

opening briefs in Civil Action No. 8-09.

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FSM SUPREME COURT TRIAL DIVISION

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|--------------------------------------|---|----------------------------|
| EMANUEL "MANNY" MORI, |) | CIVIL ACTION NO. 2008-1111 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| MYRON HASIGUCHI, ELSA LAGRADILLA, |) | |
| and TRUK TRANSPORTATION CO., INC., |) | |
| |) | |
| Defendants, |) | |
| _____ |) | |
| TRUK TRANSPORTATION CO., INC., |) | |
| |) | |
| Counterclaimant, |) | |
| |) | |
| vs. |) | |
| |) | |
| EMANUEL "MANNY" MORI, |) | |
| |) | |
| Counter-Defendant, |) | |
| _____ |) | |
| TRUK TRANSPORTATION CO., INC., |) | |
| |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| BARNEY OLTER, MARION OLTER, ROSELT |) | |
| POBUK, LISA OLTER, and DWIGHT OLTER, |) | |
| |) | |
| Third-Party Defendants. |) | |
| _____ |) | |

ORDER DISPOSING OF PENDING MOTIONS

Ready E. Johnny
Associate Justice

Decided: August 17, 2011
Corrected: August 29, 2011

APPEARANCES:

For the Plaintiff: Sabino S. Asor, Esq.
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For the Defendants: Stephen V. Finnen, Esq.
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HEADNOTES

Torts – Fraud

Since the elements of fraud are: 1) a knowing or deliberate misrepresentation by the defendant, 2) made to induce action by the plaintiff, 3) with justifiable reliance by the plaintiff upon the misrepresentations, 4) to the plaintiff's detriment, a plaintiff must show that the misrepresentations were done to induce action by him, and that he relied on them to his detriment. Mori v. Hasiguchi, 17 FSM Intrm. 630, 637 (Chk. 2011).

Civil Procedure – Dismissal; Civil Procedure – Pleadings

A plaintiff is not precluded from relief just because the party's lawyer has misconceived the proper legal theory of the claim since a plaintiff need not even advance a legal theory. Mori v. Hasiguchi, 17 FSM Intrm. 630, 637 (Chk. 2011).

Business Organizations – Corporations – Stock and Stockholders; Civil Procedure – Derivative Actions

A shareholder's derivative action is one to enforce a corporation's right when the corporation has failed to enforce a right which it may properly assert. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Pleadings

The circumstances constituting fraud must be stated with particularity. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

Shareholder derivative actions have pleading requirements beyond those in Civil Rule 8(a) since under Rule 23.1, the special derivative action pleading requirements include allegations about the special prerequisites for such actions. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

A complaint in a shareholder action must be verified, and must include statements to the effect that the plaintiff was shareholder at the time of the transaction of which he complains or that his shares thereafter devolved on him by operation of law, that the action is not a collusive one to confer jurisdiction, and that he has undertaken efforts to have his grievances redressed by the corporation's directors or shareholders and the reasons why he failed to obtain that relief. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure

While the court must first consult FSM sources of law rather than begin by reviewing foreign ones, when an FSM civil procedure rule that was drawn from a U.S. rule has not previously been

construed, the court may look to U.S. sources for guidance. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 n.1 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

If a derivative action plaintiff has not undertaken action to have his grievances redressed then he must allege the reasons for not making the effort. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Derivative Actions

A plaintiff in a derivative action must fairly and adequately represent the interests of the shareholders similarly situated in enforcing the corporation's right. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

Since a plaintiff shareholder is presumed to be an adequate representative and since the burden is on the defendant to show that the plaintiff is inadequate, the plaintiff in a derivative action does not need to allege he is an adequate representative. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

A derivative action plaintiff must allege that, at the time of the transactions complained of, he owned shares in the corporation or that the shares thereafter devolved on him by the operation of law. Mori v. Hasiguchi, 17 FSM Intrm. 630, 638 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

A derivative action complaint, or the part of the complaint that alleges a derivative action, must be verified, that is, confirmed or substantiated by oath or affidavit whereby the truth of the statements in the complaint is sworn to. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 & n.2 (Chk. 2011).

Civil Procedure – Pleadings

A verification is used as a conclusion for all pleadings that are required to be sworn. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 n.2 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

The purpose of Rule 23.1's verification requirement is to ensure that the court will not be used for "strike suits" and that the plaintiff has investigated the charges and found them to be of substance. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings – Amendment

The failure to verify the complaint in a shareholders' derivative action is a technical defect that can be cured by amendment. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Dismissal; Civil Procedure – Pleadings; Civil Procedure – Summary Judgment – Grounds

The failure to verify a derivative action complaint will not entitle defendants to an immediate dismissal or to a summary judgment because the Civil Procedure Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Dismissal; Civil Procedure – Pleadings

A derivative action complaint does not have to be dismissed for noncompliance with the verification requirement when the court can require the plaintiff to verify it by filing an affidavit within a reasonable time, and even then, if the plaintiff fails to take advantage of the court's invitation to correct the deficiency, the dismissal should not be with prejudice inasmuch as the merits of the case have not been adjudicated. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings – Amendment

If a derivative action complaint lacks the proper allegation that it is not a collusive action it is subject to dismissal although a reasonable opportunity to amend should be permitted. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Dismissal; Civil Procedure – Pleadings

A derivative action plaintiff who has failed to both verify the complaint and to allege the absence of collusion may be given a reasonable time to cure both defects rather than have his derivative action dismissed. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

A derivative action must allege with particularity what efforts the plaintiff has made to obtain relief from the corporation's directors. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Business Organizations – Corporations – Stock and Stockholders; Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

A stockholder, instituting a stockholder's derivative suit, must plead and prove that a request to institute action was made on the corporation and refused, or that there was matter or matters which excused the making of the request, but when a stockholder sues in his own individual right, no demand upon the corporation itself is necessary. Mori v. Hasiguchi, 17 FSM Intrm. 630, 639 (Chk. 2011).

