

**For Publication**

**IN THE SUPERIOR COURT OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**GUERRERO FAMILY TRUST, et  
al.,**

**Plaintiffs,**

**v.**

**KINKI NIPPON TOURIST CO.,  
LTD., et al.,**

**Defendants.**

**CIVIL ACTION NO. 04-0574D**

**ORDER ON DECEMBER 5, 2006  
MOTIONS TO DISMISS AND  
FOR SUMMARY JUDGMENT**

Pursuant to Com. R. Civ. P. 12(b)(6), Defendants Saipan Hotel Corporation and Pedro J.L. Igitol (collectively “SHC”), Pacific Development Inc. (“PDI”), and Kinki Nippon Tourist Co., Ltd. (“KNT”) moves the Court to dismiss portions of the Third Amended Complaint (“TAC”) as to certain parties for reasons set forth below. Plaintiffs have moved for partial summary judgment on some of the same issues.

**I. SUMMARY OF MOTIONS AND ARGUMENTS**

**A. Standing to Sue of Plaintiffs from Different Corporations**

PDI argues that (1) PDI stockholders Juan T. Guerrero, Jesus T. Guerrero, and Carmen Deleon Guerrero Borja have no direct interest in SHC and therefore lack standing to sue SHC; and (2) PDI stockholders also lack standing to sue PDI because no dilution of PDI shares is alleged. PDI moves for the dismissal of the PDI Plaintiffs’ Third Claim (fiduciary duty), Fourth Claim (dilution), Fifth Claim (accounting), and Sixth Claim (injunctive relief) and the SHC Plaintiffs’ Fifth Claim (accounting) and Sixth Claim (injunctive relief).

1. **B. PDI's Fiduciary Duty to PDI Plaintiffs**

2. PDI also argues that PDI has no fiduciary duty to its shareholders, such that the PDI  
3. shareholders' claims for breach of fiduciary duty (third cause of action) should be dismissed.

4. **C. Accounting**

5. PDI moves to dismiss the fifth cause of action for accounting on grounds that it is not  
6. warranted and PDI is not the proper defendant.

7. **D. Legality of the Reorganization**

8. Plaintiffs seek summary judgment on their claim that the December 2003 SHC  
9. reorganization was illegal, on grounds that it was unauthorized by shareholders and diluted the  
10. minority shareholders' interests in violation of Article XII. Plaintiffs request an order declaring  
11. that: (1) the purported conversion of the 90,000 preferred shares of voting shares to KNT was void  
12. and unlawful, and therefore is set aside; (2) the purported creation of the additional 550,000 voting  
13. shares and their issuance to KNT and then transfer to and K.K. ING Karuizawa Training Institute  
14. ("ING") was void and unlawful, and therefore is set aside; and (3) changes proposed to SHC's  
15. Articles of Incorporation at the December 2003 SHC shareholder meeting are void and unlawful,  
16. and therefore are set aside.  
17.

18. KNT, ING, SHC, and PDI argue that the reorganization does not affect the right of SHC to  
19. own land, such that injunctive relief (sixth cause of action) to halt or undo the reorganization is not  
20. warranted and the claim should be dismissed.  
21.

22. PDI and SHC argue for dismissal of the sixth cause of action on grounds that such a claim  
23. for injunctive relief can only be brought as a derivative suit, and parties lack standing.

24. **II. FACTUAL BACKGROUND**

25. SHC was originally incorporated in 1967 as a Trust Territory corporation by Trust Territory  
26.

1. citizens. Its Articles of Corporation provided for 10,000 shares. In 1971 and 1974, SHC acquired  
2. real property interests in Garapan upon which the original Hafadai Beach Hotel (“the Hotel”) was  
3. built. At that time, Trust Territory law provided that only Trust Territory citizens or corporations  
4. wholly owned by such citizens could own land in the Trust Territory.<sup>1</sup>

5. In January 1978, Article XII of the Commonwealth Constitution went into effect, providing  
6. that only persons of Northern Marianas descent (NMDs)<sup>2</sup> could own land in the CNMI. As Article  
7. XII was originally enacted, a corporation was considered an NMD if it incorporated in the  
8. Commonwealth, had its principal place of business in the Commonwealth, 51% of its directors were  
9. NMDs, and 51% of its shareholders were NMDs.

10. On November 10, 1978, PDI entered into an agreement with SHC shareholders Jose C.  
11. Tenorio (“Joeten”) and Santiago C. Tenorio (“Santiago”), whereby they agreed to sell 8900 shares  
12. of SHC’s stock (or 89%) to PDI<sup>3</sup> for \$750 a share. PDI was to provide funds necessary to pay off  
13. two bank loans owed by SHC totaling \$1,222,000. Joeten was the record owner of the remaining  
14. 1100 shares (or 11%). Joeten later transferred 50 shares each to Santiago and Antonio C. Tenorio.<sup>4</sup>

15. PDI was a non-NMD corporation, as 60% was owned by non-NMD KNT, and 40% was  
16. owned by NMD-Plaintiffs Juan T. Guerrero, Jesus T. Guerrero, Carmen Deleon Guerrero Borja and  
17. Guerrero Family Trust. Upon PDI’s acquisition of 89% of SHC’s voting shares, the combined  
18. \_\_\_\_\_

19. <sup>1</sup> 57 TTC § 201 (“Only citizens of the Trust Territory or corporations wholly owned by citizens of the Trust  
20. Territory may hold title to land in the Trust Territory....”); *see also Madrainglai v. Emesiochel*, 6 TTR 440, 442-43  
21. (HCTT Tr. Div. 1974) (under Section 13 (1 TTC § 13) of the Trust Territory Bill of Rights, the High Commissioner  
22. could restrict or forbid the acquisition of interests in real property and in business enterprises by persons who are not  
23. citizens of the Trust Territory).

24. <sup>2</sup> *Iglesias v. Realty Trust Corp.*, 2003 MP 7, ¶ 8 (citing N.M.I. Const. Art. XII, § 5 (1978)).

25. <sup>3</sup> Plaintiffs Jose C. Tenorio Trust and Estate of Santiago C. Tenorio are successors in interest to Joeten and  
26. Santiago.

<sup>4</sup> Plaintiff AJT Trust is the successor in interest to Antonio C. Tenorio.

1. “direct” and “indirect” voting interest of all of the NMDs was (40% of 89%) [or 35.6%] + 11%, for  
2. a total of 46.6%. Defendants argue that SHC lost its NMD status at that point, but that SHC’s title to  
3. the real property acquired by it prior to the effective date of Article XII was not affected since  
4. Article XII was not retroactive.<sup>5</sup>

5. On January 22, 1980, PDI transferred record title to 1000 shares of the SHC stock owned by  
6. it to Herman R. Guerrero.<sup>6</sup> SHC was allegedly acting on the advice of the late Justice Villagomez,  
7. who suggested that the transfer would allow SHC to regain its NMD status (if it had in fact lost this  
8. status). KNT asserts that the transfer of shares to Herman Guerrero was intended to be for record  
9. purposes only, and that PDI was still the beneficial owner. Herman Guerrero did not pay for the  
10. shares.  
11.

