UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:20-cv-21808-RNS

TODD BENJAMIN INTERNATIONAL, LTD. and TODD BENJAMIN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GRANT THORNTON INTERNATIONAL LTD., GRANT THORTON CAYMAN ISLANDS, GRANT THORNTON IRELAND, BOLDER FUND SERVICES (USA), LLC, and BOLDER FUND SERVICES (CAYMAN), LTD.,

Defendants.

ALL DEFENDANTS' JOINT REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

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PRELIMINARY STATEMENT[1]

Plaintiffs' Response confirms that this Court lacks personal jurisdiction over GT Cayman and GT Ireland because Plaintiffs' sole ground for long-arm jurisdiction fails to establish sufficient connexity between the auditors' alleged Florida contacts and Plaintiffs' claims. Plaintiffs' argument that a few communications into Florida suffice is without merit. Nor can Plaintiffs show that exercising personal jurisdiction over GT Cayman and GT Ireland comports with due process.

As to GTIL, Plaintiffs continue to parrot the bare-bones allegations in their complaint that GTIL is the principal of GT Cayman and GT Ireland, but they do not address any of the Florida cases directly rejecting their agency-based jurisdiction argument. And their new theory that GT Cayman and GT Ireland are mere instrumentalities of GTIL is completely unsubstantiated by any factual allegations whatsoever. Moreover, Plaintiffs did not even bother to respond to GTIL's due process argument, which independently requires dismissal for lack of personal jurisdiction. Even if the Court were to reach the merits of Plaintiffs' apparent agency claims against GTIL, those fail too because Plaintiffs have not alleged a single statement made by GTIL that they relied upon.

Finally, Plaintiffs' attempt to misdirect the Court to irrelevant provisions in agreements other than the mandatory Cayman forum selection clause in the subscription agreements that they signed should be rejected. That clause and all other relevant agreements, including the Engagement Letters with GT Cayman and GT Ireland, require the Plaintiffs, or the closely related TCA Funds, to litigate their claims against Bolder, GT Cayman, and GT Ireland in the Cayman Islands. Thus, Plaintiffs' claims must also all be dismissed on the independent grounds of *forum non conveniens*.

I. Plaintiffs Have Not Satisfied Their Burden to Establish That This Court Has Personal Jurisdiction Over the GT Entities

A. The Court Lacks Specific Personal Jurisdiction Over GT Cayman and GT Ireland Under Florida's Tortious Act Provision[2]

1. The Connexity Requirement is Not Met Because Plaintiffs Cannot Prove That the Cause of Action Arises from the Alleged Communications by GT Cayman or GT Ireland

Plaintiffs rely upon section 48.193(1)(a)(2), which limits jurisdiction to "[c]ommitting a tortious act *within* this state." (Emphasis added.) Notably, courts in Florida adhere to a

[1] Capitalized terms have the same meanings given to them in Defendants' joint motion (D.E. 58).

[2] Plaintiffs concede that they are not arguing general jurisdiction over the GT Entities. *See* D.E. 68 at 7. Similarly, Plaintiffs concede that they are only seeking specific personal jurisdiction pursuant

"supremacy-of-text principle," under which the *words* of a governing text are of paramount concern. *See Advisory Opinion to the Governor Re Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020); *see also Rollet v. de Bizemont*, 159 So. 3d 351, 355 (Fla. 3d DCA 2015) ("In determining whether a complaint alleges sufficient jurisdictional facts to bring the action within Florida's long-arm statute, 'the trial court must ***strictly construe the statute in favor of the non-resident defendant***[ ].'") (emphasis added); *Olson v. Robbie*, 141 So. 3d 636, 640 (Fla. 4th DCA 2014). Importantly, when the communications triggering jurisdiction for a tort claim (as Plaintiffs allege here) are based on "telephonic, electronic, or written communications into Florida," the plaintiff must prove "that the cause of action arises from those communications" for the Court to exercise personal jurisdiction. *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1168 (11th Cir. 2005); *see also SkyHop Techs., Inc. v. Narra*, 58 F.4th 1211, 1227–28 (11th Cir. 2023) ("Under Florida Supreme Court precedent, a tortious act can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida so long as the cause of action . . . arises from the communications.") (internal citation and quotation omitted). Accordingly, there must be some "connexity" that exists between the out-of-state communications and the cause of action such that the cause of action "would depend upon proof of either the existence or the content of any of the communications ... into Florida." *Carlyle v. Palm Beach Polo Holdings, Inc.*, 842 So. 2d 1013, 1017 (Fla. 4th DCA 2003); *Williams Elec. Co. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988) (internal citation and quotation omitted).

Here, Plaintiffs fail to meet the connexity requirement and instead attempt to mischaracterize their high burden to meet this requirement by unilaterally lowering the standard and incorrectly claiming that "because the content of Grant Thornton's communication into Florida are ***tied to*** Plaintiffs' theories of liability" they have met the connexity requirement. D.E. 68, at 6 (emphasis added). Simply, Plaintiffs' "tied to" standard is contrary to Florida and Eleventh Circuit precedent, requiring much more.

Moreover, after Defendants' Motion raised a meritorious challenge to personal jurisdiction which included sworn testimony, Plaintiffs failed to present any counter-evidence whatsoever,

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to Florida's tortious act provision, Fla. Stat. § 48.193(1)(a)(2) and not Fla. Stat. § 48.193(1)(a)(1) or Fla. Stat. § 48.193(1)(a)(6). *Id.* at 4-7.

apart from including citations to the FAC and attaching email communications that do not meet the connexity requirement. *See* D.E. 68 at 6.[3]

2. Plaintiffs Have Failed to Produce Evidence Demonstrating that Their Causes of Action Depend Upon Proof of Either the Existence or the Content of Any of GT Cayman or GT Ireland's Communications into Florida

To be clear, GT Ireland and GT Cayman were retained to prepare audits for Cayman-Islands Funds. Plaintiffs argue that TCA Management coordinated with GT Cayman and GT Ireland pursuant to their engagement letters with the Funds and was the "source of information" about how the Funds were managed and valued (D.E. 68 at 8). However, close examination of Plaintiffs' FAC reveals that the torts for which Plaintiffs seek damages go well beyond the act of sending email communications and attending two in-person meetings in Florida merely to obtain information. For example, Plaintiffs allege that GT Cayman and GT Ireland have made negligent misrepresentations, aided and abetted fraud and breach of fiduciary duty by TCA Management by:

> a. Failing to include in its final 2017 audit report what it [k]new about the serious control issues, revenue recognition deficiencies, loan receivables and accounting issues that eventually led to TCA Management's failure;
>
> b. Failing to disclose that it could not confirm with borrowers 90% of investment banking fees purportedly owed to TCA Management;
>
> c. Failing to issue an adverse opinion in 2018, suggesting instead that TCA Management obtain a third-party valuation company to obscure TCA Management's issues and allow Grant Thornton to rely on that valuation to issue another qualified opinion;
>
> d. Deviating from its normal practices, procedures and methodologies in violation of industry standards;
>
> e. Ignoring data in its possession that contradicted conclusions reached in its audit reports; and
>
> f. Lending its name and credibility to TCA Management.

