursuant to CPLR § 3025(b), and BBShares and BB Matrix are joined as defendants herein pursuant to CPLR §§ 1002 and 1003.

BBSHARES' MOTION TO INTERVENE

With respect to that branch of BBShares' motion (seq. no. 3) for an Order pursuant to CPLR §§ 1012(a) and 1013 permitting BBShares to intervene in this action, plaintiff in his opposition unambiguously states that he "does not oppose

BBSHares' request to intervene in order to be named as the nominal defendant to Plaintiff's derivative claims." See NYSCEF Doc. No. 86-1 at pp. 1, 9. The Court perceives no reason to deny this branch of BBSHares' motion, as BBSHares "has a real and substantial interest in the outcome of the proceedings," and the motion is therefore granted such that BBSHares is added as a nominal defendant in this action as set forth in the proposed Second Amended Complaint. See *Matter of Sclafani Petroleum, Inc.*, 173 AD3d 1042, 1043 (2d Dept 2019) (stating that "whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted 'where the intervenor has a real and substantial interest in the outcome of the proceedings'"), quoting *Glob. Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d 819, 820 (2d Dept 2012).

PRIOR MOTIONS TO DISMISS THE FIRST AMENDED COMPLAINT

In light of the Court's granting of plaintiff's motion for leave to amend the First Amended Complaint in the form and manner as reflected in the proposed Second Amended Complaint (seq. no. 5), the Court denies as moot both the individual defendants' motion (seq. no. 2) to dismiss the First Amended Complaint and that branch of BBSHares' motion (seq. no. 3) which sought to dismiss the derivative claims set forth in the First

Amended Complaint. See *Singh v Wesco Ins. Co.*, 201 AD3d 450, 451 (1st Dept 2022) (holding that “[i]n light of its determination [granting] the cross motion for leave to amend the complaint, Supreme Court properly denied defendant’s motion to dismiss the complaint as moot”).

**BBSHARES’ ALTERNATIVE REQUEST THAT
PLAINTIFF POST SECURITY FOR THE DERIVATIVE CLAIMS**

Having reviewed the parties’ submissions, the Court determines that BBSHares is not entitled to the alternative relief that it seeks by its motion, *i.e.*, requiring plaintiff to post \$1 million as security for his derivative claims pursuant to BCL § 627. Pursuant to this statute, a shareholder derivative plaintiff is not required to post a security if he or she holds “five percent or more of any class of the outstanding shares” of the corporation, or if the shares “have a fair value in excess of fifty thousand dollars.” See BCL § 627. “Fair value” is a term of art under the BCL, and may include the value of pending derivative claims. See *Congel v Mlafitano*, 31 NY3d 272, 297 (2018); *Ferolito v Vultaggio*, 99 AD3d 19, 20 (1st Dept 2012).

Although the Court does not opine as to whether plaintiff may ultimately prevail on the merits of his derivative claims or how his ownership interest in BBSHares may eventually be valued in connection therewith, for purposes of this motion the Record

before the Court reflects that plaintiff's shares of BBShares have a fair value in excess of \$50,000. See NYSCEF Doc. No. 87-1 at Exs. 1, 2, 6. As such, BCL § 627 does not mandate that plaintiff post a security for his derivative claims, and the Court in its discretion denies the branch of BBShares' motion that seeks such relief. See *Roach v Franchises Int'l, Inc.*, 32 AD2d 247, 250 (2d Dept 1969) (affirming the denial of a BCL § 627 motion for a security and stating that "[t]he abuse of derivative actions instituted by stockholders having small or miniscule interests in a large corporation, directed not so much to the redress of wrongs by management, but rather to the hope of an award of attorneys' fees or the negotiation of a private settlement, was the target of the statute"); *Dingle v Xtenit, Inc.*, 2008 NY Misc. LEXIS 4458, *12 (Sup. Ct. N.Y. Cty. July 16, 2008) (denying a request that plaintiff be required to post a security for derivative claims and noting that "the purpose of section BCL § 627 . . . is to discourage baseless strike suits against large corporations by shareholders with small interests").

CONCLUSION

For the reasons set forth above, plaintiff's motion (seq. no. 5) for leave to amend the First Amended Complaint in the form and manner as reflected in the proposed Second Amended

Complaint is granted in its entirety, and BBSHares and BB Matrix are added as defendants herein. Additionally, BBSHares' motion (seq. no. 3) is granted in part and denied in part such that: (1) it is granted to the extent that BBSHares is added as a nominal defendant in this action as set forth in the proposed Second Amended Complaint; and (2) it is denied to the extent that it seeks dismissal of the First Amended Complaint and to require plaintiff to post security for his derivative claims. Finally, the individual defendants' motion (seq. no. 2) for an Order dismissing the First Amended Complaint is denied as moot.

The foregoing constitutes the decision and order of the Court.⁵

Dated: White Plains, New York
May 11, 2023



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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⁵ All other arguments raised on these three motions and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

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