

1. **For Publication**

2. **IN THE SUPERIOR COURT**
3. **OF THE**
4. **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5. GUERRERO FAMILY TRUST, et al.

CIVIL ACTION NO. 04-0574

6. Plaintiff,

7. v.

8. KINKI NIPPON TOURIST, LTD., et al.

**ORDER DENYING DEFENDANT SAIPAN
HOTEL CORPORATION'S
PARTIAL MOTION TO DISMISS**

9. Defendants.

10. This matter was last before the Court on June 20, 2006, on Defendant Saipan Hotel
11. Corporation's ("SHC's") Commonwealth Rule of Civil Procedure 12(b)(6) motion to dismiss the
12. fourth cause of action in the second amended complaint of Plaintiffs Guerrero Family Trust, et al.
13. Appearing at oral arguments and/or on the briefs were: G. Anthony Long for SHC; and Arthur B.
14. Clark and William Fitzgerald for Plaintiffs.

15. SHC argues that Plaintiffs are not entitled to a remedy for SHC's alleged share dilution
16. scheme, other than that stated in 4 CMC § 4106(a) (injunctive relief and payment of fair value of
17. the shares). *See* SHC's Reply Memorandum at 5. Assuming that damages are not a remedy, SHC
18. suggests that Rule 12(b)(6) is an appropriate tool for disposing of this portion of Plaintiffs' claim.
19. The Court must decide (1) whether the remedy of damages for the alleged share dilution is available
20. under CNMI law, and (2) if not, whether a Rule 12(b)(6) motion can be used to dismiss the claim
21. for damages.

22. **I. STANDARD OF REVIEW**

23. A Rule 12(b)(6) motion to dismiss may be granted when a petition does not clearly contain
24. either (1) direct allegations on every material point necessary to sustain a recovery on any legal
25. point.

1. theory, or (2) allegations from which an inference fairly may be drawn that evidence on material
2. points will be introduced at trial. *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990).¹

3. **II. ANALYSIS**

4. **A. CNMI law does not preclude damages as an award for the wrongful dilution of shares.**

5. SHC’s argument against the award of damages is threefold:

- 6. (1) The remedy stated in Section 4106(a), injunctive relief and the value of the share, is
7. Plaintiffs’ exclusive remedy for a violation of that section;
- 8. (2) Plaintiffs have not pleaded a violation of Section 4106(b), a section that does not limit a
9. plaintiff to an exclusive remedy;
- 10. (3) If Plaintiffs had pleaded a violation of Section 4106(b), then the remedy would be
11. limited to injunctive relief, because Section 4107 provides this form of relief for violations
12. of any provision of the chapter.

13. In analyzing these arguments, the Court first considers the nature of the alleged violation.
14. Paragraph 81 refers to SHC’s alleged role in the *reduction* and/or *dilution* of Plaintiffs’ shares: “[...]”
15. SHC unlawfully reduced or sought to reduce the value and/or the number of shares of the Minority
16. Shareholders to a lesser number of shares without the agreement and the prior written, nonproxy
17. consent of any and all shareholders.”

18. ¹ SHC has already conceded that, for the purposes of this motion only, Plaintiffs have stated a claim for
19. wrongful dilution. See SHC’s Memorandum in Support at 6. However, SHC suggests that dismissal is also appropriate
20. “when the claim does not allege ‘a cognizable legal theory’ *for recovery*” (emphasis added). SHC’s Reply
21. Memorandum at 8, citing *Does I v. Gap*, No. 01-0031, 2002 WL 1000068 (D. N. Mar. I. May 10, 2002); *Balistreri v.*
22. *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988).

23. The precise language of *Does I* is: “12(b)(6) dismissal is proper only where there is either a ‘lack of a
24. cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’”(quoting *Balistreri*).
25. The precise language of *Balistreri* reads: “Dismissal can be based on the lack of a cognizable legal theory or the
26. absence of sufficient facts alleged under a cognizable legal theory.”