[3] Although Plaintiffs fail to satisfy their initial pleading burden, together with their Motion, the GT Entities "submit[ted] affidavit evidence in support of [their] position" that personal jurisdiction is lacking; accordingly, "the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction." *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009)(internal citation and quotation omitted). In producing jurisdictional evidence, a plaintiff "may not merely rely on the factual allegations set forth in the complaint" as Plaintiffs attempt to do here. *See Kim v. Keenan*, 71 F. Supp. 2d 1228, 1231 (M.D. Fla. 1999).

See D.E. 21, ¶ 91. The allegations of the FAC establish that ***none*** of Plaintiffs' causes of action ***arise from*** GT Cayman or GT Ireland's email communications with TCA Management, but instead from their efforts to audit the Cayman Islands-based Funds, of which communicating with TCA Management was just one minor aspect. D.E. 58-4, ¶¶ 34, 36. Although the FAC alleges that GT Cayman and GT Ireland communicated with TCA Management in Florida, the communications by GT Cayman or GT Ireland into Florida are not the focus of Plaintiffs' claims, thus the claims do not arise from the communications.

Plaintiffs assert that through the final audit reports for 2017 and 2018, GT Cayman and GT Ireland provided TCA Management with a way to justify severe accounting irregularities by granting it qualified audit opinions. In light of the breadth of Plaintiffs claims, they do not "depend upon proof of either the existence or the content of any of the communications ... into Florida," *Horizon Aggressive,* 421 F.3d at 1168 (cleaned up), and the email communications and limited in-person meetings in Florida are not a "substantial aspect" of the tort alleged. *Williams Electric,* 854 F.2d at 394 (cleaned up).

When construing the connexity requirement, Florida courts have upheld jurisdiction *almost exclusively where the communications themselves constituted the tort* for which the plaintiff sought recovery. Thus, Florida courts have found jurisdiction where the communications at issue were alleged to be defamatory, *see Becker v. Hooshmand*, 841 So. 2d 561, 563 (Fla. 4th DCA 2003) (concluding that the alleged defamatory comments in the chat room were sufficient to satisfy the connexity requirement because "the communications that form the basis of the allegations in this case" were part of the communication directed to Florida that caused injury in Florida), fraudulent, *see Deloitte & Touche v. Gencor Indus., Inc.,* 929 So. 2d 678 (Fla. 5th DCA 2006) (where false reports were sent to Florida because audit was prepared for a Florida entity, Defendant "was aware that these reports would be relied on in Florida" and "were relied upon in Florida"), or where they amounted to negligent legal advice, *see Wendt v. Horowitz,* 822 So. 2d 1252, 1258–60 (Fla. 2002) (holding that sending negligent legal work into Florida could give rise to personal jurisdiction but declining to decide whether it did in that case). That is not the situation here. Plaintiffs contend that GT Cayman and GT Ireland prepared the final audit reports for 2017 and 2018, but Plaintiffs do not claim that these audits were prepared in Florida, were prepared for a Florida entity or that the audits were to be relied by anyone in Florida as the audits were prepared for Cayman-Island Funds. Further, Plaintiffs' entire claims of negligent misrepresentation, aiding

and abetting fraud, and aiding and abetting breach of fiduciary duty did not "arise from" the email communications or limited in-person meetings in Florida. *Wendt,* 822 So. 2d at 1260.

This Court's precedent dictates that personal jurisdiction over one individual claim cannot be expanded to cover other related claims unless the claims "arose from the same jurisdiction generating event." *Cronin v. Wash. Nat'l Ins. Co.,* 980 F.2d 663, 671 (11th Cir. 1993). Plaintiffs claim that the jurisdiction generating event here was that GT Cayman and GT Ireland's exchanged certain documents via email into Florida for the preparation of the audit of Cayman-Islands Funds D.E. 21 at 6. But these acts did not give rise to the many other ways in which Plaintiffs allege that GT Cayman and GT Ireland committed the various torts alleged in the complaint. *See* D.E. 21 at 24-26. For these reasons, the communication between GT Cayman, GT Ireland and TCA Management were merely incidental to Plaintiffs' claims. *See RMS Titanic, Inc. v. Kingsmen Creatives, Ltd.*, 579 Fed. Appx. 779, 788 (11th Cir. 2014). And their claims do not, therefore, "arise from the communications." *Wendt,* 822 So.2d at 1260; *Williams Elec. Co.,* 854 F.2d at 394; *Horizon Aggressive,* 421 F.3d at 1168. Thus, Plaintiffs fails to satisfy specific jurisdiction.

B. Plaintiffs Fail to Satisfy the Requirements of Constitutional Due Process for Specific Jurisdiction over GT Cayman or GT Ireland

Plaintiffs' arguments related to constitutional due process are conclusory and fail to meaningfully apply the cases to which Plaintiffs refer.

Arising Out of or Relating To. Plaintiffs cannot satisfy the minimum contacts requirement by relying on *New Lenox*. In *New Lenox*, where plaintiff had alleged fraud and misappropriation of trade secrets, the court determined that because the defendants' contacts with Florida ***related*** to the plaintiff's cause of action and the defendants purposefully directed their conduct toward the plaintiff, a Florida resident, the defendants reasonably should have anticipated being haled into court in Florida. *New Lenox Indus., Inc. v. Fenton*, 510 F. Supp. 2d 893, 904-905 (M.D. Fla. 2007). The court therefore concluded that the assertion of personal jurisdiction over the defendants in that case passed constitutional muster. *Id*. This case is distinguishable from *New Lenox* because the alleged communications into Florida are ***not*** related to Plaintiffs' causes of action, GT Cayman and GT Ireland prepared audits for Cayman Islands related entities and did not consent for their audits to be relied on by any other entity, other than the Cayman Islands entities. *See* D.E. 58-4, ¶¶ 20-35, 40-41. Plaintiffs do not meet the first prong of a traditional minimum-contacts test.

Purposeful Availment. Plaintiffs do not meet the second "purposeful availment" prong of a traditional minimum-contacts test, which requires that the alleged contacts: "(1) are related to the plaintiff's cause of action; (2) involve some act by which the defendant purposefully availed [it]self of the privileges of doing business within the forum; and (3) are such that the defendant should reasonably anticipate being haled into court in the forum." *easyGroup Ltd. v. Skyscanner, Inc.*, Case No. 20-20062-CIV-Altonaga/Goodman, 2020 WL 5500695, at *11 (S.D. Fla. Sept. 11, 2020). *First*, as discussed above none of the email communications by GT Cayman or GT Ireland provided in the Response are related to Plaintiffs' causes of action as they were simply an exchange of information for the process of valuations and not the preparation of the Cayman-Islands' entities audits—which were not completed in Florida.[4] *Second*, neither GT Ireland nor GT Cayman availed themselves of the privileges of doing business in Florida as they were preparing audits in the Cayman Islands and Ireland for Cayman-Islands Funds. *Third*, Plaintiffs contention that GT Cayman or GT Ireland by their own accord, created a substantial connection with Florida and should reasonably anticipate being haled into court in Florida (D.E. 68 at 19), is totally contradicted by Plaintiffs' assertion that they were required to coordinate with TCA Management pursuant to their engagement letters with the Cayman Islands-based Funds (*id.* at 8), because those engagement letters contained mandatory forum selection clauses (discussed further below) that would reasonably cause GT Cayman and GT Ireland to anticipate only being haled into court in the Cayman Islands, not Florida.