Business Organizations – Corporations – Stock and Stockholders; Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

The purpose of requiring that the complaining shareholder demand action from the board of directors before bringing suit under Rule 23.1 is related to the concept that a shareholder derivative suit is a device to be used only when it is clear that the corporation will not act to redress the alleged injury to itself. Mori v. Hasiguchi, 17 FSM Intrm. 630, 640 (Chk. 2011).

Business Organizations – Corporations – Stock and Stockholders; Civil Procedure – Derivative Actions

The Rule 23.1 requirement that stockholders first address their grievance to corporate authority serves numerous practical purposes, such as forcing shareholders to exhaust their intracorporate remedies; permitting the corporation to pursue alternative remedies; permitting the termination of meritless actions designed to vex or harass the corporation; permitting the corporation, with superior knowledge and financial resources, to assume control of the suit; and avoiding unnecessary judicial involvement in the organization's internal affairs. Mori v. Hasiguchi, 17 FSM Intrm. 630, 640 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

In a derivative action, it must appear from the complaint that plaintiff acted in good faith in seeking corporate action and exercised diligence in exhausting his remedies within the corporation. Mori v. Hasiguchi, 17 FSM Intrm. 630, 640 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Dismissal

A derivative action must be dismissed when a plaintiff has not demanded action by the

corporation's directors unless the court finds that Rule 23.1's demand requirements are excused under the rule's alternative provision that the plaintiff explain his reasons for not making the effort. Courts have allowed recourse to this reasons "for not making the effort" clause when a demand would be futile, useless, unavailing, or an idle ceremony. Mori v. Hasiguchi, 17 FSM Intrm. 630, 640 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Pleadings

As is true of pleading demand and refusal, what must be shown in the complaint to justify excusing compliance with the demand requirement is a matter of judicial discretion. At a minimum, the plaintiff must plead facts explaining the lack of a demand – it is not enough for plaintiff to state in conclusory terms that he made no demand because it would have been futile. Mori v. Hasiguchi, 17 FSM Intrm. 630, 640 (Chk. 2011).

Civil Procedure – Derivative Actions; Civil Procedure – Dismissal; Civil Procedure – Pleadings

A motion to dismiss derivative action allegations will be granted when the complaint has not alleged and shown that the plaintiff made a proper demand for redress and was refused or alleged and shown that such a demand would have been futile. Mori v. Hasiguchi, 17 FSM Intrm. 630, 640-41 (Chk. 2011).

Civil Procedure – Discovery

As a general proposition, a party may obtain discovery of any matter, not privileged, that is relevant to his claims and that is admissible as evidence or calculated to lead to admissible evidence. Mori v. Hasiguchi, 17 FSM Intrm. 630, 641 (Chk. 2011).

Civil Procedure – Pleadings – Supplemental

A suit that was filed after the complaint was filed in this case is not part of the plaintiff's claims in this case since the plaintiff never moved for, or was granted leave to, file a supplemental pleading under Civil Rule 15(d). Mori v. Hasiguchi, 17 FSM Intrm. 630, 641 (Chk. 2011).

Civil Procedure – Interrogatories

An interrogatory about an event after the suit was filed is irrelevant unless it would lead to admissible evidence about earlier events. Mori v. Hasiguchi, 17 FSM Intrm. 630, 641 (Chk. 2011).

Civil Procedure – Interrogatories

When a defendant partially answered an interrogatory by noting that the Transco policy of requiring court probate orders to determine the heirs of deceased shareholders had been used numerous times but objected to providing the names, dates of probate proceedings in which courts, and the number of shares involved as overly broad and intrusive, the court does not think it overly broad or intrusive for a list to be provided of the names of the deceased shareholders for whom probate orders have been provided Transco since 2004, but anything more would be unnecessary. Mori v. Hasiguchi, 17 FSM Intrm. 630, 642 (Chk. 2011).

Civil Procedure – Discovery

When the documents sought, if relevant, would have been relevant only to the plaintiff's derivative action claims and when the court's order dismisses those claims, the plaintiff is not entitled to have these documents produced. Mori v. Hasiguchi, 17 FSM Intrm. 630, 642 (Chk. 2011).

Civil Procedure – Discovery

In a suit over the transfer of shares, the corporation's policy for issuance of new stock certificates after transfer is certainly relevant and should be (and was) produced, but no other policy, whether adopted by the board or otherwise, appears relevant unless it involves the formalities needed

for the transfer of shares, so only any further such policies should be produced. Mori v. Hasiguchi, 17 FSM Intrm. 630, 642 (Chk. 2011).

Civil Procedure – Dismissal; Civil Procedure – Joinder, Misjoinder, and Severance

A plaintiff who did not assert a cause of action against a person later named as a third-party defendant by a defendant-third-party plaintiff may move to strike the third-party claim, or for its severance, or separate trial. Mori v. Hasiguchi, 17 FSM Intrm. 630, 643 (Chk. 2011).

Civil Procedure – Joinder, Misjoinder, and Severance

A plaintiff's motion to dismiss a third-party defendant is a motion to strike the defendants' third-party claim against that party, but whenever a motion to dismiss or to strike, or to vacate, or for a judgment on the pleadings, or for a summary judgment actually challenges the desirability of the impleader, it will be treated accordingly. Mori v. Hasiguchi, 17 FSM Intrm. 630, 643 (Chk. 2011).

