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TOPWAY APPLIANCE CO., LTD. and
DIANA YU

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

TOPWAY APPLIANCE CO., LTD., a
China corporation, and DIANA YU, an
individual,

Plaintiffs,

v.

THE ANT COMMANDOS, INC., a
California Corporation, RAYMOND
YOW, an individual, HONG LIP YOW,
an individual, and Does 1-10, inclusive,

Defendants.

And Related Cross-Actions

Case No.: EDCV07-00588 SGL (OPx)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1 **I. FINDINGS OF FACT**

2 **A. Background Facts**

3 1. On March 18, 2008 and April 17, 2008, the Court held a trial on the
4 Ninth and Tenth Causes of Action in Plaintiffs’ First Amended Complaint. Said trial
5 was combined with an evidentiary hearing on Plaintiffs’ Motion for Preliminary
6 Injunction pursuant to Fed. R. Civ. P. 65(a)(2).

7 2. The Court heard the testimony of Plaintiff Diana Yu, who testified on her
8 own behalf and on behalf of Topway.

9 3. The Court heard the testimony of Defendants Hong Lip Yow and
10 Raymond Yow, who testified on their own behalf and on behalf of TAC.

11 4. The Court received and admitted into evidence Joint Exhibits 1 through
12 44, 55 through 60, and 100.

13 5. Plaintiff Topway Electrical Appliance Co., LTD is a corporation
14 organized under the laws of China with its principal place of business in Shenzhen,
15 China.

16 6. Plaintiff Diana Yu, aka Yan Yu , is a Chinese national residing in
17 Shenzhen, China.

18 7. Steven Tan, aka Tan Lai Suo, is and has been an owner of Topway since
19 at least 1996. 3/18/08 Transcript, p. 10, line 12-15.

20 8. Defendant Hong Lip Yow (“Lip Yow”) is an individual residing in
21 California.

22 9. Defendant Raymond Yow is an individual residing in California.

23 10. Defendant The Ant Commandos, Inc. is a corporation organized under
24 laws of California with its principal place of business in Chino, California.

25 11. TAC was duly incorporated in California on March 10, 2006. *See* Exh.
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B. Plaintiffs' Ninth and Tenth Causes of Action

12. Plaintiffs' Ninth Cause of Action challenges the validity of TAC's June 25, 2007 Action by Majority Written Consent of Shareholders of The Ant Commandos, Inc. (hereinafter the "June 25, 2007 Action") (*see* Exh. 17 at p. 4), whereby Raymond Yow and Lip Yow voted to purportedly remove Diana Yu from TAC's Board. Plaintiffs contend that they are shareholders of TAC and therefore seek a declaration that the June 25, 2007 Action by which Yu was voted off of the Board is fraudulent and illegal because Plaintiffs, as shareholders, were not given proper notice of said vote or an opportunity to vote.

13. By their Tenth Cause of Action, Plaintiffs seek a declaration that (a) Topway and Yu are combined 50% shareholders of TAC; (b) Yu and Tan are directors of TAC; and (c) any vote terminating Yu or Tan as directors of TAC which was taken by shareholders that did not include Topway or Yu is illegal, null and void.

14. Plaintiffs filed this action (initially in California state court) on April 20, 2007. Plaintiff Yu testified that by no later than March 19, 2007, after several failed attempts to conduct shareholder inspections of TAC's books and records, Topway and Yu came to the conclusion that Defendants would not, and will not, honor their shareholder rights. 3/18/08 Transcript, p. 63, line 23 to p. 64, line 6.

C. Formation and Ownership of TAC

15. In late 2005 or early 2006, Lip Yow approached Diana Yu and Steven Tan with a business proposition for Topway. Lip Yow proposed forming a new American company with Topway to sell guitar gaming consoles in the United States that are compatible with the highly popular "Guitar Hero" game. Lip Yow's proposal contemplated that 50% of the newly formed company would be owned by the Yow brothers, and the other 50% would be owned by Topway (or designees thereof). 4/17/08 Transcript, p. 9, line 9 to p. 11, line 1.

1 16. In early 2006, Diana Yu and Steven Tan, acting on behalf of Topway,
2 agreed to Lip Yow's business proposal. The parties' agreement led to the formation
3 of TAC. 3/18/08 Transcript, p. 23, line 23 to p. 25, line 10.

4 17. Although the agreement was not codified in a formal contract or
5 otherwise reduced to writing, the parties do not dispute that they entered into a valid
6 and enforceable oral agreement with respect to the formation of TAC. The parties do
7 dispute, however, certain specific items of consideration that each side was obligated
8 to provide in return for their respective 50% shares in the company.

9 18. Defendants never delivered any TAC share certificates to Topway or Yu.