Fair Play and Substantial Justice. Plaintiffs have argued that exercising jurisdiction over the GT Cayman and GT Ireland would not violate traditional notions of fair play and substantial justice because they have had far more than "slight" contact with Florida. *Id.* at 19. In support of their arguments, Plaintiffs have relied on *Spigot, Inc. v. Hoggatt,* No. 218CV764FTM29NPM, 2020 WL 1955360, at *13 (M.D. Fla. Apr. 23, 2020), in which the plaintiffs sufficiently established that their causes of action arose from the defendants' conducting a business in Florida and the defendants' committing a tortious act in Florida because the Court found defendants to be

[4] The email communications where GT Ireland is included are simply to provide information about the Cayman-Islands Funds and not for the preparation or advice on the audits. *See e.g.*, D.E. 69-6 (provided wording changes and not audit changes); D.E. 69-7 (minor changes to language not audits); 69-8 (questions about final opinion not changes to opinion); D.E. 69-10 (requesting information regarding Performing Loans); D.E. 69-11 (TCA just confirming its understanding of the qualification); D.E. 69-12 (requesting information of IB fees).

the but-for cause of the allegations. *Id*. at 12-13. Here, Plaintiffs have not and cannot assert that GT Cayman or GT Ireland's communications into Florida are the but-for cause of their allegations based on the breadth of the allegations against those entities in the FAC, as explained *above*. *Id.*

In sum, the FAC does not allege sufficient jurisdictional ***facts*** to bring any claim, and thus, this action within the ambit of Florida's long-arm statute nor does it demonstrate that sufficient minimum contacts exist between Florida and GT Cayman or GT Ireland to satisfy the Fourteenth Amendment's due process requirements. Moreover, the affidavits submitted by GT Cayman and GT Ireland with the Motion controverted the jurisdictional allegations of the FAC and were not rebutted by the Plaintiffs. Accordingly, this Court should enter an order granting GT Cayman and GT Ireland's motion to dismiss for lack of personal jurisdiction.

C. The Court Also Lacks Personal Jurisdiction Over GTIL[5]

Plaintiffs' Response concedes they have not alleged that ***GTIL*** engaged in ***any*** suit-related conduct in Florida. Instead, according to Plaintiffs, "this Court's exercise of personal jurisdiction . . . extends to GTIL under agency principles." D.E. 68 at 20. But Plaintiffs failed to allege a principal-agent relationship between GTIL and GT Ireland or GT Cayman. Nor do Plaintiffs rebut GTIL's evidence conclusively showing that no such agency relationship exists. *See* D.E. 58-5 (Parmar Decl.). GTIL's motion to dismiss should be granted.

1. Plaintiffs' Allegations of Control are Deficient Under Florida Law

GTIL set out the legal standards governing Florida's stringent "operational control" test. D.E. 58 at 20-22. But Plaintiffs did not address a single Florida case GTIL cited. Instead, citing only two paragraphs of their lengthy complaint, they claimed they alleged agency-based jurisdiction against GTIL because "GTIL authorizes the use of the 'Grant Thornton' brand, monitors and enforces the professional standards applicable to [its member firms], and coordinates strategy and policy for th[os]e firms." D.E. 68 at 21. As GTIL demonstrated – and Plaintiffs did not dispute – courts in Florida routinely reject attempts to impute jurisdictional contacts based on the same allegations of control. *See* D.E. 58 at 20-22 (citing cases). This Court should do the same.

Plaintiffs rely almost exclusively on one out-of-district case, which, they claim, "acknowledged an agency relationship between GTIL and its member firms based on similar

[5] As explained in the Motion, the Court respectfully should dismiss GTIL for lack of personal jurisdiction whether or not it dismisses GT Cayman and GT Ireland on that same basis.

allegations." D.E. 68 at 21 (citing *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 408 (S.D.N.Y. 2005)). This is false. GTIL was not a defendant in *Parmalat* (and personal jurisdiction was not at issue there). GTIL is incorporated in England and Wales. FAC ¶ 3. The different legal entity (GTI) that was sued in its home state in *Parmalat* was "an Illinois nonprofit corporation." *Parmalat*, 377 F. Supp. 2d at 397. And the facts in *Parmalat* are even further distinguishable from the allegations here.[6] In *Parmalat*, plaintiffs alleged that GTI intervened after the exposure of a fraud committed by one of its member firms, GT-Italy, by requesting the resignation and suspension of GT-Italy's responsible partners and then later "expelled GT-Italy for its part in the fraud and after it would not cooperate in an internal investigation." *Id.* at 408. Here, unlike in Parmalat, there are no similar allegations that GTIL disciplined, or had the desire or ability to discipline, GT Ireland, GT Cayman, or any of those firms' audit partners for the specific auditing services they provided to the TCA Cayman Funds. *Id.* Plaintiffs also do not discuss *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, which GTIL cited in its Motion (D.E. 58 at 38). But as that court found in an analogous case dismissing ***GTIL and GT Cayman*** for lack of personal jurisdiction, "*Parmalat* is not persuasive" because "the legal entities in *In re Parmalat* and the present case are distinct, and the Plaintiffs herein do not plead any actions on the part of GTIL in overseeing or directing the audit prepared by GT-Cayman in the present case." *Firefighters' Ret. Sys.*, Case No. 13-373-SDD-EWD, 2016 WL 4942004, at *6 (M.D. La. Sept. 15, 2016). The same is true here. "Plaintiffs' reliance on [*Parmalat*] is misguided." *Id.*[7]

2. Plaintiffs' "Mere Instrumentalities" Theory Fails as a Matter of Law

Plaintiffs' additional, new theory that this Court can exercise agency-based jurisdiction over GTIL because GT Ireland and GT Cayman are "mere instrumentalities of GTIL," D.E. 68 at 22, fares no better. The "mere instrumentality" basis for jurisdiction requires allegations sufficient to "pierce [the agent's] corporate veil and impute [the agent's] contacts to [the principal]." *United States ex rel. v. Mortg. Invs. Corp.*, 987 F.3d 1340, 1356 (11th Cir. 2021). To satisfy this standard,

[6] Not only did *Parmalat* involve different facts, but it also applied different law. 377 F. Supp. 2d at 404 n.97 (addressing Illinois law to merits of claim, not Florida law or personal jurisdiction).