Civil Procedure – Default and Default Judgments

No default can be entered against a party which has either filed a response indicating its intent to defend the action or engaged in other behavior which constitutes an active defense. Mori v. Hasiguchi, 17 FSM Intrm. 630, 643 (Chk. 2011).

Civil Procedure – Default and Default Judgments

If a party against whom judgment by default is sought has appeared in the action, that party must be served with written notice of the application for judgment so when a renewed motion for entry of default judgment was not served on a party who had undisputedly appeared in the action or served on his former counsel, the motion for a default judgment against him will be denied without prejudice for lack of service of the motion on him. Mori v. Hasiguchi, 17 FSM Intrm. 630, 643-44 (Chk. 2011).

Civil Procedure – Default and Default Judgments; Civil Procedure – Res Judicata

While a default judgment is not an adjudication on the merits of a claim, it is a final judgment with res judicata and claim preclusion effect. Mori v. Hasiguchi, 17 FSM Intrm. 630, 644 (Chk. 2011).

Civil Procedure – Judgment on the Pleadings; Civil Procedure – Summary Judgment

When matters outside the pleadings are presented, a motion for judgment on the pleadings is actually a summary judgment motion. Mori v. Hasiguchi, 17 FSM Intrm. 630, 644 (Chk. 2011).

Civil Procedure – Judgment on the Pleadings; Civil Procedure – Motions

A plaintiff's "renewed" motion for judgment on the pleadings will be denied without prejudice when the third-party defendants were not served although their rights would be affected; when the renewed motion, incorporated by reference deep in another document, may have slipped by the other parties without notice since none responded; and when the situation has changed since the motion was originally made. Mori v. Hasiguchi, 17 FSM Intrm. 630, 644 (Chk. 2011).

Civil Procedure – Dismissal; Civil Procedure – Summary Judgment – Grounds – Particular Cases

A partial summary judgment motion will be denied when it asks that the individual defendants be dismissed because the corporate defendant's presence in the case is solely as an interpleader – as a party who has joined in one case all those persons with claims to any of the 2,160 shares so that all their rights can be adjudicated and the corporation will abide the result – ignores the plaintiff's tort claims of attempted improper interference with his purchase of the stock and that at least one individual defendant seems central to those claims and the corporation may also be involved. Mori v. Hasiguchi, 17 FSM Intrm. 630, 645 (Chk. 2011).

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This order disposes of all pending matters before the court resulting from motions made by either the plaintiff, Emanuel "Manny" Mori, or the defendants, Myron Hasiguchi, Elsa Lagradilla, and Truk Transportation Co., Inc. ("Transco"), or suggested by the court.

I. MATTERS BEFORE THE COURT

This comes before the court on: 1) Plaintiff Mori's Motion for an Order to Compel Discovery, filed October 26, 2009; 2) the defendants' Opposition to Motion to Compel, filed November 18, 2009; 3) the defendants' Motion for Entry of Default Judgment, filed February 7, 2011; 4) Plaintiff Mori's Motion for Dismissal Against Third Party Defendants, filed May 18, 2011; 5) Plaintiff Mori's Views per Order of May 18, 2011, filed June 6, 2011; 6) the defendants' Response to Court Order; Motion to Dismiss or Strike; Limited Opposition to Plaintiff's Motion to Dismiss, filed June 8, 2011; 7) the defendants' Response to Plaintiff's Response; Renewal of Motion for Default Judgment, filed June 22, 2011; 8) Plaintiff Mori's Opposition to Defendants' Motion to Dismiss or to Strike, filed June 24, 2011; 9) the defendants' Response to Court Order Re: Default of Barney Olter, filed June 27, 2011; 10) the defendants' Renewed Motion for Partial Summary Judgment; Supplemental Opposition to Motion to Compel, filed June 30, 2011; and 11) the defendants' Supplement to Motion to Dismiss or Strike, filed July 13, 2011.

Many filings were responses to the court's May 13, 2011 Order Setting Further Schedule, which, among other things, noted that while Mori's complaint contained allegations that could only be characterized as a shareholder's derivative action to enforce the corporation's rights, until then the litigation activity had mostly focused on, and the third-party defendants were only interested in, the status of the 2,160 Transco shares once owned by Salter Olter. The court suggested that the parties submit their views on whether the derivative action allegations should be severed and made a separate action with a different docket number and with only the "interested" parties included, and whether, since the plaintiff's motion to compel also seemed to focus on the derivative action allegations, that motion should be handled under that new docket number if severance is granted.

The court will address the various motions contained in the filings listed above in the following order: first, matters pertaining to whether the plaintiff's derivative action allegations should be stricken or dismissed since if those allegations are dismissed it will make the court's own motion to sever moot and may make some or all of the motion to compel discovery moot; second, the motion to compel; third, if the derivative action allegations are not dismissed in their entirety, the court's own motion to sever; and fourth, all remaining matters – the disposition of defaulting parties and cross-motions for summary judgment.

II. WHETHER TO DISMISS OR STRIKE THE DERIVATIVE ACTION ALLEGATIONS

A. *Parties' Positions*

The defendants move to either dismiss or strike the part of Mori's complaint, specifically paragraphs 16-18, that alleges a stockholder derivative action. Those paragraphs allege that Transco's President, Myron Hasiguchi, has, to Transco's detriment, had Transco purchase goods from his family's store when less expensive alternatives were available; has taken over a quarrying and rock-crushing partnership for his family business when Transco had the resources, interest, and proven capability to operate and manage a rock-crushing operation; and has established his own construction company into

which Hasiguchi has transferred substantial Transco assets and capital.

