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IN THE SUPERIOR COURT OF GUAM

DELLE SWEGLER NADLER, MOANA SWELGER LUKA, and MARK SWEGLER, derivatively on behalf of FADIAN DEVELOPMENT, INC., Plaintiffs, v. MYUNG MOK BAE, B&K DEVELOPMENT, LLC, KEI ZA RYU BAE, and DOES 1-10, Defendants.	CIVIL CASE NO. CV0452-16 **DECISION AND ORDER** ***(Plaintiffs' Motion for Attorney's Fees and Costs)***

INTRODUCTION

This matter came before the Honorable Arthur R. Barcinas on March 25, 2026, upon Plaintiffs' Motion for Attorney's Fees and Costs. Plaintiffs Delle Swegler Nadler, Moana Swegler Luka, and Mark Swegler (collectively, "Swegler Heirs") filed this suit deriviatively on behalf of Fadian Development, Inc., ("Fadian"). Plaintiffs were represented by Attorney Minakshi V. Hemlani, Esq. Defendants Myung Mok Bae and Kei Za Ryu Bae (collectively, "the Baes") were represented by Attorney Delia S. Lujan Wolff. Attorney Georgette B. Concepcion represented[1] Defendant B&K Development, LLC ("B&K") previously in this matter. Having reviewed the briefings filed by both parties, the Court issues the following Decision and Order.

BACKGROUND

[1] Brooks Concepcion Law, P.C. was discharged as counsel of B&K Development, LLC. on June 25, 2020. (Discharge of Counsel, June 25, 2020)

On May 26, 2016, the Swegler Heirs brought this action derivatively on behalf of Fadian ("Plaintiffs"). The Plaintiffs sought a judgment quieting title in the Fadian real properties, cancellation of the fraudulent quitclaim deed and related instruments, damages for breach of fiduciary duty, punitive damages, injunctive relief, attorney's fees, and costs. Verified Complaint at 15, Prayer for Relief ¶¶ 1-8 (May 26, 2016).

This Court previously granted the Plaintiff's Motion for Summary Judgment, declaring the Quitclaim Deed purporting to convey the Fadian Property to B&K as null and void, ordering the deed cancelled, and the title quieted in favor of Fadian. Decision and Order (Nov. 3, 2019). Additionally, the Court granted the Plaintiff's Motion for Summary Judgment and found that Defendants Bae and Ryu breached their fiduciary duties to Fadian by transferring the Fadian Property to B&K, as well as aided and abetted each other's breach of their fiduciary duties. *Id.*

Following this Court's granting of the Plaintiff's Motion for Summary Judgment, the parties briefed on the issue of damages. The Plaintiffs' briefing included a request for attorneys' fees and costs. An evidentiary hearing on damages was set, but the Plaintiffs then moved to withdraw their request for damages and separately filed this Motion for Attorneys' Fees and Costs on March 25, 2026 ("Plaintiffs' Motion"). This Court granted the Plaintiffs' motion to withdraw. Order (April 2, 2026). The Plaintiffs susbsequently filed this motion for Attorney's Fees and Costs. On April 22, 2026, the Defendants filed their Opposition, and the Plaintiffs then later replied.

After receiving the briefings of the Parties, the Court took this matter under advisement.

DISCUSSION

I. The American Rule

Under Guam Rules of Civil Procedure Rule 52(d)(2)(A), claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. GRCP Rule 52(d)(2)(A). In cases involving the award of attorney's fees, Guam follows the American Rule. *See Fleming v. Quigley*, 2003 Guam 4 ¶ 7. The American Rule dictates that parties will bear their own litigation expenses, including attorney's fees. *Id.*

There are, however, several recognized exceptions to the American Rule. These exceptions include where attorney's fees are: (1) authorized by statute, (2) authorized by contract, or (3) allowed in judicially-established equitable circumstances. *Id.* Guam law recognizes other equitable exceptions to the American Rule, including the common fund, substantial benefit, private attorney general, third-party tort, and bad-faith theories of recovery. *Id.* at n. 3 *citing Trope v. Katz*, 45 Cal. Rptr. 2d 241, 245, 902 P.2d 259, 263 (1995); *Young v. Redman*, 128 Cal. Rptr. 86, 92 (Ct. App. 1976).