[7] Plaintiffs' reliance on *Scrimgeour v. Pulte Home Corp.*, D.E. 68 at 21, is even further afield. There, the defendant did not even challenge the existence of "an agency relationship," and the court did not address Florida's "operational control" standard. Case No: 6:13–cv–280–Orl–22GJK, 2013 WL 12157875, at *5-6 (M.D. Fla. Sept. 5, 2013).

Plaintiffs must allege "both that the corporation is the 'mere instrumentality' of the nonresident defendant and that the nonresident defendant engaged in 'improper conduct in the . . . use of the corporation." *Parisi v. Kingston*, 314 So. 3d 656, 664 (Fla. 3d DCA 2021); *see also Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000).

Plaintiffs do not make a single allegation in their complaint that would justify piercing GT Ireland and GT Cayman's corporate veils. There are no allegations suggesting that GTIL "unilaterally controlled" GT Ireland and GT Cayman, that those three entities "ignored corporate formalities," or that they "commingled" their assets. *Mortg. Invs. Corp.*, 987 F.3d at 1356. This Court recently rejected a similar attempt to apply agency-based jurisdiction because "there [were] simply no facts . . . showing that corporate formalities were ignored; [or] that [the alleged principal] exerted extraordinary control over its subsidiaries." *L.H. v. Marriott Int'l, Inc.*, 604 F. Supp. 3d 1346, 1357 (S.D. Fla. 2022) (Scola, J.). There is no reason to depart from that holding here.[8]

Plaintiffs try in vain to argue that the "fact that GTIL doesn't—and can't—directly provide auditing services to clients only proves that GTIL relies . . . on its member firms . . . to conduct its business." D.E. 68 at 22. But Plaintiffs' false conclusion simply does not follow from their (correct) premise. As Plaintiffs concede, "GTIL's stated purpose includes monitoring and enforcing standards applicable to member firms and coordinating strategy and policies applicable to member firms." FAC ¶ 3. In other words, GTIL's business is licensing the "Grant Thornton" brand and providing services to member firms. By contrast, GT Cayman and GT Ireland's business

[8] *Meier ex rel. Meier v. Sun International Hotels, Ltd.* does not help Plaintiffs. The court in *Meier* found that foreign defendants could be subject to general jurisdiction (not at issue here) through both their direct contacts with the forum (not alleged here) and the imputation of regular and systematic contacts of their in-state (Florida) subsidiaries (also not alleged here). 288 F.3d 1264, 1272-1275 (11th Cir. 2002). Moreover, the Florida subsidiaries' "existence was simply a formality," because their "sole purpose" was to sell travel packages to the foreign defendants' properties and provide other business services in Florida for the foreign defendants, all while comingling bank accounts with the foreign defendants. *See id.* Here, however, Plaintiffs attempt to impute jurisdiction to GTIL solely based on the contacts of Cayman and Ireland entities, who allegedly had minimal contacts with Florida, and who, in any event, were "carrying on [their] own [audit] business . . . and preserv[ing] some semblance of independence" from GTIL, which does not perform audits. *See id.* at 1274. Under those circumstances, "jurisdiction over [GTIL] may not be acquired on the basis of the local activities of [GT Cayman or GT Ireland]." *See id.*; *see also Herederos De Roberto Gomez Cabrera, LLC v. Teck Resources Ltd.*, 43 F.4th 1303, 1312 (11th Cir. 2022) (affirming this Court's dismissal of foreign defendant for lack of personal jurisdiction where alleged agents were "legally distinct entities and observed all corporate formalities").

is to provide audit (and other) services to their own clients. *See* D.E. 58-5 ¶¶ 10-13, 35-36 (Parmar Decl.). Thus, far from being mere instrumentalities of GTIL, GT Ireland and GT Cayman carry out their own independent businesses and there are simply no allegations here that GTIL "dominated and controlled" GT Ireland and GT Cayman "to such an extent that [their] independent existence[s were], in fact nonexistent." *Abdo v. Abdo*, 263 So. 3d 141, 150 (Fla. 2d DCA 2018).[9]

3. Plaintiffs Did Not Respond to GTIL's Due Process Argument

GTIL also argued that exercising personal jurisdiction against it would violate due process. D.E. 58 at 22-23. Plaintiffs did not respond. For the unopposed reasons stated in the Motion, GTIL's due process argument is an independent reason to grant GTIL's motion to dismiss.

4. Plaintiffs Failed to Rebut GTIL's Evidentiary Showing

For the reasons stated, Plaintiffs fail to allege that GTIL is subject to agency-based jurisdiction in Florida. But even if the Court were to disagree, GTIL's evidentiary showing clearly demonstrates that (1) GTIL does not exercise operational control over GT Ireland or GT Cayman; (2) all corporate formalities are followed; (3) there is no commingling of assets; and (4) there has been no abuse of the corporate form. D.E. 58-5 ¶¶ 25-37 (Parmar Decl.). Plaintiffs' only response is to criticize Ms. Parmar because she did not annex "corporate documents" to her declaration. D.E. 68 at 21. Plaintiffs cite no authority for their contention that Ms. Parmar is unable to attest to GTIL's operations based on her own knowledge, a procedure frequently followed and relied upon by this very Court. *See, e.g.*, *Marriott Int'l, Inc.*, 604 F. Supp. 3d at 1357; *Med-X Global, LLC v. SunMed Int'l, LLC*, Civil Action No. 19-20722-Civ-Scola, 2021 WL 3772673, at *4 (S.D. Fla. Aug. 25, 2021). GTIL's competent evidence is unchallenged, and the evidence conclusively shows that exercising personal jurisdiction over GTIL would be improper.

[9] Plaintiffs' so-called "evidence of GT Ireland and GT Cayman being synonymous with GTIL" is based on two statements by GT Cayman (not by GTIL) regarding GT Cayman's services. *See* D.E. 68 at 22 & nn.81, 83 (citing exhibits). But the first exhibit, a proposal from GT Cayman to the TCA Funds, contains an express disclaimer making clear that "'Grant Thornton' refers to the brand under which the Grant Thornton member firms provide assurance, tax and advisory services to their clients and/or refers to one or more member firms, as the context requires." D.E. 69-3 at 11. Moreover, the disclaimer further provides: "GTIL and each member firm is a separate legal entity. Services are delivered by the member firms. GTIL does not provide services to clients. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions." *Id.* The second exhibit does not attach the "completed questionnaire" Plaintiffs cite (but again, it is not allegedly a statement by GTIL). D.E. 69-38.

