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IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NORMA S. ADA, *et al.*, **Plaintiffs,** **v.** **MASAJI NAKAMOTO, *et al.*,** **Defendants.** --- **SAIPAN SHANGRILA RESORT, INC.,** **Defendant/Cross-Plaintiff,** **v.** **NAMIO MIURA, SUMIO UCHIKAWA, PHO TG., LTD. and FORTY LOVE CO., LTD.,** **Defendants/Cross-Defendants.**	**CIVIL ACTION NO. 08-0029 D** **ORDER GRANTING DEFENDANTS/CROSS-DEFENDANTS' MOTION TO DISMISS DEFENDANT/CROSS-PLAINTIFF SHANGRILA'S CROSS-CLAIM**

I. INTRODUCTION

THIS MATTER came before the Court on October 18, 2010, for a hearing on Defendants/Cross-Defendants' "Motion To Dismiss Defendant/Cross-Plaintiff Shangrila's Cross Claim." The Cross-Plaintiff Saipan Shangrila Resort, Inc. ("Shangrila") was represented by Douglas F. Cushnie, Esq. Cross-Defendants Namio Miura ("Miura"), Sumio Uchikawa ("Uchikawa"), PHO TG., LTD. ("PHO TG"), and Forty Love Co., LTD. ("Forty Love") (collectively, "Defendants") were

represented by Colin M. Thompson, Esq. Defendants move the Court to dismiss Plaintiffs' Cross-Claims pursuant to NMI R. Civ. P. 12(b)(6).

II. FACTUAL AND PROCEDURAL BACKGROUND

Anaks Ocean View Saipan (the "Development") is located in the Puerto Rico area of Saipan. (FAC ¶ 1.) Anaks Resort Development, Inc. ("Anaks"), a corporation organized under the laws of the Commonwealth of the Northern Mariana Islands ("CNMI"), constructed the Development around 1989. (*Id.* ¶¶ 2, 8.) Initially, Anaks was formed by three Japanese corporations; however, at the time this lawsuit was filed, Plaintiffs allege that Anaks is wholly owned by Saipan Shangrila Resort, Inc. ("Shangrila"). (*Id.* ¶¶ 9, 74-75.) PHO TG, Forty Love, and Hoyu House Co., Ltd ("Hoyu House") are all Japanese corporations and each own 25% of Shangrila. (*Id.* ¶¶ 48, 145.) Yoshio Arino ("Arino") owns Hoyu House, Miura owns PHO TG, and Uchikawa owns Forty Love. (*Id.*) Another 25% of Shangrila shares are held by the company as non-voting shares.[1] PHO TG and Forty Love suamong the original incorporators of Shangrila and held subscription rights to purchase Shangrila stock. (Decl. of Thompson Ex. C.)

Through an affidavit filed with Shangrila's Articles of Incorporation on March 16, 2007, the subscribers of Shangrila's shares agreed to pay for the subscribed shares upon the issuance of Shangrila's corporate charter. The corporate charter was issued on March 16, 2007, however, none of the subscribers paid for their shares. On December 3, 2009, more than two years after Shangrila received its corporate charter, Arino sent call notices to the incorporators to pay for their subscribed shares. Only Hoyu House paid for its shares during the specified time in the call notice . On December 25, 2009, Arino rescinded the subscription rights of PHO TG and Forty Love because they failed to act on the call notices. On February 9, 2010, Arino held a special meeting of shareholders where many drastic changes were made to Shangrila including replacing its previous officers and board members. Neither PHO TG nor Forty Love attended the shareholder's meeting.

[1]These shares, originally held by Masaji Nakamoto, were converted to non-voting status in September 2009, at a shareholder meeting. (Defs' Ex. 1, filed Feb. 15, 2010.)

On August 2, 2010, Shangrila filed a cross-claim against Defendants. The first cause of action alleges that Uchikawa was negligent in providing accountancy services for Anaks which allowed Masaji Nakamoto to embezzle funds from Anaks resulting in losses to Shangrila. (Cross-Cl. at 5.) The second cause of action alleges that Defendants entered into a settlement agreement purportedly transferring their Shangrila stock, in contravention of Shangrila's articles of incorporation, causing Shangrila to incur legal fees in resisting the settlement approval. (*Id.* at 6-7.) Defendants have filed a motion to dismiss Shangrila's cross-claims pursuant to NMI R. Civ. P. 12(b)(6) alleging that Shangrila was not authorized to bring suit against the Defendants.

