

**FILED**

DEC 16 2019

**IN THE HIGH COURT  
REPUBLIC OF THE MARSHALL ISLANDS**

**ASST. CLERK OF COURTS  
REPUBLIC OF THE MARSHALL ISLANDS**

FIRST COMMERCIAL BANK,  Plaintiff,  vs.  FV TAUMOANA, ET. AL.,  Defendants.	CIVIL ACTION 2017-278   <b>JUDGMENT</b>
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To: Divine Waiti, counsel for plaintiff  
David M. Strauss, counsel for defendants FV Taumoana and Tuvalu Tuna FH Co.

**I. INTRODUCTION**

This matter is brought under the maritime jurisdiction of this Court on a complaint filed in November 18, 2017, by plaintiff. A trial covering a span of 5 days commencing April 15, through 19, 2019 was held in the matter. The plaintiff is First Commercial Bank a banking corporation established pursuant to the laws of the Republic of China, Taiwan, (hereinafter, "FCB"), and the defendants are the FV Taumoana, a fishing vessel registered under the flag of the Republic of Tuvalu (hereinafter "Taumoana"), being sued *in rem*; Ching Fu Shipbuilding Co., Ltd. ("Ching Fu"); and. Tuvalu Tuna FH Co., (hereinafter "TTFH"), a corporation established under the laws of the Republic of Tuvalu.

Plaintiff seeks judgment in the amount of US\$24M plus related attorney's fees and costs against TTFH and Taumoana and seeks to have the Court enforce a September 30, 2016 and an October 30, 2017, guarantee agreement FCB claims TTFH concluded which authorized the making of a mortgage in FCB's favor on the Taumoana, her engines, tackle, boilers, machinery, gear

equipment, appurtenances and furnishings and further seeks to have the Court authorize the sale of the Taumoana to satisfy any judgment issued.

Earlier, on April 25, 2018, in this same action, the Court granted judgment by default in the amount of US\$24,005,872.98 in favor of plaintiff and against defendant Ching Fu for the failure of Ching Fu to timely answer or otherwise defend against the complaint made against it.

In essence, FCB's claim is contingent upon a finding that Wei Jhy Chen (hereinafter "John Chen"), had actual, apparent or implied (inherent) authority to commit TTFH to the September 30, 2016, guarantee agreement, the December 17, 2016, first preferred ship mortgage agreement on the Taumoana and the October 3, 2017, guarantee agreement.

Defendants Taumoana and TTFH, on the other hand, assert that neither John Chen nor Chang-nan Chen, acting individually or jointly had any authority whatsoever to commit TTFH to the guarantee agreements nor to the first preferred mortgage agreement on the Taumoana. Defendants claim that the September 7, 2016, TTFH board resolution (hereinafter "the TTFH resolution") alleged to express the consent of the TTFH board to guarantee the Ching Fu loan, putting a mortgage on the company vessels, including the Taumoana, and authorizing John Chen to arrange for all matters, was never brought to the attention of, discussed nor agreed to by the board. Further, that the signatures of the NAFICOT appointed directors were forged.

Subsequent to the submission by the parties of their written closing arguments and proposed findings of fact and conclusions of law, the Court asked that the parties make additional written submissions on laws of the Republic of Tuvalu relating to companies.

For the reasons set forth below, the Court adjudges in favor of defendants Taumoana and TTFH and against plaintiff FCB.

## **II. ISSUES**

At issue are -

1. whether defendant TTFH, through the alleged September 7, 2016, board resolution gave actual authority to John Chen to execute the guarantee agreements dated September 30, 2016, and October 3, 2017, guaranteeing the payment of US\$20 million and NT\$1,746,650,000, respectively, in the event of default by Ching Fu of its loan with plaintiff and to agree to and approve the December 21, 2016, First Preferred Maximum Principle Ship Mortgage Agreement on the Taumoana?
2. whether John Wei Chen had *apparent* or *inherent* authority to execute the September 30, 2016, and October 3, 2017 guarantee agreements and to agree to and approve the December 21, 2016, First Preferred Maximum Principle Ship Mortgage Agreement on the Taumoana?
3. whether TTFH was an affiliate or subsidiary of Ching Fu?
4. whether TTFH was a close corporation thus enabling John Chen as TTFH general manager and Ching-nan Chen as a member of the TTFH board to commit and bind TTFH?
5. whether TTFH is precluded under Section 37 of the Tuvalu Companies Act from challenging the validity of the September 7, 2016 TTFH board resolution, September 30, 2016 guarantee agreement, the December 21, 2016, Minutes of Meeting of the TTFH board, the December 21, 2016 Mortgage Agreement on the Taomoana and October 3, 2017 guarantee agreement and promissory note.

### III. FINDINGS OF FACT

The following witnesses testified: Ms. Ying-Chih Wu, (hereinafter “Wu”), and Mr. Cheng-tung Liu, (hereinafter “Liu”), employees of plaintiff First Commercial Bank and Samasoni Finikaso, (hereinafter :Finikaso”) and Nikolasi Apinelu, (hereinafter “Apinelu”), NAFICOT appointed TTFH directors on behalf of defendants. The following documents were received into evidence:

For Plaintiff:

- P-1 Copies of the Chinese and English versions of the February 15, 2016, Guarantee Agreement signed by Ching-Nan Chen, Chao-Hsia Chen Lu and John Chen, in favor of FCB - admitted without objection;

- P-2 copies of the Chinese and English versions of email from Karen Chen to Ms. Wu indicating transmission of TTFH financial statements; the Chinese and English versions of TTFH financial statements; an undated letter from Chao-Hsia Chen Lu, as President of Fong Haur, appointing John Chen as general manager of TTFH - admitted without objection; a copy of Memorandum of Association for TTFH; Chinese and English version of email from Karen Chen to Ms. Wu transmitting TTFH Articles of Incorporation [sic]; admitted without objection
- P-3 Chinese and English version of email from Karen Chen to Ms. Wu transmitting a copy of a 2016 [sic] TTFH board resolution replacing Kakee Kaitu with Falasese Tupau as a TTFH director and the October 23-24, 2015, in attendance record of the TTFH board meeting - admitted without objection;
- P-4 Chinese and English versions of copies of the TTFH Financial Statements and Audited Report for years 2015 and 2014 - admitted without objection;
- P-5 Chinese and English versions of the FCB's TTFH Offshore Company Credit Report dated August 25, 2016 - admitted without objection;
- P-6 Chinese and English versions of copies of a September 8, 2016, email from Karen Chen of Ching Fu to Ms. Wu, which had attached 2 different versions of a September 7, 2016, TTFH board resolution - copy of email was admitted based on personal knowledge of Ms. Wu, but, the attached board resolution was admitted only to indicate that it was received as part of email but excluded as to the truth of matters asserted therein on the basis of hearsay and/or lack of authentication (exclusion was made at close of plaintiff's case in chief and after cross examination by defendant

on said resolution);