II. Plaintiffs' Request for Jurisdictional Discovery Should Be Denied.

Plaintiffs' passing request (D.E. 68 at 21 n.75 & 23) for jurisdictional discovery should be denied. First, it is "procedurally improper" and untimely. *See Del Valle v. Trivago GmbH*, Civ. Action No. 19-22619-Civ-Scola, 2020 WL 2733729, at *4-5 (S.D. Fla. May 26, 2020) (rejecting "hedged request" for jurisdictional discovery "bur[ied]" in opposition brief, rather than formal motion, and where plaintiffs were aware for at least two months that defendants would challenge personal jurisdiction), *rev'd on other grounds*, 56 F.4th 1265 (11th Cir. 2022); *Patent Holder LLC v. Lone Wolf Distributors, Inc.*, Civ. Action No. 17-23060-Civ-Scola, 2017 WL 5032989, at *7-8 (S.D. Fla. Nov. 1, 2017) (noting that failure to file motion seeking discovery or stay of motion to dismiss pending discovery is sufficient basis to deny request for jurisdictional discovery). Second, Plaintiffs' request is nothing more than a "fishing expedition" to find additional facts that they were unable to locate among the litany of documents already obtained by the Funds' Receiver, many of which are attached to Plaintiffs' supporting declaration in opposition to this Motion. *See Patent Holder*, 2017 WL 5032989, at *7-8.[10]

III. Plaintiffs Fail to Allege Agency-Based Claims Against GTIL

As for their substantive claims against GTIL, Plaintiffs fail to allege that GTIL is liable under an actual or apparent agency theory. For the reasons discussed above, *supra* at 7-10, Plaintiffs' actual agency allegations fail. Plaintiffs' do not seriously argue otherwise, claiming instead that they "allege[d] that GTIL created the appearance of agency." D.E. 68 at 39. But the allegations they rely on – language in the Engagement Letters and use of the "Grant Thornton" brand – are legally insufficient to allege apparent agency. D.E. 58 at 35-38.

GTIL showed that "Plaintiffs cannot use statements in the Engagement Letters to support their claim that GT Cayman or GT Ireland are the apparent agents of GTIL" because "Plaintiffs do not allege that they ever received [the Engagement Letters]." *Id.* at 37 (citing cases). Plaintiffs did not challenge GTIL's position. D.E. 68 at 40 (arguing that they relied only on audit opinions). Accordingly, under settled law, the Engagement Letters cannot create an apparent agency relationship because the "manifestation of agency [must have been] made by [GTIL] to

[10] This is particularly so regarding Plaintiffs' request for jurisdictional discovery from GTIL because Plaintiffs did not "dispute in any way the statements made under penalty of perjury by [Ms. Parmar]" and there is "no indication of impropriety" in her sworn declaration. *See Patent Holder*, 2017 WL 5032989, at *8.

Plaintiff[s]." *Fojtasek v. NCL (Bahamas) Ltd.*, 613 F. Supp. 2d 1351, 1357 (S.D. Fla. 2009); *see also Ocana v. Ford Motor Co.*, 992 So. 2d 319, 327 (Fla. 3d DCA 2008).[11]

That leaves only Plaintiffs' allegations about the "Grant Thornton" branding and signatures on the audit opinions (which, again, were not issued by GTIL). Here, again, however, "Florida law is clear that the use of a logo or trademark symbol alone cannot create an apparent agency." *Am. Int'l Grp., Inc. v. Cornerstone Bus., Inc.*, 872 So. 2d 333, 336 (Fla. 2d DCA 2004); *see also Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 120 (Fla. 1995); *Ferrer v. Jewelry Repair Enters.*, 310 So. 3d 428, 429 (Fla. 4th DCA 2021); *Ocana*, 992 So. 2d at 327. Of the Florida cases GTIL cited, D.E. 58 at 37-38, Plaintiffs only discussed *Mobil*. According to them, *Mobil* should be disregarded because "the Court found that 'the franchise context requires an enhanced showing of agency.'" D.E. 68 at 39 (purporting to quote from *Mobil*). Contrary to Plaintiffs' claim, however, the quoted passage does not appear anywhere in *Mobil*. And there is nothing in the decision that purports to limit its holding to the franchise context.[12]

The other cases Plaintiffs rely on are distinguishable. In *Borg-Warner Leasing v. Doyle Electric Co.*, the principal "appoint[ed] [an individual agent] as the bearer of its letterhead documents and as the exclusive negotiator of its demands" of the plaintiff. 733 F.2d 833, 836 (11th Cir. 1984). And, in the remaining cases, the principal's full legal name was listed on the signature lines of the relevant contracts. *See Marchisio v. Carrington Mortg. Servs.*, 919 F.3d 1288, 1312 (11th Cir. 2019); *Semoran Pines Condo. Assoc. v. Arab Termite & Pest Control of Fla., Inc.*, 543 So. 2d 417, 418 (Fla. 5th DCA 1989). Neither case suggests that audit opinions that do not mention GTIL and are signed by two separate "Grant Thornton" entities – with addresses in the Cayman Islands and Ireland – qualify as a representation *by GTIL to Plaintiffs* that GT Ireland and GT Cayman are acting as GTIL's agents. *See* D.E. 58-4, Ex. 2 (Glennon Aff). In fact, the law is to the contrary. *See Firefighters Ret. Sys.*, 2016 WL 4942004, at *6 (rejecting identical argument).[13]

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[11] It is also undisputed that the Engagement Letters expressly disclaimed an agency relationship and were ***not*** sent to Plaintiffs and did ***not*** contain statements made ***by GTIL***, all of which is independently fatal to Plaintiffs' reliance on them to establish apparent agency.

[12] Even though *Mobil* was decided on summary judgment, the Court based its holding on "[t]he factual allegations in the complaint," which "clearly fail[ed] to allege even the minimum level of a 'representation' necessary to create an apparent agency relationship." *Mobil*, 648 So.2d at 121.

[13] It is worth noting that, for decades, the overwhelming majority of courts to have considered arguments for vicarious jurisdiction or liability over international umbrella organizations like GTIL, based on the same bare-bones allegations Plaintiffs press here, have rejected them. *See,*

IV. The Audit Engagement Letter FSC Is Enforceable Against Plaintiffs

The GT Entities can enforce the forum selection clause contained in the Engagement Letters against Plaintiffs because Plaintiffs are transaction participants whose conduct or interests are "derivative of" or "directly related to" those of the contracting parties. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998) (forum selection clause enforceable against a non-party where the non-party is "closely related to the dispute such that it becomes 'foreseeable' that it will be bound"); *see also* D.E. 58 at 29 (citing additional cases). The "closely related" standard is satisfied when a close business relationship exists between the signatories and a non-signatory. *See, e.g., Power Up Lending Grp., Ltd. v. Nugene Int'l., Inc.*, CV 17-6601 (SJF) (AKT), 2019 U.S. Dist. LEXIS 5720, at *21-25 (E.D.N.Y. Jan. 10, 2019).