12. Assuming the transaction effectively transferred shares to Mr. Guerrero, PDI’s record  
13. ownership of SHC was reduced to 7900 shares (or 79%). The combined “direct” and “indirect”  
14. voting interest of all of the NMDs listed above was then (40% of 79% [or 31.6%] + 21%, for a total  
15. of 52.6%. While Plaintiffs believe that this transaction ensured SHC’s NMD status, PDI argues that  
16. it was insufficient to re-bestow NMD status. PDI reasons that ownership of a 21% minority voting  
17. interest in Corporation A, when combined with the ownership of a 40% minority interest in  
18. Corporation B, which owns a 79% majority voting interest in Corporation A, cannot be considered  
19. the equivalent, legally or logically, of ownership of a 52.6% majority voting interest in Corporation  
20. A. PDI also points out that KNT owned the vast majority of non-voting shares.  
21.

---

22.  
23. <sup>5</sup> In *Iglesias v. Realty Trust Corp.*, 2003 MP 7 ¶ 8 n. 5, the Supreme Court held that the 1986 amendment to  
24. Section 5 was not retroactively applied to corporations formed before January 7, 1986. The Supreme Court offered no  
25. authority for the position other than the wording of the amendment itself: “However, this amendment was not  
retroactively applied to corporations formed before January 7, 1986.”

26. <sup>6</sup> Plaintiff Guerrero Family Trust is the successor in interest to Herman R. Guerrero.

1. On January 7, 1986, Article XII was amended to provide that a corporation was only an  
2. NMD if 100% of its voting shares were owned by NMDs.<sup>7</sup> If SHC were an NMD, this amendment  
3. would not have affected its status, since it was not retroactively applied to corporations formed prior  
4. to that date.

5. In 1996, KNT contributed \$9,000,000 to SHC in exchange for all 90,000 shares of SHC's  
6. non-voting stock.

7. As of December 1, 2003, SHC had an authorized capital of \$10,000,000, divided into 10,000  
8. shares of voting stock and 90,000 shares of non-voting stock, each with a par value of \$100. All of  
9. the authorized shares were issued and outstanding. The record owners of SHC's 10,000 voting  
10. shares were as follows: PDI, 7900 shares; J.C. Tenorio, 1000 shares; Estate of Herman R.  
11. Guerrero, 500 shares; Estate of Maria T. Guerrero, 500 shares; Santiago C. Tenorio, 50 shares; and  
12. AJT Trust, 50 shares. KNT still owned 90,000 shares of non-voting stock.

13. Loans to SHC totaling over 6 billion yen from five banks were due in December 2003.  
14. These loans had been taken out by SHC primarily for the purpose of financing the construction of  
15. the Taga Tower addition to the Hotel, which was completed in 1996. Each of the loans was either  
16. guaranteed by KNT or secured by assets of KNT. KNT was concerned about SHC's ability to  
17. repay, as SHC had been experiencing operating losses for several years. As guarantor, KNT was  
18. ultimately responsible for the loans whether it chose to contribute additional capital for repayment  
19. or fulfill its guarantee.

20. At the December 4, 2003 board meeting, KNT introduced a plan with the following  
21. components:

22. (1) increase authorized capital of SHC from \$10,000,000 to \$70,000,000;  
23. (2) provide for a capital contribution from KNT to SHC of \$56,012,658.23;

24. <sup>7</sup> *Iglesias*, 2003 MP 7, ¶ 8 n.5 (citing N.M.I. Const. Art. XII, § 5 (1986)).

1. (3) convert KNT's 90,000 non-voting shares to voting shares;
2. (4) amend the Articles of Incorporation to permit the issuance of 550,000 new voting shares (\$55,000,000).in SHC;
3. (5) offer each of the existing shareholders the opportunity to subscribe to a proportionate number of the additional shares (with KNT to buy any remaining shares); and
4. (6) pay off the five bank loans.

5. At the meeting, SHC Directors Juan T. Guerrero, Herman T. Guerrero and Frances Dlg.  
6. Borja all indicated their belief that if the reorganization occurred, the local shareholders would  
7. prefer to sell their shares.

8. On December 16, 2003, the recapitalization plan was presented to the SHC shareholders at  
9. the annual shareholders meeting. Plaintiffs Guerrero Family Trust, Jose C. Tenorio Trust, Estate of  
10. Santiago C. Tenorio, and AJT Trust (minority shareholders of SHC) attended the December 16,  
11. 2003 SHC stockholders meeting either directly or through proxies.

12. Minority shareholders were given the option to buy the new shares in proportion to their  
13. present ownership. Representatives of the minority shareholders of SHC all stated that they wanted  
14. to end their relationship with SHC and requested that KNT or SHC buy them out. In response to the  
15. minority shareholders' requests, Hideo Takahashi, KNT's representative and the SHC board  
16. chairman, agreed that KNT would carry out the purchase of the Plaintiffs' shares within the  
17. following six-month period.

18. After Mr. Takahashi stated his agreement, Juan S. Tenorio, the representative of the estate of  
19. Santiago Tenorio, moved to approve amendments to SHC's articles of incorporation and implement  
20. the proposed recapitalization plan. The plan was unanimously approved by the oral vote of those in  
21. attendance. There was no *written* consent to the restructuring. It is disputed whether the minority  
22. shareholders' approval of the recapitalization plan was conditioned on KNT first buying their  
23. shares.

24. In past meetings, the PDI Chairman or the President voted PDI's shares in SHC with the  
25. shares.

1. knowledge and acquiescence of the PDI Board and the SHC shareholders. At the December 16,  
2. 2003 meeting, PDI's President orally votes PDI's shares in SHC in favor of the restructuring.  
3. Neither PDI's shareholders nor its board of directors approved PDI's President's vote of PDI's  
4. shares in SHC prior to the December 2003 SHC shareholder meeting. PDI did not obtain the  
5. contemporaneous signatures of each director in lieu of a board meeting on this matter.

6. On December 17, 2003, certifications of the amendments to the articles of incorporation  
7. were filed with the CNMI's Registrar of Corporations, as required by law. In accordance with the  
8. approved recapitalization plan, KNT arranged for the transfer to SHC, on December 18, 2003, of  
9. the sum of \$56,012,658.23 (which was the dollar equivalent of 6,018,000,000 Japanese yen, the  
10. amount needed to pay off the five bank loans). In exchange, KNT was issued 550,000 shares of the  
11. newly authorized SHC voting common stock, with a par value of \$55,000,000.<sup>8</sup> Using the funds  
12. contributed by KNT, SHC paid off five bank loans which came due in December 2003.

14. The recapitalization increased shareholder equity from a negative \$14.4 million as of  
15. September 30, 2003 to a positive \$39 million as of September 30, 2004.