A. The Court cannot order the Baes to pay the attorneys' fees of the Swegler Heirs under the Guam Business Corporation Act

Plaintiffs argue that the Guam Legislature has expressly adopted the "substantial benefit" doctrine for derivative actions brought by corporate shareholders. Specifically, Plaintiffs state that 18 GCA § 28726 of the Guam Business Corporation Act (GBCA) authorizes the indemnification of attorney's fees for shareholders who successfully bring derivative actions. While Plaintiffs' characterization of section 28726 is correct, that statute does not authorize the Swegler Heirs to be paid their attorney's fees or litigation expenses by the Baes or B&K, LLC in the way that Plaintiffs' request.

Guam Code Annotated states the following:

> On termination of the derivative proceeding the court may:
>
> (a) order the corporation to pay the plaintiff's reasonable expenses (including counsel fees) incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation;
> (c) order a party to pay an opposing party's reasonable expenses (including counsel fees) incurred because of the filing of a pleading, motion or other paper, if it finds that the pleading, motion or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

18 GCA § 28726(a)(c).

Plainly stated, this section of the GBCA authorizes the Court to order a corporation to indemnify the reasonable expenses of the plaintiff incurred by them, if the Court finds that the

corporation has received a substantial benefit as a result of the plaintiff's litigation efforts. This appears to be substantively similar to the "substantial benefits" exception to the American Rule.

This authority, however, cannot be used to order the Baes to indemnify the Swegler heirs. The Swegler heirs, not the Baes, represent the Fadian corporation in this matter, and the statute only authorizes ordering a corporation to pay the plaintiff's expenses.

Under subsection (a) of the statute, the Court could only require Fadian to indemnify the Swegler Heirs. The Sweglers' litigation of this matter resulted in substantial benefit to the Fadian Corporation in the form of the protection of corporate assets. This falls squarely within the scenario posed by subsection (a).

The problem, however, is that the Sweglers have moved for indemnification by the Defendant Baes, in their individual capacity, rather than in their capacity as shareholders of Fadian. The Court could only use subsection (a) to require indemnification by the corporation.

Under subsection (c), there appears to be some room to allow for the Court to award of attorney's fees to be paid by the Baes. This subsection too, however, appears to be ill-fitted.

Subsection (c) appears to contemplate an award of attorney's fees for frivolous actions within a derivative proceeding. While the Court has made previous findings regarding breach in fiduciary duty and other bad conduct by the Defendant, it cannot be said that the Defendants have acted frivolously in these proceedings.

The Plaintiffs have requested in the alternative that the Court issue an order requiring Fadian to pay the Swegler heirs' attorney fees. The Court retains the right to do so upon the termination of these derivative proceedings but also notes that Fadian possesses the authority to issue such indemnification without Court order under 18 GCA § 28822.

Having determined that the Court cannot invoke the statutory exceptions to the American Rule in the manner requested by Plaintiffs, the Court now moves to determine whether other exceptions may apply.

b. The Court cannot order the Baes to pay under the "Substantial-Benefit," "Common Fund," or "Third-party Tort" Doctrine

The Guam Supreme Court adopted other equitable exceptions to the American Rule in *Fleming v. Quigley*. *See* 2003 Guam 4 ¶ 7. These equitable exceptions include the common fund, substantial benefit, private attorney general, third-party tort, and bad-faith theories of recovery. *Id.* at n. 3 *citing Trope v. Katz*, 45 Cal. Rptr. 2d 241, 245, 902 P.2d 259, 263 (1995); *Young v. Redman*, 128 Cal. Rptr. 86, 92 (Ct. App. 1976).

The Substantial-Benefit doctrine, as Plaintiff points out, is similar in language and function to the language of 18 GCA § 28726. For the reasons stated above, the substantial benefit doctrine would not apply here to help the Plaintiff receive an award of attorney's fees from the Baes.

The "common fund" doctrine also does not offer a way for the Swegler Heirs to recover against the Baes.

The "common fund" exception is meant to avoid unjust enrichment by distributing funds established by litigation so that the *beneficiaries* of the litigation bear the cost. *See lealao v. Beneficial California, Inc.,* 82 Cal.App.4th 19, 52-53.

There has been no common fund created or preserved through the litigation efforts of the Swegler Heirs here. The only interest implicated was Fadian's interest in thirty-three (33) parcels of real property. As such, the Court is also unable to use the "common-fund" doctrine to order the Baes to pay the Sweglers.

