



Plaintiff's misguided Complaint should be DISMISSED and her request for a temporary restraining order ("TRO") and injunctive relief should be DENIED.

## ANALYSIS

### I.

#### **PLAINTIFF HAS FAILED TO SHOW EITHER IRREPARABLE INJURY OR A LIKELIHOOD OF SUCCESS ON THE MERITS**

The party seeking a preliminary injunction has the burden of proving that she is entitled to such an extraordinary remedy. In Guam, for a preliminary injunction to issue, "the movant must show, (1) irreparable injury, and (2) likelihood of success on the merits." Hong Kong and Shanghai Banking 16 Corp., Ltd. v. Kallingal, 2005 Guam 13 ¶18 (*citing* Carlson v. Guam Telephone Authority, 2002 17 Guam 15 ¶8) (internal quotations omitted). According to a leading treatise on procedure, "[i]t is frequently observed that a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." 11A WRIGHT, MILLER & KANE, FED. PRACTICE & PROCEDURE, Civil 2d §2948 (1995 ed.).

#### **A. Plaintiff's Speculation about Possible Negative Outcomes is Insufficient to Show Irreparable Harm**

Plaintiff is heard to complain of a host of vague harms that might befall GRMC if the "outsiders" are not reined in. However, she does not show that any of her speculative parade of horrors is either imminent or irreparable.

There is no allegation and no proof that the "outsiders" are attempting to imminently loot GRMC of its assets or close down the hospital. Indeed, there is no allegation—and certainly no proof—that any patient at GRMC has faced or will face any

harm as a consequence of GRMC's new leadership. Instead, the Complaint alleges what can only be viewed as long-term institutional concerns, such as jeopardizing financing, eroding "investor confidence," and "eroding morale and confidence in the organization." Even if these concerns were legitimate—and nothing in the record suggests that they are—they are not the kind of imminent threats of irreparable harm contemplated by the rules governing TROs and preliminary injunctions.

Thus, in the similar case of Tsang Bros Corporation v. Man Ling Au, et al., Super. Ct. Guam Civil Case No. CV1218-17, Decision and Order — P1.'s Application for Preliminary Injunction (Dec. 22, 2017) (per Sukola, J.) at pp. 6, 7, an injunction was denied and a TRO dissolved where the motion for such relief was "based on unsubstantiated conclusions repeated several times regarding lack of control of the business due to the transfer of the shares without a proxy or loss of financing needed for expansion due to threat of loss of the line of credit."

The Guam Supreme Court has reasoned that "irreparable harm is not assumed; it must be demonstrated." Hong Kong and Shanghai Banking Corp., 2005 Guam 13, ¶ 22. Plaintiff has nothing but conjecture to support her claims of irreparable harm. In fact, some of Plaintiff's claims are easily refuted. For example, Plaintiff's concerns about new leadership somehow jeopardizing loan proceeds are misplaced inasmuch as the major bond refinancing GRMC has been pursuing that was referenced in Plaintiff's Complaint was recently completed and closed. *See* Declaration of Teodorico Constantino, Chief Financial Officer, GRMC, ¶4.

Moreover, if injunctive relief were to be granted as requested, GRMC's Board and management would effectively be left powerless to act for an indefinite and uncertain

amount of time, threatening harm not only to GRMC, but potentially to its employees, vendors, and patients, who rely on such leadership on a day-to-day basis, while GRMC would be cast into judicial limbo awaiting the outcome of foreign proceedings. The Complaint vaguely yet broadly seeks an order enjoining GRMC, its agents, servants and employees, shareholders, board members and others, from taking any action whatsoever. *See* Prayer, ¶2. Essentially, the relief requested would not allow GRMC's new leadership to do much of anything.

When faced with competing harms, a court tends to leave the parties where it finds them; and courts rightly refrain from granting injunctive relief that might wind up doing more harm than good.

**B. Plaintiff Cannot Succeed on the Merits because she has No Claim on the Merits**

One of the key factors in considering a request for preliminary injunctive relief is the probability of success on the merits. As we have seen, in the instant case the question arises, "what merits?" How can the court assess whether Plaintiff might prevail on her claims when she is making no claims at all, but simply seeks a temporary injunctive remedy?