17. Beginning in February, 2004, KNT attempted to negotiate a purchase price for the minority  
18. shareholders' shares of SHC. There were four meetings.

19. SHC had obtained an independent third party valuation which concluded that the shares of  
20. SHC had a zero or negative value. At the first meeting, KNT offered the minority shareholders \$60  
21. a share. Representatives of the Jose C. Tenorio Trust, Estate of Santiago C. Tenorio and AJT Trust  
22. each asserted that the "fair present valuation" of their 1100 shares was equal to \$2,677,200 (or  
23. \$2433 a share). The Guerrero Family Trust's price for its shares was \$7,000,000, which included as  
24. well its 15% interest in PDI as well as the interests in PDI held by Jesus T. Guerrero and Juan T.

---

26. <sup>8</sup> Thus, KNT contributed over \$1 million in capital for which it received no additional shares.

1.  
2.  
3.  
4.  
5.  
6.  
7.  
8.  
9.  
10.  
11.  
12.  
13.  
14.  
15.  
16.  
17.  
18.  
19.  
20.  
21.  
22.  
23.  
24.  
25.  
26.

Guerrero.

In April 2004, KNT increased its offer to \$100 a share, but the negotiations with minority shareholders eventually failed. KNT’s last offer expired in October 2004.

KNT was simultaneously negotiating with Morgan Stanley for the purchase of the same shares. On December 29, 2004, following the termination of a purchase agreement with Morgan Stanley, KNT sold its 640,000 shares of SHC stock to ING (a non-NMD) for one Japanese yen each.

If the restructuring and subsequent sale were valid, approximately 98.5% of SHC’s voting stock is now directly owned by a non-NMD Japanese corporation (ING). Defendant PDI is left with approximately 1.2% of the voting stock in SHC, and Plaintiffs Guerrero Family Trust, Jose C. Tenorio Trust, Estate of Santiago C. Tenorio, and AJT Trust are left with approximately 0.03% of the voting stock in SHC. The total direct and indirect voting interest in SHC held by the minority shareholders, the only NMDs, is reduced from 52.6% to 0.07%.

**III. STANDARD FOR MOTION TO DISMISS AND SUMMARY JUDGMENT**

The Court follows the standard for Rule 12(b)(6) described in *In re Adoption of Magofna*, 1 N.M.I. 449 (1990). To avoid dismissal, a claim must pass either part of *Magofna’s* two-pronged test: “A complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.” *Id.* at 454.

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Com. R. Civ. P. 56 (c); *Santos v. Santos*, 4 N.M.I. 206, 209 (1994). The moving party on a motion for



1. summary judgment has the initial burden to show no genuine issues of material fact exist. Com. R.  
2. Civ. P. 56(c); *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990).

3. Once the moving party establishes the absence of a genuine issue of material fact, the  
4. burden shifts to the non-moving party to set forth specific facts which are admissible in evidence  
5. and show a genuine issue for trial. *Eurotex (Saipan), Inc. v. Muna*, 4 N.M.I. 280, 283 (1995).

#### 6. **IV. ANALYSIS**

##### 7. **A. RIGHT OF ACTION OF PDI PLAINTIFFS TO SUE PDI FOR DILUTION AND** 8. **BREACH OF FIDUCIARY DUTY (OR ASSISTANCE IN THESE TORTS)**

##### 9. **1. Standing based on Interest in Corporation**

10. PDI suggests that the seven plaintiffs have financial interests in different defendants. The  
11. PDI shareholders are Juan T. Guerrero, Jesus T. Guerrero, the Guerrero Family Trust, and Carmen  
12. Deleon Guerrero Borja. Collectively, they own 40% of PDI's common stock. PDI notes that this  
13. 40% interest is not alleged to have been diluted in any manner. The claims directed toward PDI  
14. pertain only to PDI's assistance in SHC's breach of fiduciary duty and dilution of **SHC** shares. *See*  
15. *TAC* at ¶¶ 125, 126, 130 and 131. PDI asserts that only those plaintiffs who were shareholders in  
16. SHC (Jose C. Tenorio Trust, the Estate of Santiago C. Tenorio, the AJT Trust and the Guerrero  
17. Family Trust<sup>9</sup>) have standing to sue for damages relating to SHC stock ownership.

19. Plaintiffs argue that PDI shareholders *are* affected by an injury to SHC, because the  
20. principal asset of PDI is its SHC stock, and dilution of this stock would presumably diminish the  
21. value of PDI shares. PDI counters that, even though PDI owned 79% of the SHC common stock and  
22. remains a stockholder, shareholders have no recognized legal interest in SHC. "The [corporation]  
23. owns its [assets]. Its legal ownership is complete. Respondent owns stock in this corporation,  
24. which stock represents a number of intangible rights in him legally distinct from the ownership  
25. \_\_\_\_\_

26. <sup>9</sup> The Guerrero Family Trust is the only plaintiff with holdings in both PDI and SHC.

1. rights of the corporation in [assets].” *Miller v. McColgan*, 110 P.2d 419, 422 (Cal.1941).

2. The Court agrees that the PDI shareholder’s indirect interest in SHC stock does not grant  
3. them standing to sue for injuries to SHC. Even if SHC were wholly owned by PDI, it would still be  
4. a distinct legal person. In their capacity as PDI shareholders, PDI Plaintiffs have no voting power in  
5. SHC or say as to how its daily affairs are run. Granting a PDI stockholder standing to sue on behalf  
6. of SHC’s injuries would amount a reverse piercing of the veil. Thus, the motion to dismiss PDI  
7. Plaintiff’s causes of action against all Defendants for breach of fiduciary duty, dilution, or  
8. assistance in these torts is GRANTED.

## 10. 2. A Corporation’s Fiduciary Duty to its Shareholders

11. PDI advances an alternative reason why PDI shareholders cannot sue PDI for breach of  
12. fiduciary duty: PDI has no fiduciary duty to any of the shareholders. “There is not, and could not  
13. conceptually be any authority that a corporation as an entity has a fiduciary duty to its  
14. shareholders.” *Radol v. Thomas*, 772 F.2d 244, 258 (6<sup>th</sup> Cir. 1985).<sup>10</sup> Plaintiffs’ only remedies,  
15. PDI suggests, are to sue the majority shareholder in PDI (who does have a fiduciary duty to  
16. minority shareholders), or sue the board of directors in a derivative suit (or in a direct action in the  
17. case of individual damage).