10 **D. Opposing Testimony Regarding Consideration Required for 50%**
11 **Interest**

12 19. The Court heard testimony from Diana Yu describing the terms of the
13 parties' agreement as understood by her and Topway. Specifically, according to Yu,
14 Topway promised to: (a) use TAC as Topway's exclusive U.S. distributor for guitar
15 gaming consoles and accessories manufactured by Topway that were compatible with
16 "Guitar Hero"; (b) manufacture guitar gaming consoles and accessories that are
17 compatible with "Guitar Hero" for sale in the United States by TAC; (c) provide TAC
18 with its advice, expertise and contacts in the gaming industry; and (d) provide capital
19 investment for TAC in the form of a free shipment of goods to be selected by Lip
20 Yow. *See* 3/18/08 Transcript, p. 20, line 3 to page 21, line 25.

21 20. Yu further testified that, in exchange for the aforementioned
22 consideration, Lip Yow (on behalf of himself and Raymond Yow) promised that: (a)
23 Topway (or its designees) would own 50% of TAC; (b) Tan and Yu would serve on
24 TAC's Board; and (c) with respect to guitar gaming consoles and accessories that
25 were compatible with "Guitar Hero", TAC promised to sell in the United States only
26 those which were manufactured by Topway. *See* 3/18/08 Transcript, p. 22, line 1
27 through 21.

1 21. Raymond Yow admitted he did not have personal knowledge of the terms
2 of the parties' agreement, nor the negotiations therefor. Lip Yow, however, claimed
3 he had such personal knowledge.

4 22. Lip Yow's testimony largely corroborated Yu's in terms of the items of
5 consideration that the parties agreed upon. The only material difference is that Lip
6 Yow contended (a) the Yow brothers promised to invest a monetary sum of \$50,000
7 for their 50% interest, and (b) Topway agreed (but failed) to match the Yow brothers'
8 investment with a \$50,000 monetary payment for the other 50% interest. 4/17/08
9 Transcript, p. 11, line 2 to 5. It appears that Lip Yow further contends that he
10 promised to make only Yu a director of TAC, not Tan.

11 23. Although he denies that he selected the products, Lip Yow does not deny
12 that Topway contributed – and TAC received – the initial shipment of goods in April
13 2006 which Topway contends was given for free in consideration for its 50% interest.
14 4/17/08 Transcript, p. 11, line 18 to 19.

15 24. Yu denies that the parties ever discussed or agreed to make monetary
16 payment – of \$50,000 or of any sum – in exchange for shares. With respect to the
17 Yow brothers' purported capital investment in the form of a \$50,000 payment, Yu
18 testified she understood that was a loan the Yows made to TAC. 3/18/08 Transcript,
19 p. 85, line 1 to 15; p. 102, line 8 to 18.

20 **E. Plaintiffs' Contention That They Were Obligated to Ship Goods, As**
21 **Opposed to Making A Monetary Investment, In Consideration for**
22 **50% Ownership Interest Finds Ample Support in the Evidence**

23 25. Although the parties offer contradictory testimony regarding what
24 consideration they agreed to provide in exchange for their respective 50% interest in
25 TAC, the Court finds that Plaintiffs' account of the facts on this issue is credible, and
26 that Defendants' version lacks credibility and was fabricated in an attempt to gain
27 advantage in this litigation.

1 26. As detailed below, the Court makes this finding based on the fact that
2 Plaintiffs' version is amply corroborated by contemporaneous documentary evidence.
3 Moreover, Defendants are in no position to challenge the veracity of said documentary
4 evidence because they were all prepared by the Defendants themselves before this
5 action was filed. The same documents also contradict the substance of Defendants'
6 trial testimony. Specifically:

7 a) In October 2006, Lip Yow transmitted to Diana Yu and Topway a
8 document via e-mail, entitled "Action by Written Consent of the
9 Board of Directors of The Ant Commandos, Inc.", for their review
10 and signature. This Written Consent, which was prepared at the Yow
11 brothers' direction, authorizes and directs TAC to issue 40% of the
12 company's shares to Topway in exchange for "Consideration *Paid*" of
13 "\$40,800.00 in *property* and past *services*", and 10% to Diana Yu in
14 exchange for "Consideration *Paid*" of "\$10,200 in *property* and past
15 *services*." Exh. 4 at p. 10 (emphasis added). There is no mention
16 therein of any obligation by Topway or Diana Yu to make monetary
17 payments for their shares.