The defendants contend that the court must dismiss these allegations because, in their view, they do not state a cause of action for derivative shareholder relief. They also contend that dismissal is appropriate because Mori has not satisfied any of Civil Procedure Rule 23.1's pleading requirements for shareholder derivative actions. The defendants further note that Mori was a member of the Transco board of directors from August 2002 to May 2009; that Mori filed this lawsuit on November 28, 2008 while he was still a director; that after April 2007, Mori did not attend any board meetings although he continued to draw a board allowance; and that he did not raise with the board of directors his concerns about the allegations in paragraphs 16-18 of his complaint.

Mori opposes the motion because those three paragraphs are his factual allegations for his breach of fiduciary duty cause of action. He contends that his breach of fiduciary duty cause of action "encompasses the derivative action and his tort claims of fraud wherein he alleges the defendants used inside information or misuse of corporate management authority by deliberately failing to register the plaintiff's stock acquisition so as to enrich themselves by buying these same stocks." Pl. Mori's Opp'n to Defs.' Mot. to Dismiss or to Strike at 3 (June 24, 2011). He asserts that his fraud claim and his derivative action claim are so intertwined in his breach of fiduciary duty cause of action that they cannot be severed or dismissed. Mori further asserts that, contrary to the defendants' argument, these three paragraphs state a claim for derivative shareholder relief because they "allege majority or management self-dealing, enrichment and possible management conflict of interests at the expense of the corporation and its shareholders" since instances of self-dealing, conflicts of interest, or fraud are the crux of every shareholder derivative action. *Id.* Mori also urges that these allegations be retained since, in his view, they are essential to his punitive damages prayer and that there is evidence to be adduced at trial to support these claims.

B. *Whether Fraud Claim and Derivative Action Intertwined*

Mori asserts as a ground not to dismiss his derivative action allegations that those claims and his tort claim for fraud are inextricably intertwined in his breach of fiduciary duty cause. Since the elements of fraud are: 1) a knowing or deliberate misrepresentation by the defendant, 2) made to induce action by the plaintiff, 3) with justifiable reliance by the plaintiff upon the misrepresentations, 4) to the plaintiff's detriment, a plaintiff must show that the misrepresentations were done to induce action by him, and that he relied on them to his detriment. Arthur v. Pohnpei, 16 FSM Intrm. 581, 597 (Pon. 2009); Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 526 (Pon. 1996); Chen Ho Fu v. Salvador, 7 FSM Intrm. 306, 309 (Pon. 1995); Pohnpei v. Kailis, 6 FSM Intrm. 460, 462 (Pon. 1994).

Nowhere in Mori's complaint does he allege that the defendants, or any one of them, made any misrepresentations to him in order to induce action by him and that he relied on those misrepresentations to his detriment. Mori's personal claim is that the defendants, specifically Hasiguchi, made statements to Barney Olter to induce him to take action injurious to Mori. Mori thus does not allege a personal fraud claim. But a plaintiff is not precluded from relief just because the party's lawyer has misconceived the proper legal theory of the claim, FSM v. Kana Maru No. 1, 14 FSM Intrm. 368, 372 (Chk. 2006); Annes v. Primo, 14 FSM Intrm. 196, 203 (Pon. 2006); Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003); Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 114 (Chk. 1995), since a plaintiff need not even advance a legal theory, Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 595 (App. 2008); Nakamura v. Mori, 16 FSM Intrm. 262, 268 (Chk. 2009); Annes, 14 FSM Intrm. at 203; Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 449 (Pon. 2003); Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 230 (Pon. 2002); Semwen, 7 FSM Intrm. at 114.

A shareholder's derivative action is one to enforce a corporation's right when the corporation has failed to enforce a right which it may properly assert. FSM Civ. R. 23.1. Mori asserts fraud as part of, or intertwined with, his derivative action. That is, acting on Transco's behalf, Mori alleges that Transco President Hasiguchi made knowing or deliberate misrepresentations to Transco that were made to induce action by Transco and that Transco justifiably relied on the misrepresentations to its detriment. Even so, "the circumstances constituting fraud . . . shall be stated with particularity." FSM Civ. R. 9(b).

C. A Derivative Action's Elements and Allegations

Mori opposes dismissal of his derivative action but does not address the defendants' assertion that he cannot maintain a stockholders' derivative action because he has not complied with Civil Procedure Rule 23.1's pleading requirements.

Shareholder derivative actions have pleading requirements beyond those in Civil Rule 8(a). Under Rule 23.1, the special derivative action pleading requirements include allegations about the special prerequisites for such actions:

a complaint in a shareholder action must be verified, and must include statements to the effect that plaintiff was shareholder at the time of the transaction of which he complains or that his shares thereafter devolved on him by operation of law, that the action is not a collusive one to confer jurisdiction, and that he has undertaken efforts to have his grievances redressed by the directors or shareholders of the corporation and the reasons why he failed to obtain that relief.

7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1836, at 161-62 (2d ed. 1986) (footnotes omitted).¹ If the plaintiff has not undertaken action to have his grievances redressed then he must allege the reasons "for not making the effort." FSM Civ. R. 23.1.

Lastly, a plaintiff in a derivative action must "fairly and adequately represent the interests of the shareholders similarly situated in enforcing the corporation's right." *Id.* But since a plaintiff shareholder is presumed to be an adequate representative and since the burden is on the defendant to show that the plaintiff is inadequate, 7C WRIGHT ET AL., *supra*, § 1833, at 141 & n.19, the plaintiff does not need to allege he is an adequate representative.