Plaintiff appears to be arguing that because the Philippines SEC is expected to make a ruling soon, and she expects that ruling to be in her favor, that she has somehow demonstrated a probability of success in this action. Plaintiff is mistaken. Determining whether or not Plaintiff and her allies are likely to succeed on the merits of foreign regulatory and judicial battles would require the court to speculate on the actions of non-Guam residents acting in a foreign country as well as on the determinations of foreign

administrative bodies and foreign courts applying foreign law. This court is not equipped to make such speculations; and even if it undertook to do so, it could not forecast events with any clarity in the instant case because it has only been supplied a rather selective version of this already litigious saga.

Among other things, Plaintiff fails to show that any action taken by the Philippines SEC will actually resolve the key issue of share ownership. In reality, while SEC entities sit to regulate publically-traded corporate transactions, they do not sit to adjudicate disputed ownership of shares, which is ultimately the function of the courts (in this case, the courts of a foreign nation). Thus, even if the Philippines SEC were to issue an order favorable to Plaintiff's position, it would likely impose a fine or take other administrative action, but it would not necessarily resolve the issue of share ownership. Neither would such a ruling necessarily be the end of the story. Plaintiff has failed to show that any SEC ruling would not be subject to administrative or judicial review. In other words, the SEC's ruling is not the end of this controversy but likely just the beginning. Yet Plaintiff would have the Court issue a boundless and indefinite injunction preventing the new Board and managers from taking any material actions at GRMC.

Second, and perhaps more importantly, Plaintiff has only given the court one side of a very complicated story that is already mired in litigation in the courts of the Philippines. Attached as an addendum to this memorandum is the October 5, 2018 Order issued by a Philippines court which effectively undermines Plaintiff's contention that the merits of this corporate dispute are likely to be resolved in her favor.

In Professional Services Corp. v. Bengzon, Dr. Alfredo R.A. Bengzon, father-in-law of Plaintiff herein, together with his co-respondents (collectively the "Bengzon

Group”), refused to accept the authority of petitioners (newly-selected PSI Directors) and were found to have “blocked, threatened and prevented the newly elected Board of Directors and others of PSI from assuming their office and performing their functions and responsibilities to the detriment of the operations of The Medical City.” Professional Services Corp. v. Bengzon, Rep. Philippines, Reg’l. Tr. Ct. (Pasig) No. R-PSG-18-02241, Order (Oct. 8. 2018), p. 6.<sup>1</sup>

According to the court, the Bengzon Group’s disruptions “gravely affected the day-to-day operations of the The Medical City” and other clinics in the Philippines. *Id.*, p. 4. The court therein found that the petitioners (the newly-selected PSI Directors) were entitled to injunctive relief to protect them and the public at large from the actions of the Bengzon Group based on a *prima facie* showing that the Board Members were duly elected.

In other words, **Plaintiff herein is attempting to have this Court impose an order that would effectively allow the Bengzon Group to do here on Guam what a court in the Philippines ordered them to *refrain* from doing there—prevent a newly-elected Board from performing their functions and responsibilities as Directors of a hospital.** The Bengzon court noted that other Philippines courts and the Philippines SEC would be addressing the legality of share ownership, amongst other issues, but nevertheless did not hesitate to the rule that the newly-elected directors were entitled to be free from interference from the Bengzon Group at least until such time as those issues are finally resolved. Similarly, this Court should decline to allow the Bengzon Group to upset

---

<sup>1</sup> The Court is asked to take judicial notice of this disposition issued by a foreign judicial tribunal. A copy of the Order is attached to this Brief.

the outcome of corporate proceedings unless and until a final judgment of a court of competent jurisdiction commands a contrary result.

That Plaintiff would seek *ex parte* TRO and injunctive relief without first apprising this court of the Bengzon ruling speaks volumes about the supposed “merits” of her cause; and it suggests that Plaintiff’s self-serving allegations be taken with more than the cursory grain of salt.

C. **Injunctive Relief Should be Denied because this Court Lacks the Power to Shape Effective Injunctive Relief under the Circumstances**

As we have seen, the Complaint vaguely yet broadly seeks an order enjoining GRMC, its agents, servants and employees, shareholders, board members and others, from taking any action whatsoever. *See* Prayer, ¶2. To that extent the Complaint is manifestly overbroad.

At the same time, the Complaint seeks to have the court stay the actions of the November 19, 2018 shareholders and board meetings “until such time as the SEC can resolve the ownership issue of the shareholders presently before it.” Prayer, ¶3. Yet as discussed, Plaintiff fails to take into account the possibility of administrative appeals or judicial review, which are seemingly inevitable under the circumstances.