27. Neither *Does I* nor *Balistreri* suggests that dismissal of a claim may result from a plaintiff’s failure to allege
28. the proper mechanism for the recovery of a particular award. Thus, the Court bases its review on the *Magofna* standard.
The damages portion of the claim may be dismissed if the complaint lacks allegations (1) that contain evidence of the
damages sustained, or (2) from which an inference may be drawn that evidence on the nature of damages will be
introduced at trial.

1. The *reduction* aspect of the alleged tort falls under both Section 4106(a) and Section
2. 4106(b), which essentially describe the same violation. Section 4106(a) reads, “It shall be unlawful
3. for a corporation organized under the laws of the Commonwealth, to require a shareholder to sell,
4. decrease or otherwise relinquish his or her shares in the corporation.” Section 4106 (b) states, “It
5. shall be unlawful for a corporation under the laws of the Commonwealth to reduce the number of
6. shares of a shareholder to a lesser number of shares [...].”

7.
8. The Court agrees with SHC’s arguments that, outside of the somewhat conclusory allegation
9. contained in Paragraph 81, Plaintiffs have not set forth how SHC actually reduced the *number* of
10. shares belonging to Plaintiffs. Thus, Plaintiffs cannot maintain a cause of action under Sections
11. 4106(a-b) for a forced *reduction in the number* of their shares.

12. However, this does not end the analysis. Paragraph 81 also refers to a reduction in *value*, or
13. a *dilution* of Plaintiffs’ shares. There are several paragraphs in the SAC with allegations pertaining
14. to SHC’s alleged role in *diluting* Plaintiffs’ shares. Paragraph 27 refers to SHC’s proposed corporate
15. reorganization. Paragraphs 55 and 56 refer to SHC’s proposed sale and dilution of Plaintiffs’
16. interests.

17.
18. The *dilution* aspect of SHC’s allegedly tortious action is not explicitly proscribed by either
19. Section 4106(a) or Section 4106(b). Section (a) comes closest to identifying the tort of dilution,
20. stating that “the value of a shareholder’s ownership in a corporation shall not be changed through
21. merger or any form of corporate reorganization.” Judging from the title of the section, “No Share
22. Buyouts or *Diluted* Value Stock Splits or Diminished Proportional Ownership Without Permission
23. of Shareholders” (emphasis added), the Legislature must have intended to protect shareholders from
24. share dilution. However, the Legislature provided no clearly defined cause of action or remedy for
25. this tort in either Section 4106 or 4107.

1. The Second Restatement of Torts, Section 874A, address situations in which, “a legislative
2. provision protects a class of persons by proscribing or requiring certain conduct but does not
3. provide a civil remedy for the violation.” In such situations, if the court may consider allowing a
4. particular remedy if it “determines that the remedy is appropriate in furtherance of the purpose of
5. the legislation and needed to ensure the effectiveness of the provision.” *Id.* The court may “accord
6. to an injured member of the class a right of action, using a suitable existing tort action or a new
7. cause of action analogous to an existing tort action.” *Id.* Citing this section of the Restatement,
8. Plaintiffs urge the Court to allow the remedy of damages for dilution. SHC, in turn, cites comment
9. h(2) to Section 874A: “When adequate remedies are set forth in the legislative provision itself in
10. order to effectuate the policy of the legislation, the court should not supplement those remedies.”

12. Although the tort of wrongful dilution has not been codified into CNMI law, it has been
13. recognized as a cause of action in other American jurisdictions. *See In re Dreiling*, 233 B.R. 848
14. (Bkrtcy. D.Colo. 1999) (issuance of new stock to shareholders as part of a restructuring was illegal
15. where there was no proper authorization for the issuance); *Horwitz v. Balaban*, 112 F.Supp. 99
16. (S.D.N.Y.1949) (recognizing the individual right of plaintiff to enjoin the dilution of his stock
17. interest resulting from an improper issuance of option shares to a corporate officer); *Avacus*
18. *Partners, L.P. v. Brian*, No. 11001, 1990 WL 161909 (Del.Ch. Oct. 24, 1990): (a claim that the
19. board improperly issued stock in a manner that impacted the shareholders' voting power may state
20. either an individual or a derivative claim).

22. Given that wrongful dilution has not been clearly codified into Title 4 of the CNMI code, the
23. Court is not prepared to conclude that Sections 4106 and 4107 alone provide adequate remedies for
24.