III. MOTION TO DISMISS PURSUANT TO NMI R. CIV. P. 12(b)(6)

A. Standard

Under NMI R. Civ. P. 12(b)(6), a complaint or pleading is subject to dismissal where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable legal theory. *See Bolain v. Guam Publications, Inc.*, 4 NMI 176 (1994). In deciding a motion to dismiss under NMI R. Civ. P. 12(b)(6), the court must assume the truth of all factual allegations in the challenged pleading and construe them in the light most favorable to the non-moving party. *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.* 2 NMI 482, 490 (1992). While the court must construe facts in favor of the non-moving party and draw reasonable inferences therefrom, the court need no strain to find inferences favorable to the non-moving party. *In re Adoption of Magofna*, 1 NMI 449 (1990). Furthermore, a reviewing court need not accept legal conclusions couched as factual statements as true. *Papason v. Allain*, 478 U.S. 265, 286 (1986). "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 570 (2007). A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1937 (citing *Twombly*, 550 U.S. at 555).

B. Discussion

Defendants argue that Shangrila's cross-claims must be dismissed because the board of directors

never authorized Shangrila to bring suit. (Mot. at 8) Defendants claim that Arino, who is the president, a shareholder and a director of Shangrila, unilaterally filed the cross-claims on behalf of Shangrila.

1. Because the cross-claims are not styled as a shareholder derivative suit, approval by the board of directors was necessary for Shangrila to file suit.

There are two ways to file a lawsuit on behalf of a corporation. *First*, the corporation's articles may permit an individual officer, shareholder or director to bring an action on behalf of the corporation. In this case, Shangrila's articles do not permit such an action. (Decl. of Thompson Ex. C.) Instead, Article 5 of Shangrila's articles of incorporation states that Shangrila "shall have and exercise all the powers granted to a corporation under Commonwealth law . . . ." (*Id.*) Under the law of the Commonwealth, "[a]ll corporate powers shall be exercised by or under the authority of . . . its board of directors . . . ." 4 CMC § 4441(b). Thus, permission to file a lawsuit must be taken at a board of directors meeting or consented to by all members of the board without a meeting. 4 CMC § 4462. Defendants contend that there was no board meeting or consent by members of the board to file these cross-claims.

Second, it is possible for an individual shareholder to file suit on behalf of the corporation through a shareholder derivative action. "A shareholder derivative suit is a uniquely equitable remedy in which a shareholder asserts on behalf of a corporation a claim belonging not to the shareholder, but to the corporation." *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991), *rev'd on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 n.13 (Del. 2000). In order to properly bring a shareholder derivative suit, a shareholder must initially demand those in control of the corporation to assert a claim and the demand refused. The demand requirement may be excused depending on the particular facts pled. In this case, the Shangrila cross-claim is utterly devoid of any facts pertaining to a demand or why such a demand would be futile. Accordingly, this action does not meet the requirements for a shareholder derivative suit. Notwithstanding these facts, Arino contends that the Defendants are not in a position to assert lack of corporate authorization because as of they were removed as officers, directors or shareholders of Shangrila on February 9, 2010. (Resp. at 2.) For the reasons set forth below, the Court disagrees with this contention.

2. The call notices issued by Arino are void as a matter of law and, therefore, the changes implemented at the February 9, 2010, special meeting of shareholders are also void.