D. Rule 23.1 and Mori's Complaint

A derivative action plaintiff must allege that, at the time of the transactions complained of, he owned shares in the corporation or that the shares thereafter devolved on him by the operation of law. Although no dates are cited, Mori does allege that he was an heir to two Transco shareholders, his late wife Umiko Mori and the former Transco President, Masataka Mori. The court will take judicial notice that it is commonly known in Chuuk that Masataka Mori died in the 1990s. Transco shares would thus have devolved on Mori by operation of law sometime before Hasiguchi became Transco president and thus necessarily before President Hasiguchi conducted any of the transactions complained of in Mori's

¹ While the court must first consult FSM sources of law rather than begin by reviewing foreign ones, when an FSM civil procedure rule that was drawn from a U.S. rule has not previously been construed, the court may look to U.S. sources for guidance. *See, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008); Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 444 (App. 1994). FSM Civil Rule 23.1 is virtually identical to the U.S. rule and has never been construed and only rarely cited.

complaint. The defendants, in their papers, concede that Mori met the requirement with a "bare bones allegation" that he was a Transco shareholder the time of the transactions.

A derivative action complaint, or the part of the complaint that alleges a derivative action, must be verified.² FSM Civ. R. 23.1. Mori's complaint is not verified. The purpose of Rule 23.1's verification requirement is to ensure that the court will not be used for "strike suits" and that the plaintiff has investigated the charges and found them to be of substance. See, e.g., Porte v. Home Fed. Sav. & Loan Ass'n, 409 F. Supp. 752, 754 (N.D. Ill. 1976); Weisfeld v. Spartans Indus. Inc., 58 F.R.D. 570, 577 (S.D.N.Y. 1972).

The failure to verify the complaint in a shareholders' derivative action is a technical defect that can be cured by amendment. McDonough v. American Int'l Corp., 151 F.R.D. 140, 143 (M.D. Fla. 1993); Halsted Video, Inc. v. Gutillo, 115 F.R.D. 140, 176 (N.D. Ill. 1987) ("failure to verify is a technical defect curable by amendment"); Nussbacher v. Continental Ill. Bank & Trust Co., 61 F.R.D. 399, 401-02 (N.D. Ill. 1973), *rev'd on other grounds*, 518 F.2d 873 (7th Cir. 1975). The failure to verify a derivative action complaint will not entitle defendants to an immediate dismissal or to a summary judgment because the Civil Procedure Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." McDonough, 151 F.R.D. at 143; see also Halsted Video, Inc., 115 F.R.D. at 176. A complaint does not have to be dismissed for noncompliance with the verification requirement when the court can require the plaintiff to verify it by filing an affidavit within a reasonable time. In re ORFA Secs. Litig., 654 F. Supp. 1449, 1458 (D.N.J. 1987) (10 days given to file and serve affidavit to verify the complaint); see also McDonough, 151 F.R.D. at 143 (plaintiff given 30 days to verify complaint); Weisfeld, 58 F.R.D. at 578 (10 days). And even then, "if plaintiff fails to take advantage of the court's invitation to correct the deficiency . . . the dismissal should not be with prejudice inasmuch as the merits of the case have not been adjudicated." 7C WRIGHT ET AL., *supra*, § 1827, at 58.

Mori's failure to verify his derivative action pleading, by itself, would not result in a dismissal unless he failed to cure the defect within a reasonable time once invited to do so by the court. The same is true for his failure to allege that the case is not a collusive action to confer jurisdiction on the FSM Supreme Court. "If a complaint lacks the proper allegation [that it is not a collusive action] it is subject to dismissal, although a reasonable opportunity to amend should be permitted." 7C WRIGHT ET AL., *supra*, § 1830, at 93. A plaintiff who has failed to both verify the complaint and to allege the absence of collusion may be given a reasonable time to cure both defects rather than have his derivative action dismissed. Weisfeld, 58 F.R.D. at 577-78. If these were the only defects in Mori's derivative action pleading, the court would take this path. But they are not.

A derivative action must also allege with particularity what efforts the plaintiff has made to obtain relief from the corporation's directors.

A stockholder, instituting a stockholder's derivative suit, must plead and prove that request to institute action was made on the corporation and refused, or matter or matters which excused the making of the request. Where a stockholder sues in his own individual right, no demand upon the corporation itself is necessary.

² To verify is "[t]o confirm or substantiate by oath or affidavit; to swear to the truth of." BLACK'S LAW DICTIONARY 1698 (9th ed. 2009). A verification is a "formal declaration made in the presence of an authorized officer, such as a notary public . . . whereby one swears to the truth of the statements in the document. • Traditionally, a verification is used as a conclusion for all pleadings that are required to be sworn." *Id.*

Liken v. Shaffer, 64 F. Supp. 432, 440 (N.D. Iowa 1946) (citations omitted). Mori's Complaint does both – institute a stockholder's derivative suit (the allegations in paragraphs 16-18) and sue in his individual right (his claim that the defendants interfered with his stock purchase from Barney Olter).

The purpose of requiring that the complaining shareholder demand action from the board of directors before bringing suit under Rule 23.1 is related to the concept that a shareholder derivative suit is a device to be used only when it is clear that the corporation will not act to redress the alleged injury to itself.

7C WRIGHT ET AL., *supra*, § 1831, at 96. The Rule 23.1 requirement

that stockholders first address their grievance to corporate authority serves numerous practical purposes, such as forcing shareholders to exhaust their intracorporate remedies; permitting the corporation to pursue alternative remedies; permitting the termination of meritless actions designed to vex or harass the corporation; permitting the corporation, with superior knowledge and financial resources, to assume control of the suit; and avoiding unnecessary judicial involvement in the internal affairs of the organization.

