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**FOR PUBLICATION**

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

**NORMA S. ADA, et al.,**  
  
**Plaintiffs,**  
  
**v.**  
**MASAJI NAKAMOTO, et al.,**  
  
**Defendants.**

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**CIVIL ACTION NO. 08-0029**  
  
**ORDER CLARIFYING THE COURT'S  
ORDER OF DECEMBER 31, 2009 AND  
DENYING PLAINTIFFS' MOTION  
FOR RECONSIDERATION**

THIS MATTER was heard on February 22, 2009. Timothy H. Bellas appeared on behalf of plaintiffs Norma S. Ada, Mary Asper, William R. Barrineau, Maria H. Zarzosa, Willi Gutowski, Anita Gutowski, Eric W. Smith, Rhoda Smith, Jack Hardy, and Shan Ping Bacon (“Plaintiffs”). On December 31, 2009, the Court issued an Order granting the motion to dismiss by defendants Kawasho Real Estate Corporation, Shimizu Corporation, and All Nippon Airways, Co., Ltd. (collectively, the “moving Defendants”). *Ada v. Nakamoto*, Civ. No. 08-0029 (N.M.I. Super. Ct. 12/31/2009) (Order Granting Motion to Dismiss by Defendants Kawasho Real Estate Corporation, Shimizu Corporation, and All Nippon Airways, Co., Ltd.) (“12/31/09 Order”). Plaintiffs now move for clarification and reconsideration of that Order.

**I. DISCUSSION**

Under Com. R. Civ. P. 59(e), a party may move to alter or amend a judgment if the motion is filed not later than 10 days after entry of the judgment. Such a motion is commonly referred to as a motion for reconsideration. *See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F. 3d 1292, 1296 n.3 (10th Cir. 2002). The 12/31/09 Order dismissing Plaintiffs’ causes of action against

1 the moving Defendants did not constitute a final judgment triggering the running of the 10-day period.  
2 (*See McLaughlin v. Unum Life Ins. Co. of Am.*, 212 F.R.D. 40 (D. Me. 2002). The instant motion is  
3 therefore timely.

4 The major grounds justifying reconsideration of a judgment involve “an intervening change in  
5 the controlling law, the availability of new evidence, or the need to correct a clear error or prevent  
6 manifest injustice.” *Camacho v. Tenorio Enterprises*, 2 N.M.I. 407, 414 (1992). In addition to these  
7 grounds, Plaintiffs contend the Court should reconsider the 12/31/09 Order because the Court did not  
8 correctly apply the legal standard governing Com. R. Civ. P. 12(b)(6) motions in dismissing their  
9 Consumer Protection Act cause of action. With regard to Plaintiffs’ cause of action for assisting in  
10 breaches of fiduciary duty, Plaintiffs also argue that they alleged sufficient facts in the Complaint to  
11 satisfy the requirements of a derivative suit. The Court will address these arguments and clarify the  
12 12/31/09 Order where appropriate rather than treating Plaintiffs’ motions for reconsideration and  
13 clarification separately.

14 **A. The Court Properly Applied the Legal Standard in Dismissing Plaintiffs’ Consumer  
15 Protection Act Claim.**

16 In deciding a motion to dismiss under Com. R. Civ. P. 12(b)(6), the Court must assume the truth  
17 of all factual allegations in the challenged pleading and construe them in the light most favorable to the  
18 non-moving party. *Cepeda v. Hefner*, 3 N.M.I. 121, 127-28 (1992); *Govendo v. Marianas Pub. Land*  
19 *Corp.* 2 N.M.I. 482, 490 (1992). The Court correctly applied this standard in the 12/31/09 Order  
20 dismissing Plaintiffs’ claim against the moving Defendants for violation of the Consumer Protection  
21 Act (the “Act”), 4 CMC §§ 5101 *et seq.*

22 The Act was created to “[p]rohibit practices by merchants which deceive, mislead, or confuse  
23 the consumer” and to further an “orderly market environment.” 4 CMC § 5102(b). The Act was  
24 drafted in response to legislative findings that consumers need to be “protected from abuses in  
25 commerce which deprive them of the full value and benefit of their purchase of goods and services or  
26 which deceive them regarding the availability and nature of goods or services for sale.” 4 CMC §  
27 5102(a)(1). Thus, the Act declares to be unlawful certain unfair methods of competition and unfair or  
28 deceptive acts or practices “in the conduct of any trade or commerce.” 4 CMC § 5105. “Trade” or