- P-7 the combined Chinese and English translation of the TTFH September 30, 2016, guarantee agreement - admitted over objection of defendants based on personal knowledge of Ms. Wu;
- P-8 Chinese and English versions of FCB Direction on Change of Facility Conditions - admitted without objection;
- P-10 Chinese and English versions of Ching Fu loans with FCB B admitted without objection;
- P-11 copies of the English version of the December 21, 2016, First Preferred Maximum Principal Ship Mortgage on the Taumoana with the following attachments: a copy of the Declaration of An-Chi Chang dated December 21, 2019, a distorted copy of September 30, 2016, guarantee agreement, a distorted copy of a power of attorney appointing An-Chi Chen as agent and attorney for TTFH in relation to the mortgage of the Taumoana consisting of two pages signed by John Chen and the clean copy of the same power of attorney; a copy of a power of attorney signed by Wang Hui-Ying, in her capacity of manager for FCB appointing herself as attorney in fact for FCB, a power of attorney signed by Wang Hui-Ying appointing An-Chi Chang as attorney in fact for FCB; a copy of the December 21, 2016, Minutes of the Meeting of the Directors of TTFH, signed by John Chen and Ching-nan Chen, authorizing John Chen with all powers necessary to execute the guarantee agreement and first preferred mortgage on the Taumoana; and, a copy of an affidavit of An-Chi Chang attesting to the fact that she witnessed the signing of the above referenced documents

- admitted based on personal knowledge of Ms. Wu;

- P-12 the Chinese and English versions of An-Chi Chang's December 29, 2016, email to Amanda of Ching Fu and Ms. Wu; English version of email from An-Chi Chang to Amanda of Ching Fu; a mixed Chinese and English version of document with a heading of Bank of Taiwan dated 12/21/2016; an mixed Chinese and English version of email from Tuvalu Ship Registry to An-Chi Chang; mixed Chinese and English version of emails from Tuvalu ship Registry to An-Chi Chang; copy of Tuvalu ship Registry Mortgage Deed; Copy of Tuvalu Ship Registry Certificate of Mortgage Registration B copies of emails or facsimiles from An Chi-Chang to Ms. Wu are admitted based on personal knowledge of Ms. Wu, , i.e., p. 1, 2, 3, 4, 5, 6 and the copy of the Mortgage Deed and Certificate of Mortgage Registration, p. 12 and 13 have been admitted as part of plaintiffs' exhibit p-13 and are therefore admitted B the remainder of the documents are excluded, i.e., p. 7, 8, 9, 10 and 11;
- P-13 copy of Tuvalu Ship Registry Certificate of Registry of Taumoana; copy of the Tuvalu Ship Registry Certificate of Mortgage Registration for the Taumoana - admitted on personal knowledge of Ms. Wu;
- P-14 a copy of Tuvalu Ship Registry Mortgage Deed on the Taumoana - admitted on personal knowledge of Ms. Wu;
- P-18 Chinese and English versions of email from Karen Chen of Ching Fu to Ms. Wu; attached copy of the Certificate of Registration of TTFH; Tuvalu Ship Registry Certificate of Registry for the Taumoana; and the Chinese and English translation of the TTFH Financial Statements and Audited Report for Years 2015 and 2014 -

admitted without objection.

For Defendants:

- D-15 an unsigned minute of the TTFH Board of Directors Meeting September 7, 2016 - admitted without objection;
- D-18 a copy of the September 7, 2016, TTFH board resolution entitled “AConsentoftheBoardofDirectorstoActionwithoutMeeting” (sic), where the placement of the signatures do not line up with the names associated with the signatures - admitted over objection of plaintiff on the basis that it is document plaintiff provided to defendant as part of discovery;
- D-21 a copy of 2 pages from the digital Taiwanese news publication “Focus Taiwan” February 12, 2019, 2018, Edition - admitted over objection of defendant under MIRE Rule 903(6);
- D-24 Articles of Association for TTFH - admitted over objection of plaintiff;
- D-25 (Plaintiff’s proposed P-17 which plaintiff did not introduced into evidence) TTFH Agenda of Board of Directors Meeting of October 16, 2017; Weelee October 16, 2017 Management Letter; TTFH Proxy Vote Form through which Ching-nan Chen appointed John Wei Chen as his proxy; Weelee Taumoana 2016 Trip Summary; Weelee Taumoana 2017 Trip Summary; Weelee 2016 Sales Summary; Weelee 2017 Sales Summary; TTFH 2017 Balance Sheet (Basi-Month); Taumoana Loan summary at End of June in 2017; Interest Summary; Taumoana Income Statement (August 20, 2017 Update); Taumoana Estimated Sales and Cost; VDS Update; TTFH Balance Sheet (Basi-Month); Indirect Costs; Miscellaneous Expenses; TTFH 2016 (Balance Sheet Basi-Month); Indirect Costs; Miscellaneous Expenses; TTFH

2016 Income Statement (Basi-Month); and TTFH Financial Statements for Years Ending December 31, 2016 and 2015 with Independent Auditors Report - admitted without objection.

D-26 (Plaintiff's proposed P-15 which was not introduced by plaintiff) FCB's November 7, 2017, Chinese version and English translation of Notice of Deemed Due and Payable - admitted without objection; and,

D-27 (plaintiff's proposed Exhibit P-9 which was not introduced by plaintiff) a copy of the October 3, 2017 TTFH guarantee agreement, written in Chinese and English, for NT\$1,746,650,000 and a copy of a promissory note on the October 3, 2017, guarantee agreement - admitted without objection.

Based on the testimonies of the witnesses, the documents admitted into evidence, the record on file and the written submissions of counsel, this Court finds as follows:

(1) Individuals Referenced. The following individuals, referenced in the witness testimony or documents admitted into evidence, had connections to TTFH either as: directors, officers or shareholders of TTFH; directors, officers or shareholders of corporations that do business with TTFH; or, are related to directors, officers or shareholders of corporations that do business with TTFH:

- a) John Chen, Fong Haur appointed director and TTFH general manager; also Ching Fu Vice-President and son of Chang-nan Chen and Chao-Hsia Chen, the respective presidents for Ching Fu and Fong Haur;
- (b) Chang-nan Chen, TTFH director and Ching Fu president and spouse to Chao-Hsia Chen Liu, Ching-Fu President and father of John Chen;
- (c) Chao-Hsia Chen Lu, President of Fong Haur Fishing Corporation Co. Ltd., spouse of Chang-nan Chen and mother of John Chen;
- (d) Grace Chen, president of Weelee International Holdings Co., Ltd., and



spouse of Steve Chen;

- (e) Steve Chen, younger son of Chang-nan Chen and Chao-Hsia Chen Liu;
- (f) Finikaso, Tuvalu Government Director of Fisheries and NAFICOT appointed director;
- (g) Apinelu, Tuvalu Government Chief Executive Officer for the Ministry of Natural Resources and NAFICOT appointed director; and,
- (h) Afasene Hopi, NAFICOT appointed TTFH general manager.

(2) Tuvalu Tuna FH Co., Ltd. The Tuvalu Tuna FH Co., Ltd., or TTFH, is a corporation established in 2008, pursuant to the laws of Tuvalu and is a joint venture between the National Fishing Corporation of Tuvalu (NAFICOT), and Fong Haur Fishing Corporation Co., Ltd., (hereinafter “Fong Haur”), a Republic of China, Taiwan, company, to engage in the fishing industry, with each party owning 50% of the shares of the company. The person representing Fong Haur during the establishment process of TTFH was Steve Chen.