Plaintiff speculates that the Philippines SEC could render a decision in Mid-December, but what if it does not? What if that decision is unfavorable to Plaintiff? What if the aggrieved party then takes further steps to obtain administrative or judicial review? Is GRMC to be held in limbo by order of the Court for the period of months or years that might be required for a foreign council and the foreign courts to reach a final disposition? This Court recently rejected a request to impose a similarly indefinite period of limbo. *See*

Salas v. Ungacta, Super. Ct. Guam Civil Case No. CV1001-16, Decision and Order (May 10, 2017) (per Iriarte, J.), p. 2 (denying request for indefinite stay).

Moreover, the relief Plaintiff seeks would not actually preserve pre-suit status quo. Plaintiff admits that the actions of the parent company's board and shareholders in the Philippines has already "caused irreparable harm to Plaintiff personally and the GHDI." Complaint, ¶¶15, 16. She fails to explain how injunctive relief can "unring the bell" on this alleged harm. Plaintiff Bengzon is no longer CEO of GRMC and a new CEO, former lieutenant Governor and M.D. Michael Cruz has been appointed. *See* Declaration of Teodorico Constantino, ¶ 3. Plaintiff would apparently have this Court straightjacket the incoming CEO and leave him and the new GRMC management team powerless to do much of anything.

## II.

### **PLAINTIFF'S SUIT FAILS TO STATE A CLAIM BECAUSE IT IS A REMEDY IN PURSUIT OF A CAUSE OF ACTION**

The black letter rules of civil procedure mandate that an essential element of a civil action is a "demand for a judgment." Specifically, Rule 8(a) states that "a pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) **a demand for judgment** for the relief to which the pleader seeks." The third element, a demand for judgment, is manifestly missing from Plaintiff's Complaint.

The Complaint cites no statutory basis for an injunction, so presumably she is seeking injunctive relief pursuant to Rule 65 of the Guam Rules of Civil Procedure. That Rule contemplates temporary relief *pending trial*. But here, there will be no trial.

Pursuant to Guam R. Civ. P. 12(b)(6) a complaint is subject to dismissal where it fails to state a claim upon which relief can be granted. The bar is low in that Guam law only requires a Plaintiff to make a short and plain statement of her entitlement to relief. *See Ukau v. Wang*, 2016 Guam 26, ¶52. Yet Plaintiff has failed to clear the bar, because she states no claim for relief whatsoever. Plaintiff's Complaint is the epitome of a suit that fails to state a claim. Plaintiff seeks temporary and preliminary injunctive relief, but her Complaint fails to state any underlying cause of action.

Plaintiff appears to maintain that she was wrongfully terminated as CEO, but her Complaint does not seek her reinstatement or back wages. Neither does she seek damages based on any tort or contract theory. Plaintiff maintains that her former employer is threatened with doom by the actions of "outsiders," but she states no legal basis as a former director for any claim to oust the outsiders. This cannot possibly be a shareholders derivative action because, according to GRMC's 2018 Annual Report—signed by Plaintiff Bengzon herself—she is not a shareholder of GRMC. *See* Declaration of Teodorico Constantino, Exhibit A. So what claim precisely is Plaintiff seeking to vindicate? She fails to say. In fact, the Complaint states no colorable claim for relief whatsoever. A TRO and injunction are not claims for relief but instead merely interim remedies pending trial.

This is no mere technical defect but presents a fundamental problem for Plaintiff. A preliminary injunction is a "drastic remedy," which serves to maintain the status quo *ante litem*. *See Benavente v. Taitano*, 2006 Guam 20, ¶16. Essentially, the function of

Rule 65 is to preserve the status quo until the court can resolve the merits of the case. Yet here, the requested injunction is Plaintiff's end game. The issuance of an injunction would effectively end the litigation—there would be nothing further for the court to adjudicate, and no trial to preside over. Rule 65(a)(2) provides for consolidation with the trial on merits. Here, however, there are no “merits” to try. The Complaint is manifestly defective and should be dismissed.

### III.

#### **PLAINTIFF LACKS STANDING TO ASSERT CLAIMS FOR HARM TO GRMC**

Whether a plaintiff has standing to pursue her claim is a threshold issue, as the court has no subject matter jurisdiction over a matter when the plaintiff lacks standing. Benavente v. Taitano, 2006 Guam 15, ¶4. To establish standing, the Plaintiff must allege that she has suffered an injury-in-fact to a legally protected interest. Macris v. Guam Memorial Hospital Authority, 2008 Guam 6, ¶10.