19. Plaintiffs distinguish PDI’s citations as cases in which courts have held that a corporation is  
20. not liable to its shareholders for breaches of fiduciary duty **by its directors**. Plaintiffs argue that  
21. these cases have no bearing on the instant case, because this case concerns a claim against PDI for  
22. breach of fiduciary involving misconduct by its **majority shareholder** (KNT). In this situation,

---

24. <sup>10</sup> See also *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del.1996) (holding that corporate entities  
25. have no fiduciary duty to their shareholders and rejecting plaintiff’s argument that a corporation is vicariously liable for  
26. the actions of its directors under principles of respondeat superior); *Alessi v. Beracha*, 849 A.2d 939, 950 (Del.  
Ch.2004) (plaintiff shareholder presented no viable legal theory to hold a corporation liable to remedy its shareholder’s  
alleged injuries); *State Teachers Retirement Bd. v. Fluor Corp.*, 566 F. Supp. 939, 944 (S.D.N.Y.1982).” *PPI  
Enterprises (U.S.), Inc. v. Del Monte Foods Co.*, No. 99-3794, 2000 WL 1425093 (S.D.N.Y. Sept. 26, 2000) at \*10.

1. minority shareholders can bring suit directly against a corporation and its majority shareholders for  
2. breaches of fiduciary duty by the majority shareholders. Plaintiffs cite what appear to be direct  
3. actions in which courts allude to a fiduciary duty on the part of a corporation. PDI suggests that the  
4. cases do not create precedent for a corporate fiduciary duty.

5.           The first case is *Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E. 2d 70, 74 (Mass. 1985).  
6. PDI notes that Microwave was actually in the lawsuit in two capacities, and it could be the court  
7. was referencing the corporation in which Microwave itself had an interest as majority shareholder.  
8. PDI argues that the three cases the *Microwave* court cited do not support a judicially-created  
9. fiduciary duty running from the corporation to its shareholders. *See Donahue v. Rodd Electrotyping*  
10. *Co. of New England, Inc.*, 328 N.E.2d 505, 517 (Mass. 1975) (under Massachusetts law each  
11. stockholder in close corporations has a duty of loyalty to the other shareholders); *Wilkes v.*  
12. *Springside Nursing Home, Inc.*, 370 Mass. 842, 851, 353 N.E.2d 657, 663 (Mass. 1976)  
13. (concerning a breach of fiduciary duty by a majority shareholder); *Leader v. Hycor, Inc.*, 479  
14. N.E.2d 173, 175 (Mass. 1985) (same).

15.           Plaintiffs' next case is *Thompson v. Central Ohio Cellular, Inc.*, 639 N.E. 2d 462 (Ohio  
16. App. 1994), in which the court stated, "It is axiomatic that corporations and their officers and  
17. directors occupy a fiduciary relationship with corporate shareholders." *Id.* at 468. PDI suggests that  
18. the authorities relied on by the court do not reference a fiduciary duty of the corporation toward its  
19. shareholders. *See Crosby v. Beam* 548 N.E.2d 217 (Ohio 1989); *Gries Sports Enterprises, Inc. v.*  
20. *Cleveland Browns Football Co.* 496 N.E.2d 959 (Ohio 1986).

21.           Plaintiff also relies on *Steelman v. Mallory*, 716 P.2d 1282, 1285 (Idaho 1986). PDI argues  
22. that *Steelman* contains no discussion about suing the corporation for breach of fiduciary duty, and  
23. concerned only a breach of fiduciary duty by the majority shareholders/directors in the management  
24.  
25.  
26.

1. of a closely held corporation. *Id.* at 1283. No reference is made as to why the corporation was a  
2. defendant, but it appears from the relief given that the corporation had been dissolved and the  
3. distribution of the assets was an issue. *Id.* at 1286.

4. While the above cases provide some support for Plaintiff's position, they appear to be in the  
5. minority. The Court agrees with PDI's position that judicial statements regarding corporate  
6. fiduciary duty were not fully developed.

7. The Court finds less support for Plaintiff's position in *FS Photo Inc. v. Picturevision, Inc.*,  
8. 61 F. Supp. 2d 473, 484 (E.D. Va. 1999), in which a Virginia court interpreting Delaware law found  
9. a corporate fiduciary duty, and *GLW Int'l Corp. v. Yao*, 532 S.E. 2d 151, 155 (Ga. App. 2000), a  
10. suit between two corporations, rather than by a minority shareholder against its corporation. PDI  
11. notes that the proposition for a corporate fiduciary duty in *GLW Intern. Corp. v. Yao*, 532 S.E.2d  
12. 151, 155 (Ga. App. 2000) and *FS Photo, Inc. v. PictureVision, Inc.*, 61 F.Supp.2d 473, 484 (E.D.  
13. Va. 1999) was described only in dicta. PDI argues that the cases relied on by the *FS Photo* court do  
14. not support a finding that a corporation owes a fiduciary duty to its shareholders. *See Arnold v.*  
15. *Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del.1996); *Alessi v. Beracha*, 849 A.2d 939, 950  
16. (Del. Ch. 2004); *Powers v. British Vita, P.L.C.*, 969 F. Supp. 4, 5 (S.D.N.Y.1997).

17. Given that the vast majority of cases have suggested a fiduciary duty running only between  
18. majority shareholders and minority shareholders, and between directors and shareholders, the Court  
19. cannot accept Plaintiff's position that a corporate duty runs from the corporation to the  
20. shareholders. Thus, PDI shareholders do not have standing to sue PDI for breach of fiduciary duty.  
21. Likewise, SHC shareholders do not have standing to sue SHC in this capacity. Each group of  
22. shareholders does have the right to sue the majority shareholder for this alleged breach, however.  
23. PDI shareholders have a claim for breach of fiduciary duty against KNT (now ING), and SHC  
24.  
25.  
26.

1. shareholders have the same claim against PDI and KNT (now ING). Thus, PDI's motion with  
2. respect to SHC shareholders is DENIED, and the motion with respect to PDI shareholders is  
3. GRANTED.

4. **B. RIGHT OF ACTION TO SUE PDI FOR ACCOUNTING**

5. Plaintiffs request an accounting of all funds allegedly diverted by PDI and SHC to KNT.  
6. PDI argues that the TAC contains no allegation that funds were diverted from PDI to KNT. The  
7. Court agrees that none of the allegations cited by Plaintiffs are appropriately classified as  
8. "diversions." See ¶¶ 33, 39, 42, 43, 138.

9. Plaintiffs argue that an accounting is justified by any type of financial mismanagement on  
10. the part of a majority shareholder that breached fiduciary duties to minority shareholders, whether  
11. or not there is a diversion. See, e.g., *Harmon v. Massoneilan Int'l, Inc.*, 442 A.2d 487, 492 (Del.  
12. 1982) (accounting is appropriate relief where minority shareholders sued majority shareholders for  
13. breach of fiduciary duty for approving a merger with wholly-owned subsidiary of majority  
14. shareholder's parent that exclusively benefited majority shareholders).

15. PDI has argued that it owes no fiduciary duty to its own shareholders. Plaintiffs argue that  
16. even if this is true, SHC's shareholders have alleged a cause of action for breach of fiduciary duty  
17. against PDI, as the majority shareholder of SHC.