TTFH’s Articles of Association (hereinafter “the TTFH Articles”) provided for the establishment of a 4 member Board of Directors comprised of 2 directors appointed by NAFICOT and 2 directors, including the general manager, appointed by FONG HAUR. For all relevant periods, the NAFICOT appointed directors were Finikaso and Apinelu. The FONG HAUR appointed directors were Ching-nan Chen and John Chen. In an undated letter, Fong Haur appointed John Chen as its general manager. The NAFICOT appointed directors were not aware of the appointment and had never seen the document. They believed the general manager to be Afasene Hopi, who worked full time at the TTFH Office in Funafuti, Tuvalu.

FCB asserts that TTFH is an affiliate of Ching through the familial relationship between Chao-Hsia Chen Lu, the president of Fong Haur, and Ching-nan Chen, her spouse, and John Chen, their son. In addition to being directors of TTFH, Ching-nan Chen and John were also the chairman

and vice chairman of Ching Fu, respectively. As an affiliate company of TTHF, Ching Fu had the authority to authorize the loans on behalf of TTFH through the persons of Ching-nan Chen and John Chen (testimony of Wu). This familial relationship is referenced in TTHF Financial Statement and Audited Report for TTFH for FY 2015 and 2014 (P-18), the TTFH Financial Statement and Audited Report for FY 2016 and 2015 (P-17) and the FCB Credit Report ( P-5), but there is no reference to the number of shares held by Ching Fu or Weelee in TTFH or held by Ching-nan Chen or John Chen other than for the 50% shares owned by Fong Haur.

Black's Law Dictionary (11<sup>th</sup> Ed 2019) defines an affiliate as "a corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation". It further defines a parent corporation as "a corporation that has a controlling interest in another corporation (called a *subsidiary corporation*), usu. (sic) through ownership of more than one-half the voting stock", and a subsidiary as "a corporation in which a parent corporation has a controlling share".

Section 5 of Schedule 1 of the Tuvalu Companies Act defines a "group of companies" as two or more corporations one of which is the holding company for the other or others and at Section 8, states that a corporation is "deemed to be a subsidiary of another corporation if that other corporation holds more than half of the agreed equity shares in the first mentioned corporation".

TTFH's Articles states in clear terms at Article 4 that 50% of the stock of TTFH shall be owned by NAFICOT and the remaining 50% by Fong Haur, not Ching Fu. Applying the definitions stated above, TTFH is not a subsidiary of Fong Haur but is an affiliate. Even if TTFH is an affiliate of Fong Haur, both parties own equal shares in TTFH and have the same number of votes - any decision of the TTFH board will require the affirmative vote by three of the board members. So the

argument by plaintiff that Ching Fu as an affiliate of TTFH could through the actions of Ching-nan Chen and John Chen is meritless - there is no evidence to support the claim that Ching Fu is an affiliate of TTFH.

FCB also argued that TTFH was a close corporation, no different from Fong Haur, Ching Fu or Weelee, which are all allegedly owned by the Chen family. But there is absolutely no evidence to establish this allegation. Its articles establishes TTFH as a formal corporation with an equal number of shares owned by NAFICOT and Fong Haur (Articles 2 and 4) and a quorum consisting of the entire board and a majority vote requirement of the entire board to approve decisions (see Articles 13, 17 and 19). This clearly does not evidence the structure of a close company. Again, the testimonies of Wu and Liu as well as the TTFH financial statements mentions above references speak only to the familial relationships and positions held by certain members of the Chen family in Fong Haur, Ching Fu and Weelee and nothing more. So, even if John Chen and Ching-nan Chen were to collectively vote the same, they lack a voting majority in terms of shares or bodies.

Accordingly, and lacking evidence to the contrary, the Court finds that TTFH was and is not an affiliate company or subsidiary of Ching Fu and is not a close company.

(3) Discrepancies in Articles of Association. The parties each introduced as an exhibit, copies of the TTFH Articles of Association ( part of plaintiff's P-2 and defendants' D-24). These exhibits are different in one very important respect. Article 8(f) of P-2 states:

*(f) approve the JV Company may provide endorsement and guarantee and act as a guarantor; and,*

Article 8(f) of D-24states:

(f) *other matters needed to be decided by the Board of Directors.*

P-2 has a paragraph (g) containing the exact language of paragraph (f) in D-24. D-24 ends with paragraph (f) and does not have a paragraph (g).

The Court has no doubt that one of the 2 exhibits has been doctored. The TTFH Memorandum of Association (part of P-2) bears the initials of the individuals who signed the document on behalf of NAFICOT and Fong Haur. Steve W. Chen, who signed on behalf of Fong Haur<sup>1</sup> placed his initials - S.W.C.- on the lower right hand corner of said document. Similar initials appear on the lower right hand corner of D-24 while the P-2 TTFH Articles does not. The Court finds as more authentic D-24, defendant's TTFH Articles.

In any event, the burden of proof to establish that TTFH Articles authorized the provision of endorsements, guarantees or to act as a guarantor for third parties is on plaintiff. The Court is not satisfied that plaintiff has met the burden of establishing such on a preponderance of the evidence.

Accordingly, this Court finds that the TTFH Articles does not contain an express provision allowing or enabling TTFH to provide endorsements, guarantees or act as a guarantor as asserted by plaintiff.

(3) TTFH Management. In addition to having the right to appoint two of the TTFH directors, the TTFH Articles gave authority to FONG HAUR to appoint the general manager for TTHF. The general manager, pursuant to Article 25, would have authority to determine all aspects of the management and operation of corporation, subject to Article 8. By undated later addressed "To Whom It May Concern", Fong Haur appointed John Chen as general manager for

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<sup>1</sup> Testimony of Finikaso.

TTFH. Finikaso and Apinelu testified that they had never seen that letter of appointment by Fong Haur, and that to their understanding that Afasene Hopi, who was stationed permanently in the TTFH Office in Tuvalu, was the general manager and coordinated TTFH activities through Grace Chen of Weelee and with John Chen. Nonetheless, Article 25 of the TTFH Articles of Association, vests in Fong Haur the right to appoint the general manager.

FCB argued that John Chen, as TTFH general manager, had (1) actual authority to provide the guarantee and act as guarantor for the Ching Fu loan; (2) apparent authority to provide for the guarantee and act as guarantor for the Ching Fu loan; or (3) had implied or inherent authority to provide for the guarantee and act as guarantor for the Ching Fu loan.

As is discussed in greater detail later, the Court found that the TTFH resolution allegedly providing John Chen the express or actual authority to provide and act as guarantor for the Ching Fu loan was invalid for the reason that the signatures of Finikaso and Apinelu were forged. Both Finkaso and Apinelu testified they did not sign the September 7, 2016 board resolution, neither was the board ever aware of the resolution. It (the board) had not met regarding the resolution, neither had it ever discussed or approved the resolution (Finikaso testified that he only came to know of the resolution upon being served with a copy of the complaint in the present case in the later part of 2017). No other evidence was introduced or admitted proving express or actual authority given by the TTFH board to John Chen to provide a guarantee or to act as a guarantor to the Ching Fu loan.