18 b) During approximately April and May 2006, Lip Yow told Diana Yu,
19 in recorded MSN chat/instant messenger communications, that (1)
20 "we will build a very strong team u [sic] and me"; (2) "I will prepare
21 container for ANTS COMMNDON [sic] and approve you as 50%
22 shareholder"; (3) "i will send over the information to you, include
23 stock"; (4) "you are the mother of TAC"; and (5) "we all own TAC."
24 Exh. 3 at pp. 8-13.

25 c) In a September 18, 2006 sworn declaration filed in the United States
26 District Court for the Central District of California, in connection with
27 the matter of Activision Publishing, Inc., et. al. v. The Ant
28 Commandos, Inc., et. al., No. EDCV 06-897, Hong Lip Yow

1 unqualifiedly declared that “Forty percent (40%) of the shares of The
2 Ant Commandos *are* owned by Topway Electrical Appliance Co.,
3 Ltd” (emphasis added). Exh. 17 at p. 6.

4 d) In October 2006, Lip Yow transmitted to Diana Yu and Topway a
5 document, entitled “Action by Unanimous Written Consent of
6 Shareholders In Lieu of Annual Meeting of The Ant Commandos,
7 Inc.”, for their review and signature. This Written Consent, which
8 was prepared at the Yow brothers’ direction, identifies Topway and
9 Diana Yu as signatories in their capacity as 40% and 10% owners of
10 TAC, respectively. Exh. 3 at p. 32.

11 e) In October 2006, Lip Yow transmitted to Diana Yu and Topway a
12 document, entitled “Action by Written Consent of the Board of
13 Directors of The Ant Commandos, Inc.”, for their review and
14 signature. This Written Consent, which was prepared at the Yow
15 brothers’ direction, identifies Topway and Diana Yu as 40% and 10%
16 owners of TAC, respectively. Exh. 5 at pp. 1-2.

17 f) TAC issued stock certificate no. 1 to Topway, dated March 20, 2006,
18 for 204,000 shares, which constituted 40% of all TAC shares then
19 outstanding. *See* Exh. 22.

20 g) TAC issued stock certificate no. 4 to Diana Yu, dated March 20, 2006,
21 for 51,000 shares, which constituted 10% of all TAC shares then
22 outstanding. *See* Exh. 25.

23 h) TAC issued stock certificate no. 5 to Topway, dated September 4,
24 2006, for 5,100,000 shares, which constituted 40% of all TAC shares
25 then outstanding. *See* Exh. 26.

26 i) TAC issued stock certificate no. 8 to Diana Yu, dated September 4,
27 2006, for 1,275,000 shares, which constituted 10% of all TAC shares
28 then outstanding. *See* Exh. 29.

- 1
- 2 j) TAC prepared a Stock Transfer Ledger which indicates that on March
- 3 20, 2006, Topway and Diana Yu were issued 40% and 10%,
- 4 respectively, of all TAC shares then outstanding. *See* Exh. 30.
- 5 k) TAC prepared a Stock Transfer Ledger which indicates that on
- 6 September 4, 2006, Topway and Diana Yu were issued 40% and 10%,
- 7 respectively, of all TAC shares then outstanding. *See* Exh. 30.
- 8 l) In a letter dated March 2, 2007, attorney Michael Oswald, counsel for
- 9 TAC, Raymond Yow and Lip Yow, responded to a shareholder
- 10 inspection demand made by the law firm of Wang Hartman & Gibbs
- 11 (the “Wang firm”) on behalf of Topway and Diana Yu. In his letter,
- 12 Mr. Oswald indicated that “access to TAC’s records and information
- 13 will not be permitted so long as the Wang firm represents either
- 14 Topway or Ms. Yu”, but no claim was made that Topway or Diana Yu
- 15 were not shareholders of TAC or had failed to pay for their shares in
- 16 TAC. *See* Exh. 13.
- 17 m) In a letter dated March 8, 2007, attorney Michael Oswald, counsel for
- 18 TAC, Raymond Yow and Lip Yow, responded to a further
- 19 shareholder inspection demand made by the Wang firm on behalf of
- 20 Topway and Diana Yu. In his letter, Mr. Oswald indicated that “If
- 21 another firm [other than the Wang firm] representing Topway contacts
- 22 me, I will be happy to discuss arrangements in which their
- 23 [inspection] requests can be handled”, but no claim was made that
- 24 Topway and Diana Yu were not shareholders of TAC or had failed to
- 25 pay for their shares in TAC. *See* Exh. 15.
- 26 n) In January or February 2007, Hong Lip Yow and Raymond Yow
- 27 presented Topway and Diana Yu with a Stock Purchase Agreement in
- 28 an attempt by TAC to buy back their shares in the company. In this

1 Stock Purchase Agreement, which was drafted at the Yow brothers’
2 direction, they affirmed that Topway and Yu “are the legal and
3 beneficial owners of an aggregate of 6,375,000 shares of Common
4 Stock [of TAC] representing 50% of the total number of issued and
5 outstanding shares”. Exh. 3 at p. 15.