Reilly Mortgage Group, Inc. v. Mount Vernon Sav. & Loan Ass'n, 568 F. Supp. 1067, 1075 (E.D. Va. 1983). And "[i]t must appear from the complaint that plaintiff acted in good faith in seeking corporate action and exercised diligence in exhausting his remedies within the corporation." 7C WRIGHT ET AL., *supra*, § 1831, at 102-03 (footnote omitted).

Mori's complaint makes no allegations and there is nothing in the complaint from which the court can infer that Mori made a demand on Transco's board of directors and was refused. The defendants imply that it would have been easy for Mori to bring these matters to the board's attention and to make the required demand because Mori was a Transco board member and could have raised the matters at one of monthly board of directors' meetings. Regardless, Mori has not alleged that he made any demand for redress on Transco's directors before bringing the derivative suit. Such a demand is a prerequisite to maintaining a derivative action and there is nothing to indicate that Mori actually made a demand.

Thus, Mori's derivative action must be dismissed unless the court finds that Rule 23.1's demand requirements are excused under the rule's alternative provision that the plaintiff explain his reasons for not making the effort. "[C]ourts have allowed recourse to this [reasons "for not making the effort"] clause when a demand would be 'futile,' 'useless,' 'unavailing,' or 'an idle ceremony.'" 7C WRIGHT ET AL., *supra*, § 1831, at 107-111 (footnotes omitted). Mori's complaint makes no such allegations and the court cannot infer from the complaint that a demand would have been futile, useless, unavailing, or an idle ceremony.

As is true of pleading demand and refusal, what must be shown in the complaint to justify excusing compliance with the requirement is a matter of judicial discretion At a minimum, however, plaintiff must plead facts explaining the lack of a demand—it is not enough for plaintiff to state in conclusory terms that he made no demand because it would have been futile.

7C WRIGHT ET AL., *supra*, § 1831, at 116-17 (footnote omitted). Mori's complaint does not even make a conclusory allegation that a demand would have been futile.

Accordingly, the defendants' motion to dismiss Mori's derivative action allegations is granted because his complaint has not alleged and shown that he made a proper demand for redress and was

refused or alleged and shown that such a demand would have been futile.

III. WHETHER TO COMPEL DISCOVERY

Mori moves to compel the defendants to respond to those parts of his discovery requests that they objected to because, in their view, Mori was on a fishing expedition. Mori's claims against the defendant may be summarized as follows: he asserts that he bought from Barney Olter all 2,160 Transco shares formerly owned by Salter Walter; that he is entitled to have those shares registered to his name and to be paid the dividends for them; and that one or more of the defendants improperly interfered with his purchase of the 2,160 shares. As a general proposition, Mori may obtain discovery of any matter, not privileged, relevant to these claims and that is admissible as evidence or calculated to lead to admissible evidence. FSM Civ. R. 26(b)(1).

1. *Responses to Interrogatories*

Mori propounded 44 interrogatories to defendant Hasiguchi. Hasiguchi objected to nearly all of them. Mori moves that he be compelled to answer them fully.

Interrogatories 1-10 all refer to Pohnpei attorney Mike Sipos and Hasiguchi's possible relationship with him. On January 26, 2009, Sipos filed suit³ against Mori on Barney Olter's behalf over the same Transco stock as is at issue here. Since that suit was filed after the complaint was filed in this case and since Mori never moved for, or was granted leave to, file a supplemental pleading under Civil Rule 15(d), Sipos's filing of that suit is not part of Mori's claims in this case although actions before November 28, 2008, when this suit was filed, might be. Interrogatories #9 and #10 are thus irrelevant. Interrogatories #7 and #8 seem calculated to lead to admissible evidence to support the allegations in paragraph 13 of the Complaint (alleged interference with Barney Olter's sale). Interrogatories #1-6 seek irrelevant information.

Interrogatories #11-19 all refer to Tino Donre, a Micronesian Legal Services Corporation attorney who represented Barney Olter in the Pohnpei Supreme Court Salter Olter probate case and also in this case. Interrogatory #18, like interrogatories #9 and #10, is about an event after this suit was filed and thus irrelevant unless it would lead to admissible evidence about earlier events. Interrogatory #19 seems calculated to lead to admissible evidence in support of the allegations in the Complaint, paragraph 13. Interrogatories #11-16 all ask for irrelevant information and, in addition, #15 also calls for speculation.

Interrogatories #20-31 all refer to Hasiguchi's possible contacts with Truk Trading Co. Only interrogatories #23, #24, #29, #30, and #31 deal with the possibility that Hasiguchi may have used Truk Trading Co. to interfere with Barney Olter's Transco stock sale to Mori. Interrogatory #25 refers to a possible discussion about this lawsuit after it was filed. It seems irrelevant. The rest of the Truk Trading Co. interrogatories are also irrelevant.

Interrogatories #33-35 involve an alleged indemnity agreement that do not appear calculated to lead to admissible evidence and which involve a different court case that has already proceeded to judgment. Interrogatory #36 is relevant only to the extent it asks if Hasiguchi has been actively trying to acquire Transco stock and therefore might have been trying to acquire some from Barney Olter.

³ Olter v. Mori, Civil Action No. 2009-011. See also Mori v. Hasiguchi, 16 FSM Intrm. 382, 384 (Chk. 2009). The Pohnpei case was later dismissed due to a settlement in which Barney Olter gave up his claim to the 2,160 Transco shares.