Additionally, although FCB referenced its P-2 TTFH Articles as authorizing the general manager to provide guarantees and to act as guarantor, with the approval of the board, the Court finds the P-2 version of the TTFH Articles not an authentic copy of the TTFH Articles but was

doctored to include a new paragraph 8(f) which expressly authorized the board to “*approve the JV Company may provide endorsement and guarantee and act as a guarantor*”.

On the issue of apparent authority, plaintiff’s submits that John Chen by the very nature of his position as general manager, had the power to authorize the guarantee for the Ching Fu loan as a normal business.

Article 25 of the TTFH Articles provides:

*Subject to article 8, all aspects of the management and operations of the JV Company’s affairs shall be determined by the General Manager who shall be appointed by FONG HAUR.*

While this language is broad with respect to the general manager’s responsibility and authority, that language must be applied with regards to Section 8 of the Articles which specifies those act which are reserved to the board or which may be undertaken by the general manager subject to the approval of the board. Approving the provision of endorsements, guarantees or to act as a guarantor is not one of the listed powers of the board, but at Article 8(a) it does authorize the board to approve loans made by the general manager. So theoretically, if the board were to authorized John Chen to make a loan on behalf of TTFH, he would have apparent authority to do such acts as may be incidental to securing the loan including the providing of a guarantee if such werenecessary; but,would not extend to providing a guarantee or acting as a guarantor for third party loan, especially one made for the sole benefit of such third party. Such act not incidental to the making of a loan on behalf of TTFH. More importantly, no evidence was offered establishing such authority.

The other argument put forth by plaintiff is that John Chen had implied or inherent authority to provide the guarantee as usual or normal to the business of TTFH and such authority

should be implied to John Chen's role as a general manager. The Restatement (Second) of Agency, §73 provides some guide with respect to the issue of whether such an authority may be implied.

It states:

*Unless otherwise agreed, authority to manage a business includes authority:*  
*(a) to make contracts which are incidental to such business, are usually made in it, or are reasonably necessary in conducting it;*  
*(b) to procure equipment and supplies and to make repairs reasonably necessary for the proper conduct of the business;*  
*(c) to employ, supervise, or discharge employees as the course of business may reasonably require;*  
*(d) to sell or otherwise dispose of goods or other things in accordance with the purposes for which the business is operated;*  
*(e) to receive payment of sums due the principal and to pay debts due from the principal arising out of the business enterprise; and*  
*(f) to direct the ordinary operations of the business.*

TTFH is a business engaged in the fishing industry. No evidence has been adduced that establishes the provision of guarantees and acting as a guarantor on third party loans is an activity within the usual or normal fishing business of TTFH. Such authority cannot be implied or considered inherent to John Chen's role as TTFH general manager. The Court notes the argument made by FCB that because John Chen was vested with authority to carry out all powers of necessary to the operations of the company, including its "financials", this authority should be implied because Ching Fu had previously guaranteed TTFH loans. The fact that Ching Fu may have guaranteed TTFH loans, is not proof of inherent authority nor does it establish authority, actual, apparent or inherent, on part of John Chen to guarantee the Ching Fu loan.<sup>2</sup> And while the TTFH Financial

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<sup>2</sup> The only references of loans made by TTFH, are the Bank of Taiwan loan set out in the TTFH Financial Statement and Audited Report 2015-2014, and a loan from Qing Long mentioned in the TTFH Financial Statements and Audited Report 2016-2015. Regarding this Qing Long loan, Finikaso was not aware of the such a loan asked questions relating to the loan which questions were left unanswered but caused for the abrupt termination of the October, 2017 TTFH board meeting which also constituted the last time the TTFH board would meet. Otherwise, no other evidence was presented providing the details of these loans.

Statement and Audited Report for 2016-2015, may contain a statement indicating that that TTFH had pledged the company's property, plant and equipment for Ching Fu Shipbuilding to loan,<sup>3</sup> this statement in and by itself does not establish authority nor does it prove customary or normal practice.

Accordingly, this Court finds that:

- John Chen was the duly appointed general manager of TTFH pursuant to Section 25 of the TTFH Articles and that Afasene Hopi oversaw the day to day operations of the TTFH office in Funafuti, Tuvalu, and communicated primarily through Grace Chen of Weelee who coordinated the crewing and repair, acquisition and repair of fishing and other equipment relating to the fishing operations of the Taumoana and other matters relating to TTFH with John Chen;
- there was no express authorization given John Chen to guarantee the Ching Fu loan.
- that the alleged TTFH board resolution was forged and not valid;
- it was not a normal or common practice for TTFH to provide endorsements or guarantees for third party loans and there was no evidence to show that the provision of endorsements and guarantees was an activity done in the ordinary or normal business of TTFH; and,
- John Chen did not have actual, apparent or implied or inherent authority to bind and guarantee of the Ching Fu loan on behalf of TTFH nor was he authorized to agree to and approve the mortgage agreement .

(4) FV Taumoana. The Taumoana is a fishing vessel owned by TTFH. TTFH engaged

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<sup>3</sup> TTFH Financial Statements and Audited Report 2016-2015, p. 14 (handwritten p. 35).



Ching Fu for the construction of Taumoana in 2007-08, which construction was completed in 2009 (according to the testimony of Finikaso)<sup>4</sup> at a cost of US\$19 million. TTFH contracted Weelee for the management and operations of Taumoana, through Grace Chen. Ching Fu was contracted, from time to time, to provide maintenance and repair services for the Taumoana. The costs for the fishing operations of Taumoana were paid from revenues realized from its fishing activities as well as advances and credit maintained with Fong Haur, Weelee and Ching Fu.

(5) The Ching -Fu Performance Bond. On or about November, 2013, Ching Fu was awarded a contract to build 6 minesweepers for the Taiwan Navy by the Taiwan Ministry of National Defense. Under the contract, Ching Fu was required to post a performance bond. FCB agreed to pay the performance bond on behalf of Ching Fu which Ching Fu would repay. FCB and Ching Fu concluded a loan agreement in February 15, 2016, and the performance bond of NT\$1,746,650,000 (approximately US\$57M) was paid to the Taiwan Ministry of Defense.

As conditions to the loan, Ching Fu was required to deposit 50% of the performance bond amount of approximately NT\$873,325,000 (US\$28M) with FCB and an guarantee agreement signed by Ching-Nan Chen, Chao-Hsia Chen Lu and John Chen agreeing to be jointly liable with for the repayment of the to FCB of the performance bond in the event of default by Ching Fu. Ching Fu fulfilled all these requirements and the performance bond was paid.

The was no evidence to indicate that TTFH NAFICOT board members were aware of or involved in the discussions leading up to FCB's payment of the performance bond. In fact, Finikaso testified that at no time had the issue of the Ching Fu loan been raised or discussed by the TTFH

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<sup>4</sup> Defendant's P-5, the English translation of the FCB Offshore Company Credit Report dated August 25, 2016, on TTFH, describes the Taumoana as being built in 2012. Whether the Taumoana was built in 2008 or 2012, is immaterial to the issues at hand.