1 “commerce” means “the sale, advertising, offering for sale, contracting for sale, exchange, distribution  
2 for consideration, or solicitation for purchase to the general public of any goods or other property, real,  
3 personal, or tangible, or of any service . . . .” 4 CMC § 5104 (b). The aim of the Act, in part, is to  
4 protect the public from being deceived into purchasing goods and services by merchants with superior  
5 knowledge regarding the value of the goods or services they sell. *See* 4 CMC § 5102(3).

6 In this case, the services at issue are the maintenance services provided to the owners (the  
7 “Homeowners”) of residential units at Anaks Ocean View Hill Saipan (the “Development”). As  
8 indicated, to fall under the Act’s protection, the services must be offered for sale “to the general  
9 public.” 4 CMC § 5104 (b). The first issue, therefore, is whether the moving Defendants offered to sell  
10 maintenance services to the general public. Plaintiffs allege that the moving Defendants sold  
11 maintenance services to the general public through their alleged alter ego, Anaks.<sup>1</sup> There are no  
12 allegations in the Complaint indicating that Anaks was in the business of selling maintenance services  
13 to the general public, however, at least not as a standalone service. For example, based on the  
14 allegations of the Complaint, a member of the general public could not have contacted Anaks to order  
15 maintenance services. The Complaint also does not allege that Anaks solicited the general public with  
16 false advertising or other deceitful inducements to sell maintenance services. There is therefore a  
17 strong argument that the Act does not apply at all under the circumstances.

18 Even though it is likely the Act does not apply at all, viewing the facts in the light most  
19 favorable to Plaintiffs, it is possible that Anaks marketed maintenance services to the general public  
20 insofar as such services were attached to the sale of units in the Development. Anaks was allegedly  
21 in the business of developing and selling real estate, and therefore must have solicited members of the  
22 general public in order to sell units in the Development. The statute of limitations for a violation of the  
23 Act is four years, however. 4 CMC § 5110. According to the Complaint, the moving Defendants,  
24 acting through their alleged alter ego, Anaks, were able to “market all One Hundred Thirty One (131)  
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27 <sup>1</sup> Plaintiffs’ Consumer Protection Act cause of action was dismissed because the Act’s statute of limitations had  
28 run and because Plaintiffs failed to state a plausible claim that Anaks was the alter ego of the moving Defendants.  
(12/31/09 Order.) For purposes of Plaintiffs’ motion for reconsideration, the Court is only addressing the statute of  
limitations issue.

1 units of the Development shortly after the construction was completed on or about 1989.” (*See*  
2 Complaint ¶¶ 3-4.) Thus, even if the moving Defendants, acting through their alleged alter ego, Anaks,  
3 offered to sell maintenance services to the general public in combination with the sale of units, the  
4 statute of limitations for any possible violation of the Act has run. The moving Defendants, acting  
5 through their alleged alter ego, sold all of the residential units on or about 1989, approximately eighteen  
6 (18) years before the Complaint was filed on February 7, 2008.

7 In their motion for reconsideration, Plaintiffs argue that the Court erroneously excluded  
8 Plaintiffs from “the class of persons known as the general public.” (Pls.’ Mem. Supp. Mot. to Clarify  
9 and Reconsider at 3.) This is not true. Plaintiffs’ argument assumes that the moving Defendants, acting  
10 through Anaks, continued to market and sell maintenance services even after 1989. This assumption  
11 disconnects the sale of maintenance services from the sale of units at the Development. Although  
12 Plaintiffs continue to pay a monthly fee for maintenance services, Plaintiffs pay this fee because it is  
13 their contractual duty under the Sublease, not because they are deceived into accepting the same bad  
14 offer every month. The Act attempts to punish merchants who would lure an unsuspecting consumer  
15 into an unfair bargain. Once the deception is accomplished, however, the act giving rise to a cause of  
16 action is completed and the statute of limitations begins to run. After the moving Defendants, acting  
17 through their alleged alter ego, Anaks, sold all the units, on or about 1989, they were done selling  
18 maintenance services and the statute of limitations began to run.