Hasiguchi's response may be limited to that. Interrogatories #37-38 are irrelevant in that they do not have a bearing on any fact material to Mori's claims. Hasiguchi partially answered interrogatory #40 by noting that the Transco policy of requiring court probate orders to determine the heirs of deceased shareholders had been used numerous times but objected to providing the names, dates of probate proceedings in which courts, and the number of shares involved as overly broad and intrusive. The court does not think it overly broad or intrusive for Hasiguchi to provide a list of the names of the deceased shareholders for whom probate orders have been provided Transco since 2004. Anything more is unnecessary. The names of the heirs or of the probate courts or the number of shares do not need to be provided. Interrogatory #41 asks for the names of shares for which dividend payments have not been disbursed because of the absence of a probate court order. Since the court expects that this list would generally overlap the #40 list (Transco refuses to disburse dividends until probate order provided and then disburses), it should not be burdensome. The time frame may be limited to 2004 through 2009 when the interrogatories were filed.

Interrogatories #42-43 concern whether Hasiguchi has ever had proxy authority to vote Transco shares and are thus irrelevant. Interrogatory #44, concerning possible payments to attorneys Sipos and Donre by Transco, Truk Trading Co., or Shigeto Store is overly broad and irrelevant.

Interrogatories #32 and #39 were answered. Accordingly, Hasiguchi shall, within 30 days, answer interrogatories #7-8, #18-19, #23-24, #29-31, #36 (as restricted), #40 (as limited), and #41 (as limited).

2. Production of Documents

Mori requested the production of 14 documents from defendant Hasiguchi. Hasiguchi objected to nearly all of them. Mori moves that he be compelled to produce them fully.

The documents sought in requests #3, #4, #5, #8, #9, #10, and #11, if relevant, would have been relevant only to Mori's derivative action claims and, since this order dismisses those claims, Mori is not entitled to have these documents produced.

The documents sought in request #1 (complete shareholder lists for various years), #2 (any payments to attorneys Donre and Sipos), #6 (legal bills), and #14 (copies of all dividend checks issued in various years) are irrelevant. Request #12 seeks communications with attorneys Donre and Sipos. Those documents, except to the extent they are about Barney Olter's sale of Transco stock, are irrelevant. Hasiguchi shall produce, within 30 days, only those documents that mention Barney Olter and Salter Olter's Transco stock.

Request #7 seeks all company policies adopted from 2004 to 2009 by the Transco board of directors and the official minutes of the adopting board meeting. Hasiguchi objected to the request as overbroad, ambiguous, and irrelevant and, without waiving his objection, provided a copy of a July 16, 2004 letter announcing the adoption of a policy for the issuance of new stock certificates including those for transfer due to the shareholder's death. The 2004 Transco policy for issuance of new stock certificates after transfer is certainly relevant and should (and was) produced. No other policy, whether adopted by the board or otherwise, appears relevant to this case unless it involves the formalities needed for the transfer of shares. If there are any further such policies, they should be produced within 30 days.

IV. WHETHER DERIVATIVE ACTION ALLEGATIONS SHOULD BE SEVERED

Since dismissal of Mori's derivative action allegation renders moot the court's own motion to

sever, the motion to sever is hereby withdrawn.

V. REMAINING MATTERS

A. *Third-Party Defendants' Dismissals or Default Judgments*

Mori moves to dismiss the third-party defendants, Barney Olter, Roselt Pobuk, and Dwight Olter, who have defaulted by not answering or otherwise defending against the defendants' amended third-party complaint. Neither Roselt Pobuk nor Dwight Olter, although served with process, have appeared in this action. Barney Olter appeared and answered the defendants' original third-party complaint and actively defended for a while (and even filed his own civil action in Pohnpei against Mori based on the same transaction) but did not respond to the amended third-party complaint filed on June 30, 2010, and served on his then-attorney on July 1, 2010, and served on him personally on July 2, 2010.

It may seem odd that a plaintiff who did not assert a cause of action against a person later named as a third-party defendant by a defendant-third-party plaintiff would be in a position to move to dismiss a party he did not name or sue. The rule, however, permits this. "Any party may move to strike the third-party claim, or for its severance or separate trial." FSM Civ. R. 14(a). A plaintiff's motion to dismiss a third-party defendant is a motion to strike the defendants' third-party claim against that party. "[W]henever a motion to dismiss or to strike, or to vacate, or for a judgment on the pleadings, or for a summary judgment actually challenges the desirability of the impleader, it will be treated accordingly." 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1460, at 460 (2d ed. 1990).⁴

Mori, however, seems not so much to challenge the desirability of impleader as he wishes to dismiss parties that may have a colorable claim to some of the Transco shares that he purchased from Barney Olter. Mori seeks the dismissal of potential counter-claimants and counterclaims to some of the stock he bought from Barney Olter. The third-party plaintiffs (the defendants) limit their opposition to Mori's motion to dismiss to their contention that, instead of dismissals, default judgments, which would have a preclusive or res judicata effect, should instead be entered.

On February 7, 2011, the clerk entered the defaults of Roselt Pobuk, Dwight Olter, and Barney Olter individually and in his capacity as the administrator of the Estate of Salter Olter. The defendants' default judgment motion was served on Barney Olter's then-counsel of record. In O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 261-62 (Pon. 2001), the court refused to enter a default judgment against a defendant who had failed to respond to an amended complaint because it was apparent that that defendant had been and continued to actively defend the case against him. "No default can be entered against a party which has either filed a response indicating its intent to defend the action or engaged in other behavior which constitutes an active defense." *Id.* at 260. Barney Olter, however, appears to have abandoned his claims and any defense to the case against him. Barney Olter, at some point before the defendants' amended third-party complaint was filed, ceased any active defense. Furthermore, the amended pleading contains new and different claims against Barney Olter that were not present in the original third-party complaint. He has not responded to these.