Board prior to and subsequent to the alleged September 30, 2016 guarantee; neither did the TTFH board approve the provision of a guarantee for Ching Fu's loan nor the mortgaging of the Taumoana as security for the Ching Fu loan.

Accordingly, the Court finds that TTFH had no knowledge of and never participated in any discussion regarding the contemplated payment by FCB of the required performance bond on behalf of Ching Fu. nor did the TTFH board ever approve its guaranteeing of and agree to being jointly liable for the Ching Fu loan or for the placing of a mortgage on the Taumoana as collateral for such loan.

(6) The Change of Facility Conditions. On August 15, 2016, at the request of Ching Fu, FCB issued a "Change of Facility Conditions" which would provide for a reduction in the amount of Ching Fu's deposit with FCB from 50% to 20% and enable Ching Fu to withdraw NT\$523,995,000. The change of facility conditions provided that the withdrawal be contingent upon the addition of TTFH and Ching Yang Investments as joint guarantors to the Ching Fu loan and the provision of a TTFH board resolution indicating the board's agreement to act as a guarantor for Ching Fu; that the TTHF Articles of Incorporation (sic) have provisions allowing TTHF to act as guarantor for a third party upon resolution of the board of directors; and a first priority line of credit mortgage on the Taumoana.

Regarding Ching Fu's efforts at satisfying the Change of Facility Conditions, Wu testified that on August 17, 2016, through email from Karen Chen of Ching Fu, she received as attachments a copy of the TTFH 2015 Financial Statement and Balance Sheet, Fong Haur's undated written appointment of John Chen as general manager for TTFH, the TTFH Memorandum of Association and a copy of the TTFH Articles. She also testified that on September 8, 2016, again by way of

email from Karen Chen, she received as attachments a copy of the purported September 7, 2016, TTFH board resolution which expressed the TTFH board's agreement to act as guarantor for the Ching Fu loan, agreement to place a mortgage on TTFH vessels and authorizing John Chen to organize all matters.

On September 30, 2016, John Chen concluded the guarantee agreement agreeing and committing TTFH to joint liability for the Ching Fu loan to an amount of US\$20 million (hereinafter "the September 2016 guarantee agreement").

On December 21, 2016, Wu received a copy of a registered first preferred ship mortgage agreement on the Taomoana (hereinafter "the mortgage agreement") issued in favor FCB in the amount US\$24M in the event of failure by Ching Fu to make payment on the loan, including, among other documents, a copy of a December 21, 2016, Minutes of the Meeting of the Directors of TTFH, (hereinafter "the December 2017 minutes") signed by John Chen and Ching-nan Chen, purportedly authorizing John Chen with all powers necessary to execute the guarantee agreement and mortgage agreement on the Taumoana.

Whether or not certain of these documents received by FCB as required by the change of facility conditions were what they purported to be is discussed in further detail hereinbelow.

(7) The Offshore Company Credit Report. As part its due diligence, FCB prepared a credit report for TTFH. This credit report was prepared by Liu who testified that most of the information contained in the report was gathered from the TTFH Financial Statements and Audited Report for Years 2014 -2015. The credit report, under the section entitled "Aanalysis of the Management and Operation", erroneously states that TTFH was established by its "parent company Fong Haur" and Ching Fu, and then refers to Ching Fu as TTFH's affiliate company in Taiwan. TTFH's Articles

identifies TTFH as a joint venture established between Fong Haur and NAFICOT with each company holding 50 percent of the shares. It limits ownership of its shares to Fong Haur and NAFICOT. No evidence has been admitted to indicate that Ching Fu, Ching-nan Chen or John Chen are shareholders. Although Ching-nan Chen and John Chen are the chairman and vice chairman of Ching Fu, respectively, and sit on the TTFH board as Fong Hour appointees and not by virtue of the offices they occupy with Ching Fu, it does not render TTFH an affiliate of Ching Fu. As is discussed later in this judgment, aside from this evidence of Fong Haur's 50% ownership of shares in TTFH, there is no evidence establishing Ching Fu or Weelee as affiliates of TTFH.

The credit report also makes other questionable or inconsistent assertions which would normally raise "red flags" during review. For example, the credit report states that TTFH had no loans with any financial institutions (see Part IV ), but then at Part IX, it states that John Chen, Ching-nan Chen, Chao-Hsia Chen, Chen Lu, Fong Haur and Ching Fu offered guarantees for TTFH's loans of US\$14 million from financial institutions. On cross examination, Mr. Lee testified that he took this statement from the notes to TTFH Financial Statements and Audited Report for Years 2014 -2015. However, on review of said notes, there was referenced only US\$833,333 owed the Bank of Taiwan, and no references to any loan or to any guarantee by the named individuals and companies. The only other reference to a US\$14 million loan is found in the audited TTFH 2016-2015 financial statements of a TTFH, which loan was questioned by Finikaso who had no knowledge of such a loan. This led to a heated exchange between Grace, of Weelee and John Chen which led to the abrupt ending of the October 16, 2017 board of directors meeting without resolution of Finikaso's question - the TTFH board has not met since. There were other discrepancies noted including the use of different font sizes on the same page of the TTFH audit reports, etc.

The Court is struck at the casual manner in which plaintiff conducted its due diligence. In addition to the matters raised above, the plaintiff knew that John Chen was guaranteeing the Ching Fu loan for and to the benefit of Ching Fu - a company in which he John Chen was vice-chairman and his father, Ching-nan Chen the chairman. At the common law, where a third party knows that the agent is acting for the benefit of himself or a third person, the transaction is suspicious upon its face and it is for that third party to take reasonable measures to protect his own interest, as the principal is not bound unless the agent is authorized.<sup>5</sup>

For the reasons stated above, the Court finds that the credit report prepared on the legal status and financial condition of TTFH as a condition of the requested change of facility conditions contained assumptions and conclusions which were factually unsupported or contradictory and, in places superficial, so as to lead this Court to question the accuracy of the credit report and the due diligence carried out by FCB.

(8) The September 7, 2016 TTFH Board Resolution. On September 8, 2016, Wu received an email from Karen Chen of Ching Fu which had attached a digital copy of a September 7, 2016, TTFH board resolution (hereinafter “the TTFH resolution”), which on its face, appears to have been signed by all TTFH board directors, including by Finikaso and Apinelu, expressing TTFH’s agreement to act as guarantor for Ching Fu, to provide Ching Fu with its vessels as collateral for the bank loan and giving full authority to John Chen to organize relevant matters. Although this resolution was not admitted based on hearsay and/or lack of proper authentication, it is necessary to discuss the issues raised by FCB’s reliance on the resolution and for the reasons discussed hereunder. As a prelude, the Court notes that FCB had in its possession the TTFH Articles.

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<sup>5</sup> See *Restatement (Second) of Agency: Agent Acts for Improper Purpose* §165 (1958).