19 **B. The Court Did Not Dismiss Plaintiffs’ Consumer Protection Act Claim Against Anaks.**

20 In the 12/31/09 Order, the Court dismissed Plaintiffs’ Consumer Protection Act claim against  
21 the moving Defendants, but did not dismiss the claim in relation to any other defendant. Again,  
22 Plaintiffs allege that the moving Defendants, acting through their alleged alter ego, Anaks, sold all the  
23 units in the Development by 1989. Because the sales of maintenance services are connected to the sales  
24 of units in the Development, the statute of limitations has run on any sale potentially involving the  
25 moving Defendants.

26 **C. The Complaint Is Not Styled as a Derivative Suit and Does Not Meet the Requirements of**  
27 **Com. R. Civ. P. 23.1.**

28 In the 12/31/09 Order, the Court dismissed Plaintiffs’ cause of action against the moving

1 Defendants for assisting with breaches of fiduciary duty because Plaintiffs do not have standing to bring  
2 the claim on behalf of themselves and the action is not styled as a derivative action. As the Court  
3 explained in the 12/31/09 Order, if acquiring Anaks was a corporate opportunity, the opportunity  
4 belonged to Anaks Ocean View Hill Saipan Homeowners' Association ("AHA"), not Plaintiffs.  
5 (12/31/09 Order.) Apart from AHA, Plaintiffs and the other Homeowners do not constitute a corporate  
6 entity from which a corporate opportunity could be taken. Plaintiffs therefore do not have standing to  
7 bring the claim on behalf of themselves.

8 Plaintiffs now move the Court to reconsider its determination that the Complaint did not meet  
9 the requirements of a derivative action. In a derivative action, the cause of action a plaintiff brings is  
10 not his own; it is the corporation's action. The corporation is the real party in interest and the plaintiff  
11 is allowed to act in protection of the corporation somewhat as a "next friend" might do for an individual  
12 because the corporation is disabled from protecting itself. *Koster v. (American) Lumbermens Mut.*  
13 *Casualty Co.*, 330 U.S. 518, 522-23 (1947). Com. R. Civ. P. 23.1 states the following rule regarding  
14 derivative suits:

15 In a derivative action brought by one or more shareholders or members  
16 to enforce a right of a corporation or of an unincorporated association,  
17 the corporation or association having failed to enforce a right which may  
18 properly be asserted by it, the complaint shall be verified and shall allege  
19 that the plaintiff was a shareholder or member at the time of the  
20 transaction of which the plaintiff complains or that the plaintiffs share  
21 or membership thereafter devolved on the plaintiff by operation of law.  
22 The complaint shall also allege with particularity the efforts, if any,  
23 made by the plaintiff to obtain the action the plaintiff desires from the  
24 directors or comparable authority and, if necessary, from the  
25 shareholders or members, and the reasons for the plaintiffs failure to  
26 obtain the action or for not making the effort. The derivative action may  
27 not be maintained if it appears that the plaintiff does not fairly and  
28 adequately represent the interests of the shareholders or members  
similarly situated in enforcing the right of the corporation or association.  
The action shall not be dismissed or compromised without the approval  
of the court, and notice of the proposed dismissal or compromise shall  
be given to shareholders or members in such manner as the court directs.

Com. R. Civ. P. 23.1.

26 There are several reasons Plaintiffs' cause of action for assisting with breaches of fiduciary duty  
27 does not satisfy the requirements of Com. R. Civ. P. 23.1. First, the cause of action does not seek to  
28 enforce the rights of a corporation. For example, the underlying breaches of fiduciary duty with which

1 the moving Defendants allegedly assisted was usurping a corporate opportunity. Plaintiffs accuse  
2 AHA's directors of "taking for themselves an opportunity which should have been available to  
3 Plaintiffs and all owners thus usurping corporate opportunities . . . ." (Complaint ¶ 134.) The  
4 Complaint therefore seeks to enforce the rights of the ten Plaintiffs, not the rights of AHA. This fact  
5 is confirmed in Plaintiffs' Prayer for Relief wherein Plaintiffs request that any claim to Anaks or the  
6 common areas of the Development be disgorged "in favor of Plaintiffs and other owners of units in the  
7 Development." (*Id.* at 26.) AHA is not even mentioned. Although Plaintiffs allude to the rights of the  
8 Homeowners, only ten Homeowners are included as Plaintiffs.