Plaintiffs' own allegations establish that Plaintiffs' claims are predicated upon and derivative of GT Cayman's and GT Ireland's engagement by and relationship with the TCA Cayman Funds, rendering their claims so "closely related" to that relationship as to require enforcement of the Engagement Letter FSC against Plaintiffs. *See, e.g.,* FAC ¶¶ 41-69. Indeed, Plaintiffs could not even bring their present claims but for the audit services provided by GT Cayman and GT Ireland pursuant to the Engagement Letters containing the FSC. For this reason, it was, or should have been, reasonably foreseeable to Plaintiffs that GT Cayman and GT Ireland would seek to litigate any dispute regarding those audit services in the Cayman Islands.

Further evidence of Plaintiffs' close relationship to the Engagement Letters is manifested by the clear alignment of Plaintiffs' interests with those of the TCA Cayman Funds' Receiver that assumed control over the Funds that were signatories to the relevant Engagement Letters. In their Response, Plaintiffs produced a supporting Declaration that underscored this close relationship. *See* Exhibit 1, Response. The Declaration, which was signed by the Receiver, states in paragraph 7 that "[i]n the interest of helping investors maximize their recovery, and pursuant to the *litigation coordination agreement* I have entered into with counsel for Plaintiffs in this litigation, I have shared some of the TCA Records with Plaintiffs' counsel in this case." (emphasis added). That

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e.g., *In re Royal Ahold N.V. Sec. & ERISA Litig*., 351 F. Supp. 2d 334, 385 n.41 (D. Md. 2004) ("It is well recognized that "[m]ember firms in an international accounting association are not part of a single firm and are neither agents nor partners of other member firms simply by virtue of using the same brand name"); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1253-54 & n.10 (S.D.N.Y. 1984) (refusing to impute alleged jurisdictional contacts between affiliated firms).

litigation coordination agreement provides in relevant part that "[t]he Parties believe that the best and most efficient means of pursuing their respective claims against the [Defendants] is by **coordinating their efforts in joint litigation, and distributing the proceeds of any recovery through the receivership proceeding**." Case 1:20-cv-21964-CMA, D.E. 290-1 (emphasis added).

Plaintiffs thus are acting in concert with the TCA Cayman Funds' Receiver – who is standing in the shoes of the TCA Cayman Funds – to maximize recovery for the TCA Cayman Funds and Plaintiffs who invested in them. In other words, the TCA Cayman Funds that signed the Engagement Letters containing the FSC are effectively now suing Defendants in this case through the joint efforts of the Plaintiffs and the Receiver. This alone is enough to establish the requisite "close relationship" between Plaintiffs and the Engagement Letter FSC.

Plaintiffs have even argued in their Response that forum selection clauses contained in agreements binding the TCA Cayman Funds are relevant and binding on Plaintiffs in this litigation. *See* D.E. 68 at 24-25 (citing administrative agreement between the TCA Cayman Funds and Bolder). The GT Entities agree. Indeed, that is precisely why the mandatory Cayman forum selection clauses in the Engagement Letters also signed by the TCA Cayman Funds should be given effect here. By Plaintiffs' own admission, there is a sufficiently close relationship between the Plaintiffs and the TCA Cayman Funds in which they invested to require enforcement of the forum selection clauses against Plaintiffs. And, although they would prefer not to be held to their prior bargains, both the Plaintiffs (via the Subscription Agreements) and the TCA Cayman Funds (via the Engagement Letters) have already, irrevocably agreed to litigate claims against Bolder, GT Cayman, and GT Ireland in the same Cayman forum. Thus, all roads lead to the Cayman Islands.[14]

Moreover, the cases cited by Plaintiffs in their Response do ***not*** stand for the proposition that the "closely related" standard can be satisfied only if the relevant relationship falls "into one of three categories: familial, controlling, or quasi-contractual." *See* D.E. 68 at p. 30. None of the cases relied on by Plaintiffs so state, and the "closely related" test is not limited to Plaintiffs' artificial categories.[15] Further, contrary to Plaintiffs' suggestion, Plaintiffs need not be a "third-

[14] Even the administrative agreement relied on by Plaintiffs indicates that the TCA Cayman Funds consented to jurisdiction in a Cayman forum and thus agreed that Cayman courts would at least be a permissible forum.

[15] Although the "closely related" standard is not limited to the three categories listed by Plaintiffs, Plaintiff concede that a "familial" relationship can be either personal or corporate. *See* Response,

party beneficiary" of the Engagement Letters before the Engagement Letter FSC can be enforced against them. *See, e.g., Lipcon*, 148 F.3d at 1299 (although third-party beneficiary status would, by definition, satisfy the "closely related" and "foreseeability" requirements, third-party beneficiary status is not required); *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209-10 n.7 (7th Cir. 1993) (same). Thus, even if Plaintiffs are not third-party beneficiaries of the Engagement Letters, the Engagement Letter FSC is still enforceable against Plaintiffs.

The Engagement Letter FSC also is enforceable against Plaintiffs under both direct benefit estoppel and equitable estoppel theories because Plaintiffs directly benefited from the Engagement Letters and assert claims seeking benefits under the Engagement Letters. *See, e.g., Kakawi Yachting, Inc. v. Marlow Marine Sales, Inc.*, Case No. 8-cv-1408-T-TBM, 2014 WL 12650701, at *8-9 (M.D. Fla. Oct. 3, 2014); *XR Co. v. Block & Balestri, P.C.*, 44 F. Supp. 2d 1296, 1300-01 (S.D. Fla. 1999). Perhaps the best evidence that Plaintiffs benefited from GT Cayman's and GT Ireland's services under the Engagement Letters is the fact that Plaintiffs premise this lawsuit precisely on the audit work performed by those entities. Because Plaintiffs assert claims based on the Engagement Letters, Plaintiffs are estopped from rejecting the forum selection clauses contained in those letters. *See* D.E. 68 at 33-34.

V. The Mandatory Forum Selection Clause in the Subscription Documents Requires That Any Litigation By Fund Subscribers Such as Plaintiffs Against the Bolder Defendants Occur in the Cayman Islands.

The Bolder Defendants also moved the Court to enforce a mandatory forum selection clause requiring that this litigation be brought in the Cayman Islands, which is supported by the plain language of the clause, the facts, and the cited case law. (D.E. 58 at 5-6; 24-28). Plaintiffs do not dispute that the clause is valid, the clause is mandatory, or that Plaintiffs' claims fall within the scope of the clause. (D.E. 68 at 25-28; 34-35). To invalidate the clause at issue, they must show that the clause is "unreasonable under the circumstances" as follows:

> [Forum] Choice clauses will be found "unreasonable under the circumstances," and thus unenforceable *only* when: (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the

p. 30. As investors in the TCA Cayman Funds, Plaintiffs clearly are in a "corporate" relationship with such funds.

> plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy.

(emphasis added). *Lipcon*, 148 F.3d at 1291. Plaintiffs' Response fails to make any of these necessary showings, which is fatal to their Response. Thus, the analysis of this Court need not go any further and the motion to dismiss on behalf of the Bolder defendants should be granted.