18. The Court agrees with Plaintiffs that accounting is justified by any type of financial  
19. mismanagement on the part of a majority shareholder that has allegedly breached its fiduciary duty  
20. to minority shareholders. In light of the Court's finding that PDI has no fiduciary duty to its  
21. shareholders, the Court finds that only the SHC shareholders have alleged a cause of action against  
22. PDI for an accounting. Thus, PDI's motion with respect to SHC shareholders is DENIED, and the  
23. motion with respect to PDI shareholders is GRANTED.  
24.  
25.  
26.

1. **C. LEGITIMACY OF REORGANIZATION**

2. **1. Change in Value or Number of Shares**

3. Section 4106(a) of Title 4 of the CMC provides in its relevant part:

4. It shall be unlawful for a corporation organized under the laws of the  
5. Commonwealth, to require a shareholder to sell, decrease or otherwise relinquish his  
6. or her shares in the corporation. Such a transaction can only occur with his prior  
7. written, nonproxy consent. Further, **the value of a shareholder's ownership in a  
corporation shall not be changed through merger or any form of corporate  
reorganization.**

8. (emphasis added).

9. Plaintiffs allege that 4 CMC 4106(a) creates a cause of action if the **value** of a shareholder's  
10. shares are reduced through a corporate reorganization. KNT notes that the book value of Plaintiffs'  
11. shares was increased, not decreased, as the result of the recapitalization of SHC and the contribution  
12. to SHC of \$56 million by KNT to pay off loans. KNT argues that the "undiluted value" of their  
13. shares prior to the reorganization was negative or zero.<sup>11</sup>

14. Plaintiffs further argue that the reorganization ultimately did not benefit shareholders. SHC  
15. had a \$51,596,339 deficit as of September 30, 2005. However, the Court finds that a negative  
16. change value in value over two years cannot be said be a timely, proximate result of a  
17. reorganization. Thus, the Court finds no change in value from a monetary perspective.

18. Plaintiffs argue that the statute applies to **any** change in value, including the value of  
19. corporate control and proportionate ownership. Plaintiffs refer to the legislative intent expressed in  
20. the Senate Committee on Resources, Economic Development, Standing Committee Report No 5-  
21. 123 re HB 5-204, S.D. (10/29/87): "First, minority shareholders are protected from losing their  
22. ownership and voting rights through corporate mergers or reorganizations. And, shareholders are

---

23. <sup>11</sup> KNT refers to an email sent from Dennis Yoshimoto, one of the representatives of the Jose C. Tenorio Trust, to  
24. Annie T. Sablan on December 16, 2003: "[S]trictly from an accounting perspective, the recapitalization of Saipan Hotel  
25. Corporation's equity has a positive effect on Joeten's book value per share."  
26.

1. guaranteed ownership in a surviving corporation proportional to the value of their interests in the  
2. original corporations.” Plaintiffs note that the legislature deliberately revised the title of the statute  
3. to include “Diminished Proportional Ownership”. The Senate Committee stated: “Lastly, please  
4. note changes to the Bill’s caption and to the caption of 4106, that reflect changes in the body of the  
5. bill. “

6. KNT minimizes the importance of the caption, suggesting that as a matter of law, section  
7. headings have no relevance for purposes of intent, scope or meaning of the law. P.L. 3-90, sec. 7,  
8. *reprinted at 1 CMC Preface at xv (1999 rev.)*. The stated legislative purpose of a statute, however,  
9. does give meaning to the statute’s terms and scope.<sup>12</sup>

11. PDI argues that the legislative purpose, as described in P.L. 5-46, contains no reference to  
12. increased capitalization.<sup>13</sup> PDI cautions that Plaintiffs’ interpretation would allow a stockholder to  
13. use Section 4106 as a sword to prevent the other shareholders in a corporation from raising capital.  
14. PDI argues that the legislature left shareholders with the ability to respond to the financial needs of  
15. the corporation by changing the corporation’s capital structure.

17. KNT notes that Plaintiffs declined the offer to buy additional shares in proportion to their re-  
18. organization interests. Thus, any reduction of the Plaintiffs’ proportionate interests in SHC was  
19. the result of their voluntary action.

20. The Court finds that even if 4 CMC 4106 is strictly construed, it is not triggered in the  
21. instant case. Plaintiffs have not introduced evidence showing that the reorganization was a  
22. proximate cause of any decrease in value to Plaintiffs’ shares. The only thing that has changed in

---

24. <sup>12</sup> See *Mendez v. Superior Court*, 206 Cal.App.3d 557, 568-569, 253 Cal.Rptr. 731, 737-738 (Cal. App. 5 Dist. 1988); *Mountain Queen Condominium Ass'n, Inc. v. Haan*, 753 P.2d 1234, 1240 (Colo. 1988) (“The definition is clarified, however, by reading it together with the stated legislative purpose”).

26. <sup>13</sup> “The Legislature finds that shareholders, particularly minority shareholders, are unprotected by the existing law should a corporation decide to buy out its shareholder, or declare a stock split diluting the shareholder’s ownership. This Act protects all shareholders in corporations organized under Commonwealth law from such action.”

1. that SHC Plaintiffs now have a smaller voting interest. Their status as minority shareholders has not  
2. changed. As counsel for PDI points out, if Plaintiffs had previously enjoyed a 51.6% overall interest  
3. in SHC, then they would have not been entitled to sue the majority shareholders for breach of  
4. fiduciary duty and dilution. A 51.6% interest would suggest that Plaintiffs **were** the majority  
5. shareholders.

6. **2. Consent**

7. a. Written, non-proxy Consent

8.  
9. The votes at the December 2003 meeting were *oral* votes, and many were *proxy* votes.  
10. Plaintiffs note that a change in the value or number of shares “can only occur with [the  
11. shareholder’s] prior written, nonproxy consent.” 4 CMC 4106(a). KNT argues that the procedural  
12. requirements of 4 CMC 4106(a) are not triggered because the value and number of shares did not  
13. change. The Court agrees with KNT’s position.

14. b. Conditional Consent

15. Plaintiffs argue that they stated at the meeting that they would only consent to the  
16. “restructuring” on the condition that their shares in SHC were purchased. Since Plaintiffs’ shares in  
17. SHC were not purchased, they argue that the condition required for their approval of the  
18. restructuring was not met.

19.  
20. Litigants dispute the nature of the conditional consent. Plaintiffs argue that since the  
21. condition was not fulfilled, the obligations attached to the condition (here, selling the stock) could  
22. not be enforced. *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 837 N.E. 2d 1121,  
23. 1132 (Mass. 2005).

24. KNT argues that the purchase of the shares was not a condition but a promise. A condition is  
25. different from a promise “in that it creates no right or duty in and of itself but is merely a limiting or  
26.



1. modifying factor.” S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, section 663 (3d. ed.  
2. 1961), quoted in *In re George Lee*, 35 B.R. 663 665 (Bankruptcy Ct., N.D. Ohio 1983).