1. this act.² Some jurisdictions have recognized the award of damages as a remedy for share dilution.
2. An example is *Lawton v. Nyman*, No. 98-288, 2005 WL 396301 (D.R.I. Feb. 15 2005), concerning
3. the rights of minority shareholders in a closely held family corporation. The shares of the minority
4. shareholders had a strategic value that was much greater than the financial value reflected in the
5. corporation's books. *Id.* The minority shareholders were misled into agreeing to the redemption of
6. their stock for less than its true value. *Id.* The Court determined that the minority shareholders were
7. entitled to damages equal to the amount they would have received from a buyer for their undiluted
8. interest in corporation. *Id.* They were also entitled to disgorgement of profits under an unjust
9. enrichment theory. *Id.*

11. In the instant case, the burden will be on Plaintiffs to prove at trial the facts necessary to (1)
12. support an individual claim for wrongful dilution of their shares, and (2) show damages beyond the
13. book value of the shares.

14. **B. Plaintiffs' claim for share dilution otherwise survives the 12(b)(6) test.**

15. Aside from their motion to dismiss Plaintiffs' request for damages, SHC has not moved for
16. the dismissal of the dilution claim.³ At this time, the Court will not inquire *sua sponte* as to whether
17. dismissal is appropriate.

19. The Court is not without power to dismiss a demand for an improper remedy pursuant to
20. Rule 12(b)(6).⁴ However, given that CNMI law does not preclude an action for the wrongful

22. ² The Court does not decide whether 4016(a) provides the exclusive remedy for a forced reduction in the number
23. of a shareholder's shares. However, it is inclined to view forced share reduction as being analogous to share dilution, as
they have the same effect of reducing the shareholder's ownership in a corporation.

24. The Court also refrains from deciding the propriety of a suit brought in Plaintiffs's individual capacities, as
opposed to a shareholder derivative suit. SHC has not raised this argument.

25. ³ A defense under 12(b)(6) for failure to state a claim is not waived if not included in the pre-answer motion.
26. Rule 12(h)(2) provides that a 12(b)(6) motion still may be raised in any pleading, by motion for judgment on the
pleadings, or at trial.

1. dilution of shares, or for the award of damages on the action, the Court need not employ Rule
2. 12(b)(6) in this manner.

3. **III. CONCLUSION**

4. Because CNMI law does not preclude an action for wrongful dilution of corporate stock or
5. for damages on the action, Plaintiffs' wrongful dilution allegation survives SHC's motion to
6. dismiss. SHC's partial motion to dismiss is DENIED.

7.
8. SO ORDERED this 5th day of July, 2006.

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10. /s/ _____
11. JUAN T. LIZAMA, Associate Judge

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⁴ This rule is frequently used to dispose of punitive damage claims. *See Miller v. Citizens Bank of PA*, No. 05-1179, 2006 WL 266092 (E.D. Pa. Feb 01, 2006) (granting the defendant's Rule 12(b)(6) motion to dismiss punitive damages in one of the counts); *Howard v. Local 152 of Intern. Const. and General Laborers' Union of America*, 999 F.Supp. 1213 (N.D.Ill.1998) (same); *Archbold v. Liberty Mut. Group Group Disability Claims*, No. 01-7160, 2003 WL 22100863 (E.D. Pa. Aug 14, 2003) (treating the defendant's request to strike punitive damages as a 12(b)(6) Motion to Dismiss for Failure to State a Claim).

Courts have also used Rule 12(b)(6) to dismiss other types of damage claims. *See Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363 (3rd Cir. 2005) (affirming the portion of the judgment granting Defendant's Rule 12(b)(6) motion to dismiss the claims for damages under certain theories); *Harris v. Hayter*, 970 F.Supp. 500 (W.D.Va.1997) (dismissing the money damages portion of a civil rights claim pursuant to the Eleventh Amendment bar against damages); *LaPoint v. Shirley*, 409 F.Supp. 118 (D.C. Tex. 1976) (dismissing under Rule 12(b)(6) the portion of the claim seeking damages sought for wrongful birth).