Plaintiff alleges certain harms that could eventually befall GRMC if the “outsiders” are allowed to have their way, such as “erod[ing] morale and confidence in the organization,” (Complaint, ¶16) compromising a pending financing exercise (¶17) and actions threatening the financial viability of hospital (¶18). These supposed harms faced by GRMC are not personal to Plaintiff Bengzon. Whether she likes it or not, Plaintiff Bengzon is now the true “outsider.” As former CEO, what standing does she have to complain of potential harm to her former company? Even if Plaintiff were still CEO, what standing would she have to complain of harm to GRMC as a whole, rather than harm

personal to herself? As discussed above, Plaintiff is not a shareholder, so what standing does she have to seek any relief? Her Complaint fails to say.

#### IV.

#### **THE COMPLAINT FAILS TO NAME INDISPENSIBLE PARTIES**

Plaintiff complains of the November 19, 2018 Board and Shareholders meetings which resulted in her being voted off the Board and terminated as CEO. She failed, however, to name the people or companies who actually voted to remove her; and they are not defendants in the instant suit, nor are they apparently even U.S. Citizens or Guam residents. How is the Court to shape effective relief in this action if the actors who allegedly inflicted the harm are beyond the reach of this Court's injunctive powers?

As this Court recently instructed, a party can move to dismiss a case under Guam Rule of Civil Procedure Rule 12(b)(7) for failure to join indispensable parties in violation of Rule 19. Under Rule 19, the Court must first consider whether absent parties are necessary parties, and if so, whether joinder is possible. *See Wong v. Cyfred*, Super. Ct. Guam Civil Case No. CV0425-18, Decision and Order (Nov. 21, 2108) (per Iriarte, J.), pp. 2-3; *citing Agana Beach Condo. Homeowners' Ass'n v. Mafnas*, 2013 Guam 9, ¶57. If joinder is not possible, the Court then determines whether a party is indispensable and if "in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." *Wong, Id., citing Benavente v. Taitano*, 2006 Guam 15, ¶46 (*quoting Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109 (1968)). An absent party is considered "needed for just adjudication" if the moving party,

who has the burden of persuasion in arguing for dismissal, satisfies one of the three tests outlined in Rule 19. *Id.*, Benavente, 2006 Guam 15, ¶76.

Under Rule 19(a)(1), an absentee's presence is required when "complete relief cannot be accorded among those already parties." *Id.*, Benavente, 2006 Guam 15, ¶59 (*quoting Morgan Guar. Trust Co. v. Martin*, 466 F.2d 593, 598 (7th Cir. 1972)).

If, as Plaintiff seems to maintain, the instant action ultimately turns on resolution of conflicting claims to ownership of stock in GRMC's parent company, then the shareholders (and the Directors) need to be joined as indispensable parties. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975). This includes the Directors and affected shareholders of GRMC, as well as those of the parent company, because the GRMC shareholders derived their interests in the shares through others, and their continuing interest as shareholders is purportedly at issue. *See Hilton v. Atlantic Refining Co.*, 327 F.2d 217, 219 (5th Cir. 1964) (royalty holders were indispensable parties to litigation involving validity of leasehold interest because they would lose benefits if lease were held invalid).

## V.

### **PLAINTIFF HAS FAILED TO COMPLY WITH OR ADDRESS RULE 65(c)'S SECURITY REQUIREMENT**

Rule 65(c) requires a "giving of security by the applicant . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65(c) requires a party to post a security bond before a restraining order or preliminary injunction is put into place. GUAM R. CIV. P. Rule 65(c); Swegler v. Myung Mok Bae, et. al., Super. Ct. Guam Civil Case No.

CV0452-16, Decision and Order (Sept. 15, 2017) at \*9. Plaintiff herein has entirely failed to address this requirement.

**CONCLUSION**

The Court should leave the parties where it found them. This is a textbook case warranting denial of injunctive relief. Plaintiff seeks vast injunctive remedies that would effectively cripple GRMC based on speculation about the acts of foreign individuals, foreign companies, and foreign tribunals, without actually making any underlying claim for relief and without regard for settled judicial principles constraining the “extraordinary” remedy of injunctive relief to proper boundaries. The Complaint should be DISMISSED, and injunctive relief should be DENIED.

Dated this 11<sup>th</sup> day of December, 2018.

**THOMPSON THOMPSON & ALCANTARA, P.C.**  
Attorneys for Defendant Guam Healthcare Development,  
Inc. dba Guam Regional Medical City

By:   
\_\_\_\_\_  
**R. TODD THOMPSON**

P181128.RTT