3. In order to be a condition rather than a promise, the parties must have so intended. *In re*  
4. *Lee*, at 665. Since there was no written agreement, there is a factual dispute as to what were the  
5. intentions of the party. For this reason alone, Defendants argue that summary judgment is  
6. inappropriate. *Riley v. Public School System*, 4 N.M.I. 85 (N.M.I. 1984) (summary judgment is  
7. inappropriate where the court must resort to determining the parties’ intent because of ambiguity  
8. arising from disputed relevant evidence).

9.  
10. KNT argues that as a general rule, however, contracts should be construed with a preference  
11. for finding mutual promises rather than conditions. REST.(2D) CONTRACTS, section 227(2) and  
12. Comment d; *U.S. v Gerth*, 991 F.2d 1428, 1434 (8<sup>th</sup> Cir. 1993). Construing an agreement as a  
13. promise is especially preferred if, as in this case, finding a condition would result in a forfeiture  
14. (here, a forfeiture of 550,000 shares of SHC for which KNT paid over \$56 million).<sup>14</sup>

15. Applying these general contract law principles, the Court can assume that to the extent there  
16. was any agreement between KNT and the minority shareholders, it was that the shareholders agreed  
17. to support the recapitalization of SHC in exchange for KNT’s promise to buy out their shares within  
18. the next six months. If KNT breached its promise to the minority shareholders of SHC, it may be  
19. subject to liability and damages. However, such a breach would not give the minority shareholders  
20. the right to disavow their prior actions upon which KNT relied. *See Castle v. Cohen*, 840 F.2d 173  
21. (3<sup>rd</sup>. Cir. 1988).

22.  
23. *Castle* involved the terms of a disputed stock purchase agreement. Shareholders who had

---

24.  
25. <sup>14</sup> REST. (2D) CONTRACTS, section 227(1); *Jones Associates, Inc. v. Eastside Properties, Inc.*, 704 P.2d 681, 686  
26. (Wash. App. 1985); *Washington Properties Inc. v. Chin*, 760 A.2d 546, 549-550 (D.C. App. 2000) (“As a general rule  
of contract interpretation, there is a presumption in favor of construing doubtful language in a contract as language of  
promise rather than as language of condition).

1. agreed to sell their shares claimed that the buyers had failed to provide an adequate valuation, which  
2. they asserted was a condition precedent to their obligation to sell their shares. The shareholders  
3. obtained a valuation that the court found was “grossly excessive.” The buyers sued for specific  
4. performance. Despite a jury’s finding that the buyers’ valuation did not comply with the  
5. requirements of the contract, the court ruled in favor of the buyer and granted specific performance.  
6. This was affirmed on appeal. Thus, to the extent that KNT breached its promise to purchase their  
7. shares for a fair price, then the shareholders only remedy is to seek damages.  
8.

9. Plaintiffs argue that the same result would occur if KNT’s agreement to purchase the shares  
10. were treated as a broken promise instead of a condition. A Plaintiff may elect rescission where a  
11. defendant’s breach of a promise is willful or goes to the root of the contract. *E.g. Septembertide*  
12. *Publ’g B.V. v. Stein and Day, Inc.*, 884 F.2d 675, 678 (2d Cir. 1989) (rescission is permitted if the  
13. breach is “material and willful, or if not willful, so substantial and fundamental as to strongly tend  
14. to defeat the object of the parties in making the contract). In *Septembertide*, however, the plaintiff  
15. was not granted rescission as the defendant had paid a substantial portion of the price agreed to in  
16. their contract. The court did not consider the breach so substantial as to warrant rescission.  
17.

18. The same may be true here. There is no evidence that KNT did not attempt to complete the  
19. sale using a price that reflected the true value of the shares. SHC obtained the independent third  
20. party valuation of the shares of SHC from the firm of Burger & Comer. In their report, dated  
21. February 12, 2004, Burger & Comer concluded that SHC shares had a zero and even negative value  
22. before the recapitalization. KNT notes that the Plaintiffs have never attacked the objective  
23. reasonableness of the valuation performed by Burger & Comer.<sup>15</sup> Any breach in the agreement to  
24.

---

25. <sup>15</sup> Herman T. Guerrero, on behalf of the Guerrero family, acknowledged that the Burger & Comer valuation  
26. report was “a good report” from a purely financial perspective. *See also* Dennis Yoshimoto’s email message to Annie  
T. Sablan, the representative of the trustee of the Jose C. Tenorio Trust at the meeting, advising her that the SHC’s  
shares had a zero or negative value (“Joeten’s share in the company (currently 10%) has a negative book value or worth

1. sell could not be considered substantial.

2. c. Authority of PDI President to Consent

3. At the December 16, 2003 shareholders' meeting, PDI's President appeared and purported  
4. to orally votes PDI's shares in SHC. Plaintiffs note that neither PDI's shareholders nor its board of  
5. directors approved PDI's President's vote of PDI's shares in SHC prior to the December 2003 SHC  
6. shareholder meeting.

7. Plaintiffs argue that the nature of the transaction required the approval not only of the PDI  
8. board of directors under 4 CMC 4551 but also of the shareholders of PDI under 4 CMC 4552.<sup>16</sup>

9. The Court is not swayed by KNT's arguments that the requirements of 4 CMC 4551 and 52  
10. were not triggered, since the SHC shares had no value at the time of the transaction, and because it  
11. owns the same amounts of SHC shares as it owned before the recapitalization. Nor is the Court  
12. moved by PDI's arguments based on the power of the President to act on behalf of shareholders.  
13. Nevertheless, the Court finds that any improper voting was ratified by the behavior of the  
14. shareholders and directors.

15. PDI notes that no PDI shareholder, all of whom were at the meeting except Jesus T.  
16. Guerrero, ever voiced concern or questioned the authority of PDI's President to vote PDI's shares in  
17. SHC. The legality of an election should not be inquired into upon the ground that illegal votes were  
18. cast at the instance of stockholders who were present at the meeting and made no objection to the  
19. zero in accounting terms.”

20. zero in accounting terms.”

21.  
22.  
23.  
24. <sup>16</sup> “A corporation may, on the terms and conditions and for the consideration determined by the board of  
25. directors: Sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property....” 4 CMC § 4551(a)(1)  
26. (emphasis added). Further, “For a transaction to be authorized: The board of directors must recommend the proposed  
transaction to the shareholders unless the board of directors determines that because of a conflict of interest or other  
special circumstances it should make no recommendation and communicates the basis for its determination to the  
shareholders ...” 4 CMC §4552(b)(1) (emphasis added).

1. receipt of the questioned votes.<sup>17</sup>

2. About two hours later the PDI directors affirmed the SHC recapitalization and the  
3. President's affirmative vote. PDI argues that effect, the president's action was ratified. "Under  
4. general principles of corporation law, a board may ratify and render binding any act by a  
5. subordinate officer or agent that it could have authorized originally." *Krishan v. McDonnell*  
6. *Douglas Corp.*, 873 F. Supp. 345, 353 (C.D. Cal. 1994). If PDI's President did in fact exceed his  
7. authority, PDI had the ability to either repudiate its President's actions at the SHC shareholder  
8. meeting, if such repudiation was accomplished in a timely manner, or ratify those acts. *Cf. Abbey*  
9. *Properties Co. v. Presidential Ins. Co.*, 119 So. 2d 74, 78 (Fla. App. 1960) (concerning proxies who  
10. vote improperly or exceed their authority). The Directors of PDI did not repudiate their President's  
11. action, but instead agreed with the recapitalization of SHC.  
12.