Article VII of Shangrila's articles of incorporation lists PHO TG and Forty Love among the original incorporators of Shangrila. (Decl. of Thompson Ex. C.) Morever, in the affidavit accompanying Shangrila's articles, these companies subscribed to purchase shares of Shangrila. (*Id.*) Unless prescribed otherwise by statute, a stock subscription is not required to be made in any particular form. *Buffalo and Jamestown R.R. v. Gifford*, 87 N.Y. 294 (1882). In this case, the terms of the Shangrila stock subscription were clearly laid out in the articles of incorporation and the affidavit. (Decl. of Thompson Ex. C.) Under these terms, the incorporators agreed to purchase 25,000 shares each at a price of $1.00 per share upon issuance of the Corporate Charter. (*Id.*)

None of the incorporators paid for their subscribed shares at the time Shangrila received corporate status in March of 2007. However, as subscribers, PHO TG and Forty Love became stockholders with all the rights and privileges of that status. *Hawley v. Upton*, 102 U.S. 314 (1880). "Subscribers, by the terms of their agreement, ordinarily become liable to pay their subscriptions only at such times as legal 'calls' are made upon them by the directors." *Cramer v. Burnham*, 140 A. 477, 479 (Conn. 1928). The issue then turns on whether Arino's call notices were legal.

On December 3, 2009, Arino, on behalf of Shangrila, without board action, unilaterally issued call notices for stock subscription payment. Pursuant to the subscription agreement, payment for the shares was due upon the issuance of Shangrila's Corporate Charter. It is impermissible for the president of a corporation to unilaterally issue call notices on behalf of the corporation when nearly three years had passed since the original due date. Under CNMI law, only the board of directors may determine the payment terms of subscriptions for shares entered into before incorporation. 4 CMC § 4351(b). Therefore, due to the change of payment terms, the call notices must have been made pursuant to a board authorization. The December 3, 2009 call notices were not issued pursuant to a Shangrila board resolution and therefore are void as a matter of law.

On February 9, 2010, Arino held a special meeting of shareholders where several drastic changes were made to Shangrila. Under CNMI law, subscribers have 20 days to act on the call notice before the corporation my rescind the subscription agreement. 4 CMC § 4351. Believing that the call

notices were properly issued and because Hoyu House was the only subscriber that paid for its subscribed shares within the call notice period, Arino rescinded Defendants' subscription rights as of December 25, 2009. However, because the call notices were invalid, it was inconsequential that the other subscribers failed to act on the call notices.

Accordingly, as a matter of law, the actions taken at the February special meeting of shareholders were a nullity.[2] Notices were not sent to all the shareholders entitled to vote as required under CNMI law. *See* 4 CMC § 4395. Furthermore, there was not a quorum present at the meeting as required by Sections 4406 and 4408. Arino's argument, that neither PHO TG nor Forty Love are in a position to assert lack of corporate authorization, falls apart because, as shareholders, they may challenge Shangrila's power to act. *See* 4 CMC § 4314.

In summary, the December 3, 2009 call notice that Arino issued was invalid because a corporate president may not unilaterally determine payment terms for subscriptions of pre-incorporation shares. In addition, the actions taken at the February 9, 2010, special meeting of shareholders are invalid because the meeting failed to conform to statutory requirements. As shareholders, Cross-Defendants are in a position to assert that Shangrila lacked authorization to bring these cross-claims. Finally, Shangrila has failed to show board authorization to bring the cross-claims. Accordingly, the cross-claims were improperly brought against Defendants and therefore must be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Defendants/Cross-Defendants' Motion to Dismiss Defendant/Cross-Plaintiff's Cross-Claim is hereby **GRANTED**.

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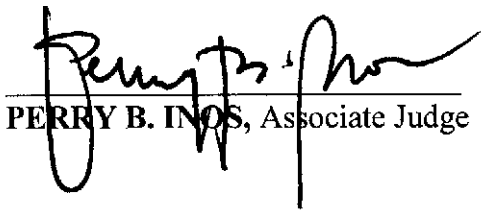
[2] Shangrila cites to *Johnston v. Livingston Nursing Home, Inc.*, 211 So.2d 151 (Ala. 1968) for the proposition that, when a corporation lacks corporate bylaws, the corporate president may call regular or special meetings. (Shangrila Resp. at 7.) However, at issue here is not whether Arino had the power to call a shareholder meeting. Rather, the issue is whether the meeting complied with notice and quorum requirements.

SO ORDERED this ____ day of August, 2011.



PERRY B. INOS, Associate Judge