9 A second issue is that Plaintiffs have not addressed whether they "fairly and adequately  
10 represent the interests of the shareholders or members similarly situated in enforcing the right of the  
11 corporation or association." Com. R. Civ. P. 23.1. There are only ten Plaintiffs in this case, all of  
12 whom reside in the CNMI, Guam or Canada. (Complaint ¶¶ 20-23.) According to the Complaint,  
13 however, there are 131 units in the Development. (*Id.* ¶ 4.) The majority of Homeowners are Japanese.  
14 (*See id.* ¶ 52.) The sheer number of Plaintiffs versus Homeowners and the fact that Plaintiffs are  
15 differently situated than the majority of Homeowners at least raises questions about how fairly and  
16 adequately Plaintiffs represent all the members of AHA. Although the moving Defendants did not  
17 contest whether Plaintiffs adequately represent the Homeowners, the moving Defendants were not put  
18 on notice that Plaintiffs' cause of action for assisting breaches of fiduciary duty was a derivative action.  
19 As discussed above, the Complaint states that the opportunity to acquire Anaks should have been  
20 available to Plaintiffs and the other Homeowners, not that it should have been available to AHA. (*Id.*  
21 ¶ 134.)

22 The Complaint also does not adequately address why it would have been futile to have AHA  
23 pursue its own rights. Com. R. Civ. P. 23.1 gives Plaintiffs the following choice:

24 The complaint shall also allege with particularity the efforts, if any,  
25 made by the plaintiff to obtain the action the plaintiff desires from the  
26 directors or comparable authority and, if necessary, from the  
shareholders or members, and the reasons for the plaintiffs failure to  
obtain the action or for not making the effort.

27 Com. R. Civ. P. 23.1. In their motion for reconsideration, Plaintiffs argue that the Complaint alleges  
28 facts sufficient to show it would have been futile to ask AHA's directors to bring a suit on behalf of

1 AHA. (Pls.’ Mem. Supp. Mot. to Clarify and Reconsider at 4-6.) Among Plaintiffs’ reasons are that  
2 AHA is a non-profit organization, the former board has blocked AHA’s access to critical information  
3 and funds, and the former board has actively sought to divide the current board against itself. (*Id.*)

4 While some of Plaintiffs’ allegations are relevant to finding AHA is unable to act on behalf of  
5 itself, the issues are not fully addressed – presumably because the Complaint was not drafted as or  
6 originally intended to be a derivative action. For example, the Complaint does not address the fact that  
7 the former, hostile board of directors has now been removed and replaced by a new board. (Complaint  
8 ¶¶ 94, 97.) Plaintiff Mary Asper is one of the newly elected board members. (*Id.* ¶ 1.) Thus, at least  
9 one of the current directors is in favor of bringing the action. With regard to financing a lawsuit,  
10 Plaintiffs do not explain why a contingency fee is undesirable or impossible. In terms of acquiring  
11 information from the former board, Plaintiffs are in no better position to acquire the information than  
12 the current board. Plaintiffs’ strongest argument concerning the futility of having AHA act on its own  
13 behalf is that the former board has attempted to divide the current board amongst itself. Nevertheless,  
14 the Complaint does not explain with any particularity what attempts have been made to divide the  
15 current board. It does not even provide the identities of all of the current board members. Without  
16 more, Plaintiffs have not shown how or why AHA is disabled from protecting its own interests. *Koster*,  
17 330 U.S. at 522-23 (1947).

18 **D. Plaintiffs May Amend the Complaint.**

19 In the 12/31/09 Order, the Court dismissed all three causes of action stated against the moving  
20 Defendants without prejudice. Plaintiffs may therefore amend the Complaint.

21 **II. CONCLUSION**

22 For the foregoing reasons, the Court hereby DENIES Plaintiffs’ motion for reconsideration of  
23 the 12/31/09 Order. Plaintiffs may have twenty (20) days from the date of this order to amend the  
24 Complaint.

25 So ORDERED this 5<sup>th</sup> day of March, 2010.

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