In contrast to making the requisite showings to avoid dismissal, Plaintiff's make two main arguments, unfounded in fact or law, that the mandatory forum clause should be discarded: 1) more than one so-called forum selection clause exists and thereby creates ambiguity or conflict requiring the Court to ignore the mandatory clause at issue; and 2) the receiver for the TCA funds waived Bolder's right to assert the parties' contractually agreed forum of the Cayman Islands. Both arguments have no merit and appear to be intended to distract and confuse the Court.

Regarding Plaintiffs' first argument, *these Plaintiffs* indisputably signed agreements containing mandatory forum selection clauses (i.e., the Subscription Agreement) binding them to litigate claims against Bolder in the Cayman Islands, and no other agreement signed by Plaintiffs is in conflict. There is only one forum selection clause that applies to actions between *Plaintiffs* as Subscribers to the fund and the Bolder Defendants as Administrator to the fund. That clause is found in the Subscription Documents. (D.E. 58 at 5). There is no competing forum selection clause anywhere else to even consider. The PPM language cited by Plaintiffs (D.E. 68 at 24) is an "Exculpation and Indemnity Clause" between the General Partner/Investment Manager and the Partnership/Limited Partners which reads as follows:

> **Exculpation and Indemnification** Neither the General Partner nor the Investment Manager shall be liable to the Partnership or the Limited Partners for any action or inaction in connection with the business of the Partnership unless such action or inaction is determined by a final, non-appealable court of competent jurisdiction to constitute gross negligence (as interpreted in accordance with the laws of the State of Delaware, U.S.) or willful misconduct. The Partnership (but not the Limited Partners) is obligated to indemnify the General Partner, the Investment Manager and their respective partners, managers, members, officers, employees and affiliates from any claim, loss, damage or expense incurred by such persons relating to the business of the Partnership; *provided* that such indemnity will not extend to conduct determined by a final, non-appealable court of competent jurisdiction to constitute gross negligence (as interpreted in accordance with the laws of the State of Delaware, U.S.) or willful misconduct. The Master Agreement contains similar exculpation and indemnification provisions in favor of the General Partner.

(D.E. 69-39, Ex. 39 at 16). This is not a "forum selection" clause. Nor does it include, or even reference the Administrator/Bolder Defendants. Likewise, the consent to jurisdiction clause in the Administration Agreement between the TCA Funds and Bolder does not somehow change the fact

that these Plaintiffs, for these claims, agreed to a mandatory Cayman forum selection clause.[16] (D.E. 68 at 24-25). The Bolder Defendants contracted with the fund at issue, TCA Global Credit Fund, LP, as the "Administrator." (D.E. 68 at 25 n.89). The Administration Agreement is an agreement between Bolder and the TCA fund itself signed by the fund's authorized General Partner. (D.E. 69-40 at 9). Thus, the clause Plaintiffs cite (which, in any event, ***also*** points to the Cayman Islands) is only applicable to litigation between *the TCA fund* and Bolder arising out of the Administration Agreement, and not to litigation brought by the Subscriber (Plaintiffs) against Bolder, which they irrevocably agreed to commence in the Cayman Islands. In sum, there simply is no language which conflicts with the mandatory Cayman Islands forum selection clause set forth in the Subscription Agreement.[17]

Regarding Plaintiffs' waiver argument, TCA's Receiver has no standing or ability to waive the Bolder Defendants' contractual right to litigate a dispute with Subscribers such as Plaintiffs in the Cayman Islands. The TCA fund does not hold and therefore cannot waive, the Bolder Defendants' vested contractual "forum" right. *Starbuck v. R.J. Reynolds Tobacco Company*, 349 F. Supp. 3d 1223, 1229-1230, (M.D. Fla. 2018) (explaining that a party must hold a right in order to waive it). Plus, none of the cases cited in Plaintiffs' Response stand for such a proposition. Nor do any of Plaintiffs' cases stand for the proposition that the Bolder Defendants' contractual forum rights are "derivative" of TCA's contractual rights. Instead, Plaintiffs just say it. In contrast, an "intended beneficiary" to a contract (i.e. a specifically named party in the contract such as the Bolder Defendants that were intended to receive a benefit) maintains a primary right that is not considered "incidental" or derivative, and thus cannot be waived by the TCA fund, as Plaintiffs argue. *See, Bochese v. Town of Ponclet*, 405 F.3d 964, 981-982 (11th Cir. 2005) (discussing when rights are primary and thus held fully vested in the intended beneficiary). Thus, the waiver argument is also without merit.

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[16] Bolder did not discuss the other agreements cited by Plaintiffs because they are inapplicable.

[17] To the extent the contractual language cited in Plaintiffs' Response were to be viewed as in conflict with the Subscription Agreement (it is actually harmonious), Plaintiffs' own cases demonstrate that "specific clauses take precedence over general ones." D.E. 68 at 26 (citing *Intel Container Corp. v. M/V Titan Scan*, 139 F.3d 1450, 1455 (11th Cir. 1998). Here, there is no question that the Subscription Agreement contains the more specific clause applicable to Subscriber disputes with the Administrator, and states that "…Subscriber submits to the exclusive jurisdiction of the Cayman Islands courts with respect to any actions against…the Administrator."

Finally, Bolder Cayman and Bolder USA are both entitled to receive the benefit of the mandatory forum selection clause as both are intended beneficiaries of the clause and/or have a sufficiently "close relationship" as contemplated by the case law and discussed by the GT Defendants. *Supra* at 13-15. In this regard, Bolder Cayman is a named party and Bolder USA is Bolder Cayman's agent.[18] *See*, *Lipcon,* 148 F.3d at 1299; *see also Manett–Farrow, Inc. v. Guci America, Inc.,* 858 F.2d 509, 514 n.5 (9th Cir.1988) ("[A] range of transaction participants, parties and nonparties, should benefit from and be subject to forum selection clauses."). Accordingly, the claims against the Bolder Defendants must be dismissed.

VI. Even if Plaintiffs Are Not Bound by The Engagement Letter FSC, the GT Entities Also Can Enforce the Subscription Documents FSC Against Plaintiffs

Although non-parties to the Subscription Documents, the GT Entities also can enforce the forum selection clauses contained therein because a "close relationship" further exists between the GT Entities and the entities named in the relevant Subscription Documents FSC, and it was thus foreseeable that the GT Entities might eventually seek to avail themselves of those forum selection clauses. *See, e.g., Frietsch v. Refco, Inc.*, 56 F.3d 825, 827-28 (7th Cir. 1995); *Elite Advantage, LLC v. Trivest Fund IV, L.P.*, Case No. 15-22146-CIV-ALTONAGA, 2015 U.S. Dist. LEXIS 110796, at *19-23 (S.D. Fla. Aug. 21, 2015). In short, the alleged conduct giving rise to all of Plaintiffs' claims is inextricably intertwined with Plaintiffs' investments in the TCA Cayman Funds via Subscription Documents that contain the additional Cayman forum selection clauses.