13. The Court finds that even though the PDI president improperly voted the PDI shareholders'  
14. shares, the PDI board ratified this vote following the meeting. This finding is dicta, however, given  
15. that the court has already found that the reorganization did not result in a change in value. Because  
16. 4 CMC 4106 is not triggered, it does not matter whether Plaintiffs provided written, non-proxy  
17. consent to the reorganization.  
18.

### 19. **3. Violation of Article XII**

20. It is disputed whether a non-NMD's ownership of a majority of SHC's voting stock affects  
21. SHC's right to own the hotel. Plaintiffs argue that any transaction leading to such ownership would  
22. be void ab initio, because land ownership by a non-NMD would violate Article XII.  
23.

---

24. <sup>17</sup> See *In re United Towns Bldg. & Loan Asso.*, 74 A. 310, 311 (N.J. Sup. 1909); see also *Bacich v. Northland*  
25. *Transp. Co.*, 185 Minn. 544, 549-550, 242 N.W. 379,382 (Minn. 1932) (acquisition of stock -- under the law of  
26. Delaware acquiescence and participation will bar the right of an assenting stockholder to complain) (citation omitted);  
see generally FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2044 ("The receipt of illegal votes at  
a corporate meeting does not render the election or other action either void or voidable, at the instance or objection of  
shareholders who were present, if no objection was taken at the time").

1. Commonwealth law mandates that a corporation may “purchase, receive, lease, or otherwise  
2. acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, wherever  
3. located, **except as restricted by N.M.I. Const. art. XII.**” 4 CMC § 4312(d) (emphasis added).  
4. Defendants argue that the transaction did not violate Article XII, and that the only result is that  
5. SHC, now a non-NMD, cannot acquire any new permanent or long term interests in real property in  
6. the CNMI. SHC’s previously acquired interests would continue to be unaffected by Article XII.

7. KNT suggests that SHC ceased being a NMD after PDI (which was owned 60% by KNT)  
8. acquired 89% of its voting shares. As of that point in time, only 11% of the voting shares of SHC  
9. were owned by an NMD, Jose C. Tenorio. Even if the indirect ownership of SHC stock by NMD  
10. PDI-stockholders, the total amount of ownership would have only been 46.6%.<sup>18</sup>

11. The solution that SHC followed with respect to Lot A-2 is indicative of SHC’s awareness of  
12. its loss of NMD status. In 1983 SHC acquired the fee simple title to Lot E.A. 795-1-A-2 (“A-2”)  
13. from Maria Luisa Santos. SHC was later advised by the Carlsmith firm that the acquisition of the  
14. A-2 likely violated Article XII and was, therefore, probably void ab initio. Unfortunately, one of  
15. the expansions of the Hafadai Beach Hotel had been or was in the process of being built on A-2.  
16. the expansions of the Hafadai Beach Hotel had been or was in the process of being built on A-2.

17. The A-2 title problem was resolved in 2003, when SHC entered into a settlement with Ms.  
18. Santos whereby SHC quitclaimed back to Ms. Santos any interest in the fee title to the property and  
19. then entered into a new, constitutionally permissible 55-year lease with her for the same property.  
20. then entered into a new, constitutionally permissible 55-year lease with her for the same property.

21. The Court agrees that SHC lost its NMD status at the time when it sold 89% of its shares to  
22. PDI. Nothing it did later allowed it to “regain” its NMD status. As discussed above, the PDI  
23. Plaintiffs’ indirect interest in voting shares is not the same as ownership of these shares. Thus, the  
24. Plaintiffs’ indirect interest in voting shares is not the same as ownership of these shares. Thus, the

---

25. <sup>18</sup> KNT points out that this Court’s January 16 Order refers only to PDI’s 79% interest and not the period in  
26. which PDI held an 89% interest. January 16 Order, p. 4. The Court acknowledges that it was unaware of the fact that  
PDI had originally acquired 89% of SHC’s voting stock, not 79%. It was also unaware of the allegation that the transfer  
of shares to Herman Guerrero was intended to be for record purposes only.

1. transaction resulting in the conversion of PDI's holdings to 79% did not revive SHC's NMD status.

2. Defendants argue that in spite of its loss of NMD-status, SHC could still continue to  
3. lawfully own the real property that it had already owned on the effective date of the Constitution. It  
4. could not, however, subsequently acquire any additional new property without complying with all  
5. applicable Constitutional or statutory requirements for the acquisition of property.

6. Defendants also draw a distinction between acquiring shares and acquiring land. SHC argues  
7. that the corporation, not its shareholders, owns the land on which the hotel is located, and that only  
8. shares of SHC have changed hands. The January 16 Order at p. 5 reflects a similar concept: "[The  
9. complaint] describes the sale of *shares* to an unnamed third party, but does not suggest that the  
10. property itself was the subject of a sale."

12. The court acknowledges its dicta in the January 16 Order at p. 5 that "even if SHC loses its  
13. status as a NMD, it would not have to forfeit this property [acquired before the 1985 amendments]  
14. under Article XII §6. SHC would only be required to forfeit any land acquired *after* losing its NMD  
15. status." Upon further review, however, the Court finds that it failed to fully develop this concept.  
16. The Court is loathe to sanction a practice by which corporations could skirt the requirements of  
17. Article XII by selling shares to non-NMDs rather than title to the land itself.<sup>19</sup>

19. This Court follows the lead of the dissent in *Milne v. Ting*, 2001 MP 16, which addressed a  
20. similar problem. *Milne* concerned an amendment to a lease between a NMD lessor and a non-NMD  
21. lessee. In an apparent attempt to transfer ownership of the land to the non-NMD, the amendment  
22. stated that if the lessee did not own the land at the end of the lease period, then the lessor would  
23. refund the rental price and pay for all improvements made by the lessee. The majority of the *Milne*  
24. court found that the amendment violated Article XII, such that it had to be severed. The dissent held

---

25. <sup>19</sup> While the Court is aware of other corporations in the Commonwealth that have lost their NMD status, the  
26. Court is not aware of any other corporation who has tried to evade Article XII by selling shares rather than land.