"If the party against whom judgment by default is sought has appeared in the action, that party . . . shall be served with written notice of the application for judgment . . ." FSM Civ. R. 55(b)(2). The defendants' May 12, 2011 Renewed Motion for Entry of Default Judgment, the operative default

⁴ This part of Rule 14(a), which is identical to the U.S. rule, has not previously been construed so U.S. sources may be consulted for guidance. *See supra* note 1.

judgment application before the court, was not served on either Barney Olter, who undisputedly has appeared in this action, or on his former counsel. No certificate of service on him is in the file. The February 2011 default judgment motion was served on Barney Olter's counsel of record who had learned in October 2010 that Barney Olter had discharged him sometime before then, making the effectiveness of the service doubtful. The court wishes to be cautious here. Accordingly, the motion for a default judgment against Barney Olter is denied without prejudice for lack of service of the motion on him personally. Roselt Pobuk and Dwight Olter have never appeared in this action so this provision in the default judgment rule does not apply to them.

While a default judgment is not an adjudication on the merits of a claim, Narruhn v. Chuuk, 17 FSM Intrm. 289, 298 (App. 2010) (a default judgment makes no claim at all as to the merits of the case), it is a final judgment with res judicata and claim preclusion effect, see Ittu v. Charley, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987); see also Mid-Pacific Constr. Co. v. Semes (III), 6 FSM Intrm. 180, 185 & n.3 (Pon. 1993). With that understanding, the defendants' Renewed Motion for Entry of Default Judgment, filed May 12, 2011, is granted as to Roselt Pobuk and Dwight Olter. There being no just cause for delay, the clerk is hereby directed to enter default judgments against Roselt Pobuk and Dwight Olter. FSM Civ. R. 54(b).

B. "Renewed" Motions

Mori, in his June 6, 2011 filing of his views, "renews" his motion for judgment on the pleadings, filed November 12, 2010. The defendants, on June 30, 2011, filed their Renewed Motion for Partial Summary Judgment. No party filed an opposition to either "renewed" motion.

1. Mori's "Renewed" Motion for Judgment on the Pleadings

Mori "renewed" his November 12, 2010 Motion for Judgment on the Pleadings by stating in the Plaintiff Mori's Views per Order of May 18, 2011 ("Views"), filed June 6, 2011, that the motion was "renewed" because he "incorporate[d] and restate[d] his Motion for Judgment on the Pleadings dated November 12, 2010" and asserted that he need not re-file the original motion because it was filed in the present matter when the third-party defendants were "duly represented by their previous counsel of record, the MLSC, and service was duly made on previous counsel." Views at 5, 6 (June 6, 2011). Mori thus incorporates by reference his earlier motion.

Mori stated that as a courtesy "to the intervening third party defendants," he would "re-serve" the Motion for Judgment on the Pleadings on them. *Id.* at 6. No such certificate of service has been filed. The court must presume that they have not been served. The court, in its December 9, 2010 Order Enlarging Time and Setting Schedule, noted that the motion is actually be a summary judgment motion since matters outside the pleadings were presented, FSM Civ. R. 12(c), and denied the November 12, 2010 Motion for Judgment on the Pleadings as premature because the pleadings had not yet closed. The third-party defendants had yet to plead and their rights would be affected. They now have either pled or defaulted.

Accordingly, the "renewed" motion for judgment on the pleadings is denied without prejudice. It seems that the third-party defendants were not served although their rights would be affected. It also seems that the renewed motion, incorporated by reference deep in another document, may have slipped by the other parties without notice since none responded. And, since the situation has changed since the November 12, 2010 motion was made (two third-party defendants have appeared and are represented; this order dismisses Mori's derivative action claims; and some new discovery should be available to Mori soon), it may be advantageous to Mori to revise his motion to take such matters into account if he intends to renew his summary judgment motion.

2. The Defendants' Partial Summary Judgment Motion

The defendants filed a renewed partial summary judgment motion. They ask that the individual defendants, Hasiguchi and Elsa Lagradilla, be dismissed because, in their view, Transco's presence in this case is solely as an interpleader – as a party who has joined in one case all those persons with claims to any of the 2,160 shares formerly owned by Salter Olter so that all their rights can be adjudicated and Transco will abide the result.

This argument ignores Mori's tort claims of attempted improper interference with his purchase of the Salter Olter stock from Barney Olter. Hasiguchi seems central to those claims. Transco may also possibly be involved.

Lagradilla's only involvement seems to be that she is the corporate official who would register any transferred stock in the new owner's name and thus was the person who refused to register the stock in Mori's name unless the proper probate court orders were issued and received. Her continued presence (especially since the derivative action claims are dismissed) is solely to be the recipient of a court order telling her in whose name or names to register the stocks that were formerly Salter Olter's. The parties may be able to agree that such an order to Transco would be sufficient and her continued presence is thus unnecessary and thereby agree to her dismissal. The parties are invited to consider that possibility and file their proposal within 30 days.

The defendants' renewed partial summary judgment motion is accordingly denied.

VI. CONCLUSION AND SCHEDULE

Accordingly, Mori's derivative action claims are dismissed; Mori's motion to compel discovery is granted in part and denied in part and Hasiguchi shall file and serve his answers within 30 days; the court's own motion to sever is moot and is withdrawn; default judgments are entered against third-party defendants Roselt Pobuk and Dwight Olter; the motion to enter a default judgment against third-party defendant Barney Olter is denied without prejudice for lack of service; and the renewed summary judgment motions of Mori and of the defendants are denied.

Any further discovery shall be completed by November 25, 2011, and any further pretrial motions shall be filed by December 29, 2011.

* * * *