Wu testified that upon receipt of the referenced board resolution, it did not have impressed upon it the TTFH seal and that it (the TTFH seal) was only later added along with the personal seal of John Chen, after Wu took the same to John Chen's office and asked him to seal the resolution. The fact that the TTFH resolution was not sealed should have raised a red flag, especially in light of her testimony that it is common practice in Taiwan to authenticate documents by having such documents impressed with the company seal and as well as the seal of the individual attesting to the document and Ching Fu should have been aware of this requirement as it is not the first loan it had applied for with FCB.

She also testified she was not familiar with the signatures of Finikaso or Apinelu having never had any prior dealings with the two gentlemen nor with TTFH as a business entity until the Ching Fu change of facility conditions. But she testified that she was able to compare the Finikaso and Apinelu signatures to signatures in an earlier, September 7, 2015, board resolution and an October 24-25, 2015 TTFH board resolution submitted by John Chen. Both the September 7, 2015 and the October 24-25, 2015, resolutions bore only the signature of Finikaso and not Apinelu's.

At the trial, both Finikaso and Apinelu testified that it was not their signatures on the alleged TTFH resolution; that they had never seen the purported TTFH resolution previously. It is interesting that they testified to being in Kaohsiung, Taiwan on September 7, 2016, for the TTFH annual board meeting which was to take place on September 8 through September 9, 2016, and at this meeting the Ching Fu loan, the loan guarantee, and the contemplated first preferred ship mortgage agreement were never discussed let alone approved. These facts are uncontroverted.

Defendants introduced a D18, a copy of a different version of the TTFH resolution introduced by the plaintiff and in which the signatures do not line up with the names associated with

the signatures. D-18 was a document provided to defendant by plaintiff as part of discovery in this case.

The Court is struck by the seemingly casual manner in which FCB had processed the Ching Fu loan. Plaintiff knew that John Chen and Ching-nan Chen were TTFH directors, were also the vice-chairman and chairman of Ching Fu and were processing the TTFH guarantee of the Ching Fu loan which proceeds would inure to the exclusive benefit of John Chen, Ching-nan Chen and Ching Fu. There was good reason for the plaintiff to be suspicious that John Chen and Ching-nan Chen were acting in their own personal interests and that of Ching Fu to the detriment of TTFH. It would have been prudent on its part and in its best interests to take reasonable or appropriate measures to ensure that TTFH resolution and other requirements from TTFH were what they purported to be. Plaintiff did not.

Accordingly, this Court finds that the September 7, 2016, resolution, was not signed by either Finikaso nor Apinelu and that their signatures on the resolution were forged and that the board resolution was not a valid resolution of the TTFH board. The Court further finds that the TTFH board was not aware of the resolution, did not discuss the resolution, nor did it approve of any of the matters alleged in said resolution, and made no representation, by act or omission, to signify to FCB that the September 7, 2016, resolution was valid or that John Chen had the authority to do the acts stated in the resolution.

(9) The September 30, 2016 Guarantee Agreement. On September 30, 2016, John Chen executed a guarantee agreement on behalf of TTFH agreeing to be jointly and severally liable with Ching Fu to FCB in the amount of US\$20 million upon default by Ching Fu to make payments on its loan (hereinafter “the September 2016 guarantee agreement”). Based on the Court’s evidentiary

finding that the TTFH resolution was forged, the Court also finds the September 2016 guarantee agreement invalid as not authorized and and not a valid TTFH document.

(10) The December 21, 2016, First Preferred Ship Mortgage Agreement. The December 21, 2016, First Preferred Mortgage Agreement on the Taumoana (hereinafter “the mortgage agreement”), was based on the September 30, 2016, guarantee agreement which was itself based on the TTFH board resolution of September 07, 2016, discussed above. Additionally, a document dated December 21, 2016, entitled “Minutes of the Meeting of the Tuvalu Tuna FH Co”, (hereinafter “the December 2016 minute”), appears to be a grant of authority by TTHF board for the making of a first preferred mortgage on the Taumoana and a grant of authority to John Chen to execute the guarantee agreement and the first preferred mortgage agreement and all other powers necessary to effectuate the above two documents. This December 2016 minute bears only the signatures of Ching-nan Chen and John Chen.

The testimonies of Finikaso and Apinelu were that they were not aware of any meeting of the board occurring in December 21, 2016, nor were they ever given notice of such meeting and that the TTFH board had never approved such resolution.

Article 13 of the TTFH Articles requires the presence of all directors to be present at a meeting to constitute a quorum and further provides at Article 19 that any question or resolution is decided on majority vote of the members at an ordinary or special meeting. Article 20 provides that a resolution signed by all members entitled to attend and vote at any general meeting is valid if signed by all such members. For the December 2016 minute to be valid, it should have: (i) been passed at a general meeting of the TTHF board pursuant to Article 19 by at least 3 members of the board (3 constituting a majority vote of a quorum of 4) - Finikaso and Apinelu both testified that



such a meeting never took place; or, (ii) had the signatures of all 4 directors, John Chen, Ching-nan Chen, Finikaso and Apinelu. Finikaso - only Ching-nan Chen and John Chen signed the document. This December 21, 2016 minute could not be a valid document and authorization by the TTFH board for its non-compliance the TTFH corporate procedures.

This December 2016 minute appears to the Court as a fraudulent attempt by John Chen and Ching-nan Chen at confirming John Chen's authority to conclude the September 2016 guarantee agreement as well as his authority to make the mortgage agreement, albeit in non-compliance with the corporate procedures of TTFH and contrary to the interests of TTFH.

Accordingly, the Court finds that the December 2016 minute was not a valid ratification of John Chen's execution of the September 2016 guarantee agreement by the TTFH board, neither was it a valid authorization by the TTFH board for John Chen to enter into and finalize the December 2016 mortgage agreement or any document or other act that would bind TTFH to the Ching Fu loan.

The Court further finds the mortgage agreement to be invalid as not authorized by the TTFH board.

(11) The October 3, 2017, Guarantee Agreement and Promissory Note. On October 3, 2017, John Chen signed a guarantee agreement committing TTFH to joint and several liability with Ching Fu for the payment of Ching Fu's loan obligations of up to NT\$1,746,650,000 (hereinafter "the October 2017 guarantee agreement") to plaintiff. In addition to this guarantee agreement, he also executed a promissory note for the same amount and affixed the TTFH seal as well as his personal seal. As with previous similar documents, both Finikaso and Apinelu testified that they were unaware of this latest guarantee agreement and the promissory note. They testified that they were never made aware of the documents and that the TTFH board had never approved the same.

They also stated that these documents were never raised at any meeting of the TTFH board that they attended.

For the reasons earlier expounded, and the testimonies of Finikaso and Apinelu referenced above, the Court finds that John Chen did not have the authority to conclude said October 2017 guarantee agreement and its accompanying promissory note and that TTFH was not bound by the same.