Under the "third-party tort" doctrine, a person who has been required to act in order to protect their interests by bringing or defending an action is entitled to compensation for loss of time, attorney fees, and other expenditures. *See Fleming,* at ¶ 17 *citing Twentieth Century-Fox Film Corp. v. Harbor Ins. Co.*, 149 Cal. Rptr. 313, 319 n.9 (Ct. App. 1978) (quoting Restatement of Torts § 914).

This doctrine allows attorney's fees as an *element of damages* where "plaintiff, as a proximate result of defendant's fraud, is required to prosecute or defend against a third party for the protection of his interest. In such cases, reasonable attorney's fees incurred in connection with the third-party lawsuit are recoverable as *damages* caused by defendant's tortious act." *Id.* at ¶ 28 *citing Glendale Fed. Sav. & Loan,* 135 Cal. Rptr. At 831 (citation omitted).

Much of this doctrine would seem to otherwise apply to this case, but, crucially, the Plaintiffs have withdrawn their claim for damages. Pla Mot. to Withdraw Mot. For Damages (March 25, 2026).

The *Fleming* Court's invocation of the "third-party" tort theory allowed for attorney's fees to be used *as an element of damages*. Although it ultimately declined to impose the theory because Fleming was not suing to recover for expenses incurred in a prior suit against a third party. *See Fleming*, at ¶ 28.

Here, the Sweglers assert entitlement to attorney's fees due to successfully pursuing a derivative suit against B&K LLC on behalf of Fadian. However, the Sweglers request for attorney's fees and nothing further. They have not made a claim for compensation resulting from the Baes requiring the Sweglers to sue B&K LLC due to their misrepresentation. As such, the Court finds that it cannot expand this doctrine to find that the third-party tort doctrine can be invoked in indemnification requests where no damages are requested as a result of fraud.

c. The Plaintiffs may recover from the Baes under the "Bad Faith" Exception

An award of attorney fees under the "bad faith" exception is punitive, and the penalty can be imposed 'only in exceptional cases and for dominating reasons of justice.'" *See Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 757 (9th Cir. 1986) citing *United States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir.1979) *(quoting 6 J. Moore, Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1972)); *see Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973).

The Court, within its discretion, finds it necessary to award attorney fees to the Plaintiff under the "bad faith" doctrine due to the exceptional circumstances here.

This matter differs from the ordinary derivative action. Plaintiffs did not merely achieve a favorable result for the corporation. Rather, Plaintiffs were compelled to initiate and prosecute this litigation because of Defendants' adjudicated fiduciary misconduct. This Court has already found that Defendants have breached their fiduciary duties owed to Fadian, aided and abetted one another's breaches, failed to comply with Guam statutory requirements, and sought to effect a transfer undertaken for their own benefit without consideration to the corporation.

The successful derivative plaintiffs should not be forced to bear the entire financial burden of securing a substantial corporate benefit, particularly where the heirs' interest in the company makes up 1/3rd of the company while the defendants comprise the entirety of the remaining amount.

While Fadian has borne a substantial-benefit in the form of the protection of its corporate assets, to require the corporation, and its innocent shareholders alone, to pay the costs of restoring assets wrongfully diverted through fiduciary misconduct would undermine the equitable principles underlying derivative litigation. Such a result would shift the financial consequences of Defendants' conduct onto the corporation and shareholders injured by that conduct. Equity does not require such an outcome.

The Court finds it necessary to invoke its equitable authority to prevent the burden of remedying the Defendants' misconduct from falling entirely upon the corporation and innocent shareholders.

CONCLUSION

In light of the reasoning above, Plaintiff's Motion for Attorney's Fees and Costs is **GRANTED IN PART**.

As to entitlement, Plaintiffs are entitled to recover reasonable attorney's fees and recoverable litigation expenses from Defendants Myung Mok Bae and Kei Za Ryu Bae. Recovery of gross receipts taxes and business privilege taxes is **DENIED**.

Westlaw and other properly documented legal research expenses may be recoverable subject to the Court's final determination of amount. The amount of recoverable attorney's fees and costs shall be determined by separate order following supplemental briefing.

IT IS SO ORDERED OCT 20 2026

HONORABLE ARTHUR R. BARCINAS
Judge, Superior Court of Guam