Plaintiffs simply repeat their assertion that the GT Entities cannot enforce the Subscription Documents FSC because the GT Entities are not "third-party beneficiaries" of the forum selection clauses. *See* Response, pp. 28-29. But, once again, third-party beneficiary status is not a prerequisite to enforcement of the Subscription Documents FSC by the GT Entities. *See, e.g., Lipcon*, 148 F.3d at 1299; *Hugel*, 999 F.2d at 209-10 n.7 (7th Cir. 1993). Rather, the relevant inquiry is whether the GT Entities satisfy the "closely related" and "foreseeability" requirements set forth in the foregoing cases. And as set forth previously and above, the GT Entities do so.

Plaintiffs' other arguments for why the GT Entities supposedly cannot enforce the Subscription Documents FSC against Plaintiffs are similarly misguided. First, the GT Entities do not base their argument "on a misstatement of the applicable legal standard" as contended by

[18] There is no dispute that the CP companies changed their name to Bolder in October of 2021.

Plaintiffs. *See* Response, p. 29. Again, non-parties to an agreement containing a forum selection clause (the GT Entities) can enforce the clause against a contracting party (Plaintiffs) if the non-parties can show that they are closely related to the dispute and that it was foreseeable that the non-party might eventually seek to avail itself of the forum selection clause. *Frietsch*, 56 F.3d at 827-28; *Elite Advantage*, 2015 U.S. Dist. LEXIS 110796, at *19-23. The "standard" Plaintiffs seek to invoke based on *Lipcon* ("it becomes reasonably foreseeable that [the non-party (Plaintiffs)] will be bound" (148 F.3d at 1299)) is inapplicable to the GT Entities' enforcement of the Subscription Documents FSC because the GT Entities are seeking enforcement against *parties* to the forum selection clauses in the Subscription Documents (Plaintiffs). Second, Plaintiffs' "mutuality" argument also is unavailing because Plaintiffs could enforce the Subscription Documents FSC against the non-party GT Entities for the same reasons that the GT Entities can enforce the Engagement Letter FSC against non-party Plaintiffs. *See* Response, p. 30. Sufficient mutuality thus exists to permit the GT Entities to enforce the Subscription Documents FSC against Plaintiffs.

VII. A *Forum Non Conveniens* Dismissal of the Defendants is Appropriate.

A valid forum selection clause should control except in unusual cases, and a motion seeking dismissal on *forum non conveniens* grounds should be denied only under extraordinary circumstances unrelated to the parties' convenience. *See, e.g., FDIC v. Nationwide Equities Corp.*, Case No. 1:15-cv-21872-KMM, 2015 U.S. Dist. LEXIS 160892, at *4 (S.D. Fla. Nov. 30, 2015). To ensure enforcement of the parties' contractual bargain, the presence of a forum selection clause modifies the traditional *forum non conveniens* analysis. *Id.*[19]

[19] The proper standard applied to this case, where the relevant agreements contain a foreign (Cayman Islands) forum selection clause is *forum non conveniens* and a motion to dismiss is appropriate mechanism to enforce the clauses. *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Div. Texas*, 571 U.S. 49, 60 (2013) (holding "appropriate way to enforce a forum-selection clause pointing to…a foreign forum is through the doctrine of *forum non conveniens*"); *Vernon v. Stabach*, No. 13-62378, 2014 WL 1806861, at *2 (S.D. Fla. May 7, 2014). However, because Plaintiffs chose the Cayman forum by agreement, the private interest factors in a traditional *forum non conveniens* analysis are not considered, and Plaintiffs' Response (D.E. at 68 at 34) thus improperly weighs private interest factors. *Atlantic Marine* at 64; *see also Pappas v. Kerzner*, 585 Fed. App'x 962, 964 (11th Cir. 2014); *Vanderham v. Brookfield Asset Mgmt., Inc.*, 102 F. Supp. 3d 1315, 1318-19 (S.D. Fla. 2015). In addition, only "unusual circumstances" found in the public interest factors can "rarely defeat" a plaintiff's contractually agreed forum. *Atlantic Marine* at 64. However, there are no such unusual circumstances here and the public interest factors thus favor Defendants and are substantially unrebutted in Plaintiffs' Response. D.E. 58 at 5-6, 24-28, *compare* D.E. 68 at 25-28, 34-35. Moreover, Plaintiffs bear a "heavy burden of proof",

Because the Engagement Letter FSC and Subscription Documents FSC are valid and enforceable for the reasons set forth in the Motion to Dismiss and above, the "modified version" of the *forum non conveniens* analysis applies. Plaintiffs thus bear the burden of establishing that dismissal of their Amended Complaint is unwarranted. Plaintiffs have not satisfied, and cannot satisfy, their burden here.

The contractually specified forum (Cayman Islands courts) is the appropriate forum for resolution of the parties' dispute. For the reasons detailed in the Motion to Dismiss, Cayman Islands law and courts can provide relief for Plaintiffs' claims. Additionally, GT Cayman, GT Ireland, and Bolder hereby consent to jurisdiction in the Cayman Islands and are amenable to service of process in the Cayman Islands. Thus, an adequate and available forum exists in the Cayman Islands for Plaintiffs' claims. *See, e.g.*, *Vanderham*, 102 F. Supp. 3d at 1321.

Additionally, public interest factors support litigation of Plaintiffs' claims in Cayman Islands courts. Relevant public interests include the familiarity of the courts with the governing law, the interest of any foreign nation in having the dispute litigated in its own courts, and the value of having local controversies litigated locally. *Vanderham*, 102 F. Supp. 3d at 1321; *see also Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1056 (11th Cir. 2009). Because the forum selection clauses specify Cayman Islands law as controlling and the relevant audit services were performed for entities located in the Cayman Islands, the foregoing public considerations weigh heavily in favor of litigating this case in the Cayman Islands.

Further, Plaintiffs have not carried their burden of demonstrating that their lawsuit cannot be refiled in the Cayman Islands without undue inconvenience or prejudice. *See, e.g., Vanderham*, 102 F. Supp. 3d at 1320-21. As noted above, GT Cayman, GT Ireland, and Bolder hereby consent to jurisdiction in the Cayman Islands and are amenable to service of process in the Cayman Islands. In short, Plaintiffs have not demonstrated that dismissal is unwarranted. *FDIC*, 2015 U.S. Dist. LEXIS 160892, at *8-10; *Vanderham*, 102 F. Supp. 3d at 1320-21.

CONCLUSION

Defendants' joint motion to dismiss (D.E. 58) should be granted.

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which they wholly fail to meet, to overcome the clause under the public interest factors. *Trump v. Twitter*, Civil Action No. 21-22441, 2021 WL 8202673, *3 (S.D. Fla. 2021); *see also Pappas*, 585 Fed. App'x at 964.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 2023, a true and correct copy of the foregoing was filed with the Clerk of the Court via CM/ECF, which will send notice of electronic filing to all counsel of record.

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