It is interesting that the October 2017 guarantee agreement was referenced in plaintiff's complaint but not attached as an exhibit. Plaintiff also did not introduce this guarantee agreement into evidence at the trial. This agreement was made between plaintiff and John Chen purported acting on behalf of TTFH after the September 2017 guarantee agreement was accepted by FCB and after the Taumoana mortgage agreement was registered, just over a month prior to FCB's filing of the present case. It was the defendants who introduced and had the guarantee agreement admitted into evidence. Immediately prior to concluding the October 2017 guarantee agreement with John Chen, FCB had in its possession the TTFH resolution purportedly signed by all TTFH board members, the December 2016 minute signed only by John Chen and Ching-nan Chen and the TTFH Articles setting out its corporate procedure. It knew or should have known that John Chen and Ching-nan Chen's representations that they were legitimately acting on behalf of TTFH regarding the Ching Fu loan guarantee and mortgage agreement was suspicious yet proceeded with the signing. In the Court view, this fact is relevant as it shows facilitation by FCB of this fraud on TTFH or at the very least its acquiescence.

(12) FCB's Relationship with Ching Fu. The evidence shows that FCB extended loans to Ching Fu in the total amount of US\$ 76.4 million over a 17 months period, including the US\$57

million discussed above. Ching Fu was not a stranger to FCB and may explain the relaxed manner in which FCB did its review of TTFH in regards to the Ching Fu requested change of facility conditions. Although FCB had no prior business relations with TTFH, never met the NAFICOT appointed board members and was not familiar with their respective signatures, it took the representations of John Chen at face value. It appears to the Court that because of the established relationship between FCB and Ching Fu, FCB was inclined to favorably process Ching Fu's request for a reduction of its initial deposit at the expense of TTFH, despite knowing that the obligations required of TTFH were to the personal benefit of John Chen and Ching-nan Chen and Ching Fu. It had reason to be suspicious of or question the veracity of their representations but did not.

(13) Absence of Ching Fu at Trial. Ching Fu was served with a copy of the complaint in this matter on January 9, 2018. On April 25, 2018, a default judgment was entered in favor of FCB and against Ching Fu in the amount of US\$24,005,872.98 for its' failure to appear and plead. It had notice of the complaint and was given the opportunity to appear and provide its version of the facts but did not. FCB has a judgment in its favor for the amount it seeks from TTFH.

#### **IV. CONCLUSIONS OF LAW**

(14) **Actual Authority** - Plaintiff argued that John Chen was either cloaked with actual authority through the alleged TTFH board resolution of September 7, 201, and defined actual authority as "actions done within the parameters" of the TTFH Articles of Association.<sup>6</sup>

Plaintiff's argument was that John Chen had actual authority or was expressly authorized by the TTFH resolution to conclude and thereby bind TTFH the September 2016, guaranteed agreement, the mortgage agreement (which authority is supplemented by the alleged December

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<sup>6</sup> Page 6, Plaintiff's Closing Argument.

2016 minute (part of P-11)), and the October 2017 guarantee agreement and accompanying promissory note. But as the Court has stated above and for the reasons stated there, it found the September 07, 2016, board resolution to be fraudulent and therefore not enforceable. This rendered the September 30, 2016, guarantee agreement, which was based on the September 7, 2019 board resolution invalid.

Aside from the alleged TTFH resolution, FCB to also relied on the alleged December 2016 minute which purportedly gave John Chen the same authority allegedly granted under the TTFH resolution; albeit under the presumed authority of Ching-nan Chen and John Chen acting on behalf of the TTFH board. However, the Court did find as an evidentiary fact that the December 2016 minute was invalid for its non-compliance with TTFH corporate procedures and fraudulent intent.

Therefore, as a matter of law, the Court finds that John Wei was without express or actual authority to conclude the September 30 guarantee agreement, the mortgage agreement or the December 2017 guarantee agreement and its accompanying promissory note.

(15) **Apparent Authority.** Regarding apparent authority, FCB argued that John Chen had the “apparent authority” by nature of his job as general manager to bind TTFH to the guarantee agreements and the first preferred ship mortgage on the Taumoana. Apparent authority is that legal doctrine which states that a principal will be bound not only by the authority actually given to another but also the authority it appears to give. For this proposition, plaintiff relies on Restatement (First) of Agency §161 which states that a principal who puts an agent in a position that enables the agent while acting apparently within his authority, to commit a fraud on third parties, is liable to such third parties for the fraud of his agents and cites *Mattice c. Equitable Life Assurance Society of U.S.*, 270 Wis. 504; 71 N.W.2d 262; 55 ALR 2d 1206, as further authority for this proposition.

The principle stated at §161 (and §162) is predicated on the circumstance where an agent was cloaked with apparent authority and in the reasonable exercise of such authority, commits a fraud on third parties. In such an instance, the principle will be liable. However, as held in the *Mattice* case (*supra*), the apparent authority for which the principal may be liable must be traceable to him (the preinciple), and cannot be established by the acts and conduct of the agent - the principal is only liable for that appearance of authority caused by himself. In *Opp v. Wheaton Van Lines, Inc.*,<sup>7</sup> the Court stated that a principal's liability must be established through the conduct of the principal and cannot be created merely by a purported agent's conduct or representation.

The plaintiff also references *American Anchor & Chain Corp v. United States*, 331 F.2d. 860. This case involved the conduct of an agent done in the normal course the business and there was evidence to show previous conduct involving same act by the agent. It is distinguishable from the present case as no evidence that John Chen had previously guaranteed third party loans on behalf of TTFH or approved the mortgage of property or assets of TTFH as security for such third party loans.

The *Foote & Davies, Inc. v. Arnold Craven, Inc.*, N.C. App. 591, case, also cited by plaintiff, is likewise distinguishable as it involved promises of a guarantee of a loan of the subsidiary company by the president of parent company who was also the president of the by the subsidiary

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<sup>7</sup> 231 F.3d. 1060, (citing *Boling v. Pub. Employment Relations Bd.*, 10 Cal. App. 5th 853, 888B89, 216 Cal.Rptr.3d 757 (Ct. App. 2017)) which provides that a principal will be bound not only by the actual authority it gives to another, but also the authority it appears to give and precludes the principal denying liability from his acts of knowingly permitting an agent to hold himself out as having authority, or from the principal's failure to exercise ordinary care as to clothe the alleged agent with indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority he purports to exercise. But see *Stiner v. Brookdale Senior Living, Inc.*, 354 F.Supp.3d 1046, (N.D. Cal. 2019), also cited by plaintiff, where the court held that apparent agency (authority), focuses on whether the principal, either intentionally or by want of ordinary care, caused or allowed a third person to believe the agent possessed authority to act on behalf of the principal, and therefore must be established through the conduct of the principal and cannot be created merely by a purported agent's conduct or representation.

company. TTFH is not a subsidiary of Ching Fu and John Chen and Ching-nan Chen, had no authority either as directors of TTFH acting or as Ching Fu directors to bind TTFH to any agreement.

So as *First Union Nat'l Bank v. Brown*, 166 N.C. App. 519. This case involved whether a bank had a duty to disclose a guarantee by an agent to the principal where the agent had apparent authority. John Chen was without apparent authority to guarantee the Ching Fu loan. This *First Union Nat'l Bank* case is distinguishable.

There were other cases cited by plaintiff but the Court has found the facts different or distinguishable from the present case and will not address them specifically.