1. that the amendment did not violate Article XII. Citing *Aldan Pierce v. Mafnas*, No. 89-003 (N.M.I.  
2. July 5, 1991), *Manglona v. Kaipat*, 3 N.M.I. 322, 333 (1992), and *Ferreira v. Borja*, No. 90-047  
3. (N.M.I. Feb. 18, 1992), the dissent held that there can never be a situation where there is an  
4. automatic illegal purpose under Article XII. *Milne* at ¶39 “There must first be an acquisition.” *Id.*  
5. The Court suggested that the majority’s speculation that the lessor would automatically hold title to  
6. the land at the expiration of the lease term was a narrow and myopic interpretation of Article XII.  
7. *Id.* at ¶40. Further, it was an interpretation that disrupted business and upset the parties’ economic  
8. expectations. *Id.* at ¶41; *see also Mafnas v. Yokeno*, No. 89-003 (N.M.I. July 5, 1991) at 5-6 (citing  
9. 2 CMC § 4951).

11. The *Milne* dissent’s proposed solution was to let the lease amendment stand and address  
12. Article XII violations if and when they occurred. The Court’s solution here incorporates both SHC’s  
13. solution to its A-2 title problem and the *Milne* dissent’s interpretation. When the sale of shares to  
14. PDI took place in 1980, SHC was no longer an NMD. SHC could not convey more than it was  
15. legally permitted to convey. Thus, the stock sale resulted in the grantee’s (SHC’s) ownership of, at  
16. most, a 55-year lease with the original owners of the land (the heirs of whom are plaintiffs in this  
17. case). In 2035, this *de jure* lease will end. The prospect of the lease termination in the instant case  
18. is similar to that in *Milne*. Until the termination arrives, there has been no violation of Article XII.  
19. Presumably, in 2035, the land will revert to the heirs of the original NMD-owners, who will be  
20. entitled to sue to quiet title in their favor, or negotiate a new lease.

#### 22. 4. Direct vs. Derivative Action

23. Under Commonwealth law, a shareholder may sue a corporation to establish the invalidity  
24. of and set aside an *ultra vires* act. 4 CMC § 4314. SHC and PDI argues that since the loss of a  
25. major corporate asset would not merely harm the plaintiff minority shareholders, but all  
26.

1. shareholders, it must be brought as a derivative suit pursuant to 4 CMC §4431.<sup>20</sup>

2. Individual shareholders may suffer a direct and distinct injury, however, when other  
3. shareholders, acting as officers and directors, wrongfully issue shares of corporate stock. *E.g.*,  
4. *Lockhead v. Alacano*, 697 F. Supp. 406, 412 (D. Utah 1988) (quoting *Gordon v. Fundamental*  
5. *Investors, Inc.*, 362 F. Supp. 41, 45 (S.D.N.Y. 1973)) (“[A] shareholder has a direct right to attack a  
6. corporate transaction which dilutes his proportionate ownership.”) (brackets in original); *Wenzel v.*  
7. *Mathies*, 542 N.W. 2d 634, 641 (Minn. 1996) (stock dilution claim may be brought directly). It is  
8. still disputed whether the majority shareholders acted in bad faith when they issue shares of  
9. corporate stock. Viewing the complaint in a light most favorable to the Plaintiffs, the Court agrees  
10. that, for the purpose of determining standing to sue, Plaintiffs may be considered to have suffered a  
11. direct and distinct injury. Thus, Plaintiff’s complaint will not be dismissed on this ground.

13. **D. INJUNCTIVE RELIEF**

14. Plaintiff’s sixth cause of action asks the Court to enjoin all Defendants from taking any  
15. action that will divest SHC of its alleged ownership interest, if any, of the Property under Article  
16. XII of the CNMI Constitution. The Court has already found that SHC is not an NMD and therefore  
17. cannot be an owner of the land beneath the Hotel. SHC can only lease the land for 55 years. Thus,  
18. this claim is moot.

---

21. <sup>20</sup> See *Schuster v. Gardner*, 127 Cal. App. 4th 305, 313, 25 Cal. Rptr. 3d 468, 473-74 (2005) (A shareholder  
22. cannot bring a direct action for damages on the theory that corporate management or the corporation’s wrongdoing  
23. decreased the value of his or her stock, e.g., by reducing corporate assets and net worth); *Hamid v. Price Waterhouse*,  
24. 51 F. 3d 1411, 1419-21 (9th Cir. 1995); *Oakland Raiders v. National Football League*, 131 Cal. App. 4th 621, 32 Cal.  
Rptr. 3d 266, 288-89 (2005); *Redmon v. Griffith*, No. 12-04-00172, 2006 WL 870288 (Tex. App. Apr. 5, 2006) at \*10;  
*Faour v. Faour*, 789 S.W. 2d 620, 622 (Tex. App. 1990); *Vincel v. White Motor Corp.*, 521 F. 2d 1113, 1118 (2d Cir.  
1975); *King v. Douglass*, 973 F. Supp. 707, 713 (S.D. Tex. 1996). *Nelson v. Anderson*, 72 Cal. App. 4th 111, 84 Cal.  
Rptr. 2d 753, 761 (1999); *Elmhurst Consulting, LLC v. Gibson*, 219 F.R.D. 125 (N.D. Ill. 2003).

25. The rule also applies for actions for injunctive relief. See, e.g., *Dunn v. Ceccarelli*, 489 S.E. 2d 563, 566 (Ga.  
26. App. 1997) (action for injunctive relief concerning corporate election procedures was derivative, not direct);  
*Marcuccilli v. Ken Corp.*, 766 N.E. 2d 444, 446- 51 (Ind. App. 2002).



1. **V. CONCLUSION**

2. PDI shareholders do not have standing to sue PDI for breach of fiduciary duty, dilution,  
3. accounting, or injunctive relief. PDI's motion to dismiss the PDI shareholders from Plaintiffs' Third  
4. Claim (fiduciary duty), Fourth Claim (dilution), Fifth Claim (accounting), and Sixth Claim  
5. (injunctive relief) these causes of action is GRANTED.

6. SHC shareholders, but not PDI shareholders, have alleged a cause of action against PDI for  
7. an accounting. PDI's motion to dismiss the SHC Plaintiffs' Fifth Claim (accounting) is DENIED,  
8. and the motion with respect to PDI shareholders is GRANTED.

9. The motion to dismiss the SHC Plaintiffs' Sixth Claim (injunctive relief) is MOOTED by  
10. the Court's findings in this opinion.

11. The Court finds that the issuance of voting stock to KNT was ratified, such that Defendants  
12. did not violate 4 CMC 4106. Thus, this part of Plaintiff's Motion for Summary Judgment must be  
13. denied as a matter of law.

14. Although the purported **sale** of SHC shares would violate Article XII, the Court de juro  
15. converts the sale into a 55-year lease. Thus, this portion of Plaintiff's Motion for Summary  
16. Judgment is MOOTED.  
17.

18. SHC's and PDI's motions to dismiss the claim for injunctive relief (sixth cause of action)  
19. are MOOTED.  
20.

21. Parties are ordered to file any responsive pleading within 10 days of this order.

22. SO ORDERED this 17<sup>th</sup> day of January, 2007.

23.  
24. /S/  
25. JUAN T. LIZAMA, Associate Judge  
26.