As an evidentiary fact, the Court found that John Chen, as general manager for TTFH, did not have apparent authority to provide third party loans guarantees or pledge the property and assets of TTFH as collateral. TTFH was in the business of fishing for and selling tuna fish. John Chen's authority as general manager was to carry out the normal and usual fishing business of TTFH. It was not the normal and customary business of TTFH to guarantee third party loans or offer its property and assets as security for such third parties loans. John Chen did not have apparent authority to do so. As a matter of law, this is also true.<sup>8</sup>

Accordingly, the Court finds that John Chen did not have apparent authority to guarantee the Ching Fu loan of \$20 million, agree to the September 2016 guarantee agreement, and did not have the apparent authority to approve the mortgage agreement or any of the acts leading up to the registration of the mortgage agreement; and, he did not have the apparent authority to agree to and execute October 2017 guarantee agreement and its accompanying the promissory note.

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<sup>8</sup> See discussion at paragraph (3) above.

(16) **Implied Authority or Inherent Authority.**

As an alternative to John Chen having actual or apparent authority, FCB argues that it may rely on common law doctrine of “implied” or “inherent” authority on part of John Chen as general manager to bind TTFH to the guarantee for the Ching Fu’s loan, citing the Restatement (Second) of Agency §7 and §8A for the proposition that an apparent agent has the legal power to bind his principal, entirely apart from the question whether his is actually authorized or not. §8A of the Restatement provides:

*Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.*

Expanding on this principle of inherent agency, Restatement (Second) of Agency §161 provides:

*A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized. (emphasis added).*

In this respect and as an evidentiary finding, the Court found that TTFH was a company engaged in the fishing industry with catching and selling tuna fish as its’ primary business. The provision of third party loan guarantees or pledging its property and assets as collateral for third party loans was not within the normal or usual conduct of the TTFH business. For John Chen to have inherent authority, as a matter of law, FCB must show on a preponderance of the evidence that the provision of third party guarantees for the benefit of such third part was an act that would usually or is incidental to acts which the agent is authorized. FCB has failed to establish such fact.

Accordingly, John Chen, as a matter of law, did not have inherent authority to bind or commit TTFH to the September 2016 guarantee agreement, the mortgage agreement or the October 2017 guarantee agreement.

(17) **Tuvalu Companies Act §37.**

Plaintiff has invoked the provisions of Section 37 of the Tuvalu Companies Act of 2008 asserting that the provisions of Section 37 precludes the TTFH from challenging the guarantee agreement concluded on behalf of TTFH by John Chen, arguing on the basis that the memorandum or articles of the company have not been complied with, or that John Chen did not have the authority from to provide the guarantee or act as a guarantor for Ching Fu because he was performing an act customarily exercised by him as general manager, or a document issued by an officer or agent of the company with actual authority, or who would customarily exercise or have the authority to issue such document, except where the person had actual knowledge of the matter, or should have had actual knowledge of the matter.

The Court does not agree. Section 37(1)(d) of the Tuvaly Companies Act prohibits a company from asserting that:

*a person held out by the company as an officer or agent of the company has not been duly elected or appointed or does not have the authority to exercise the powers or perform the duties customarily exercised or performed by the officer or agent of a company carrying on business of the kind carried on by the company or customarily exercised or performed by an officer or agent of the type concerned.* (Emphasis added).

Section 37(1)(e) also precludes a company from asserting that:

*a document issued by an officer or agent of the company with actual authority, or who customarily would in the exercise or performance of his powers or duties have authority to issue the document, is not valid or is issued without authority, except where the person has actual knowledge of the matter sought to be so asserted or, if having regard to his position with, or relationship to, the company, he ought to have knowledge of that matter.* (Emphasis added).



Section 37(1)(d) relates to the authority of the person to exercise the power or perform the duties customarily exercised or performed by that person in carrying out the normal or customary business of the company or customarily exercised by such person. It does not relate to authority exercised or performed which are not within the normal or usual business of the company or are not normal or customary powers or duties of the person in that capacity. The usual and normal business of TTFH is fishing - the catching of tuna fish for the sale of the same. As stated previously, the giving of guaranties for third party loans is not within the usual or normal business of TTFH and the authority of John Chen as general manager to provide such guarantees is not a power normally or customarily performed by not within his usual or normal power or duty. There is a dearth of evidence in both respects.

On this basis, the TTFH is not precluded from asserting that John Chen was without authority to provide the guarantee for the Ching Fu loan and to assert that placing of a mortgage agreement on the Taomoana was also invalid.

Section 37(1)(e) relates to a document that is issued by an officer or agent of the company who has actual, apparent or implied or inherent authority to issue such document. It does not relate to a document issued without authority. The Court has found that John Chen was without authority to issue the guarantee agreements as well as the mortgage agreements. The actual or express authorization he relied on was forged and the corporate provision upon which that actual or express authorizaion was based was likewise fraudulent. TTFH is not precluded from asserting that the guarantee agreements and mortgage agreement concluded by John Chen were invalid and that John Chen was without authority to issue the same.

Finally, Section 37(2) prevents recovery of a debt by a person upon a fraud upon the

company by that person, or if the person participated or acquiesced in such fraud.

Because the Court has found that the totality of evidence would indicate, at the very least acquiescence on part of FCB to the fraud committed upon TTFH by Ching-nan Chen and John Chen, it is not entitled to recover on the invalid TTFH guarantee or the Taumoana mortgage agreement.

## V. CONCLUSION

Based on the above findings of fact and conclusions of law, the Court answers the issues framed above as follows:

1. whether defendant TTFH, through the alleged September 7, 2016, board resolution gave actual authority to John Chen to execute the guarantee agreements dated September 30, 2016, and October 3, 2017, guaranteeing the payment of US\$20 million and NT\$1,746,650,000, respectively, in the event of default by Ching Fu of its loan with plaintiff and to agree to and approve the December 21, 2016, First Preferred Maximum Principle Ship Mortgage Agreement on the Taumoana?

Answer: No.

2. whether John Wei Chen had *apparent* or *inherent* authority to execute the September 30, 2016, and October 3, 2017 guarantee agreements and to agree to and approve the December 21, 2016, First Preferred Maximum Principle Ship Mortgage Agreement on the Taumoana?:

Answer: No.

3. whether TTFH was an affiliate or subsidiary of Ching Fu?

Answer: No.

4. whether TTHF was a close corporation thus enabling John Chen as TTFH general manager and Ching-nan Chen as a member of the TTFH board to commit and bind TTFH?

Answer: No.

5. whether TTFH is precluded under Section 37 of the Tuvalu Companies Act from

challenging the validity of the September 7, 2016 TTFH board resolution, September 30, 2016 guarantee agreement, the December 21, 2016, Minutes of Meeting of the TTFH board, the December 21, 2016 Mortgage Agreement on the Taumoana and October 3, 2017 guarantee agreement and promissory note.


Answer: No.

**VI. JUDGMENT**

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. judgment be entered in favor of defendants F.V. Taumoana and Tuvalu Tuna FH Co., and against plaintiff First Commercial Bank and that plaintiff takes nothing from defendants;
2. the warrant of arrest on defendant F.V. Taumoana be dissolved; and,
3. the parties shall bear their own costs.

Dated: December 16, 2019.

  
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Witten T. Philippo  
Associate Justice