6 o) Plaintiffs’ contention that the \$50,000 paid by the Yow brothers was
7 really a loan to TAC is corroborated by a prior consistent statement
8 Yu made during an April or May 2006 MSN chat/instant messenger
9 communication with Lip Yow. During that communication, Yu, upon
10 leaning from Lip Yow that he had “put in 50,000 yesterday,”
11 characterized that transaction as “borrow [sic] you money” – which
12 was her way of describing a loan made by the Yow brothers to TAC.
13 *See* Exh. 3 at p. 13; 3/18/08 Transcript, p. 102, line 8 to 18.

14 p) Defendants have failed to present any documentary evidence prepared
15 before this litigation which support their claim that Topway and Yu
16 agreed to make a \$50,000 monetary payment for their 50% interest.

17 q) Defendants claim that, between September 2006 and March 2007,
18 they made demands on Plaintiffs to pay for their shares on at least a
19 monthly basis. None of these purported demands were reduced to
20 writing, and Defendants have not otherwise presented any pre-
21 litigation documentary evidence to corroborate their contention that
22 they made such demands.

23 **F. Defendants Concede That They Agreed Plaintiffs Could Ship Goods**
24 **As Consideration for 50% Ownership Interest**

25 27. In his trial testimony, Lip Yow indicated that he strongly preferred, and
26 thus initially demanded, that Topway make a monetary investment in consideration
27 for shares in TAC. However, Lip Yow later conceded that he ultimately acceded to
28 Tan’s request for Topway to make its capital investment in the form of a free

1 shipment of goods, rather than any monetary payment. 4/17/08 Transcript, p. 11, line
2 2 to 17.

3 28. Lip Yow further testified that in or about May or June 2006, after he was
4 unable to sell the free goods for what he believed was sufficient value, he went back
5 to Tan and demanded that Topway make a monetary capital contribution in
6 consideration for shares. 4/17/08 Transcript, p. 15, line 8 to 11.

7 29. There is no evidence to corroborate Defendants' claim that Lip Yow
8 approached Topway, Yu or Tan to make a second demand for monetary investment.
9 This state of the evidence stands in sharp contrast to the substantial volume of
10 contemporaneous, pre-litigation, documentary evidence prepared by the Defendants
11 which support Plaintiffs' factual contentions in this case. *See Proposed Findings of*
12 *Fact paragraphs 26(a)-(q), supra.* Accordingly, the Court finds that Lip Yow's
13 allegation that Defendants made a second demand on Topway for monetary
14 investment is fabricated and not credible.

15 30. There is no evidence that Topway, Yu or Tan assented to the Defendants'
16 second demand for monetary investment.

17 31. There is no evidence that Defendants offered or gave Topway or Yu any
18 new or additional consideration in exchange for their purported assent to the
19 Defendants' second demand for monetary investment.

20 **G. Defendants' Allegation That Plaintiffs Agreed to Make a Matching**
21 **\$50,000 Monetary Investment for Shares Is Riddled With**
22 **Inconsistencies**

23 32. A further reason why the Court rejects Defendants' trial testimony that
24 Plaintiffs agreed to make a matching \$50,000 monetary investment for their shares is
25 because there are numerous inconsistencies in the Defendants' story.

26 33. Specifically, Lip Yow testified at trial that the "total" consideration paid
27 by him and Raymond Yow for their 50% shares was \$50,000. *See 4/17/08 Transcript,*
28 *p. 11, line 2 to 5; p. 17, line 5 to 6; p. 31, line 6 to 9.* However, in a sworn declaration

1 previously submitted in this action on Dec. 27, 2007, Lip Yow stated that in addition
2 to a \$50,000 monetary investment, he and his brother also contributed \$52,000 in the
3 form of salaries not taken, for a total of \$102,000 in consideration for their shares.
4 *See* Exh. 10 at p. 4; 4/17/08 Transcript, p. 31, line 12 to p. 32, line 20.

5 34. Further, on March 20, 2006, TAC issued stock certificates to Lip Yow
6 and Raymond Yow for a total of 255,000 shares combined. *See* Exhs 23, 24.
7 According to a March 20, 2006 Action by Written Consent of the Board of Directors
8 of The Ant Commandos, Inc., the stated par value for TAC shares was \$0.20 per
9 share. *See* Exh. 6 at p. 4. Based on this par value, the Yow brothers paid a total of
10 **\$51,000** in consideration for their shares – *not* \$50,000 *or* \$102,000.

11 35. Lip Yow testified that Plaintiffs strung him along by continually
12 promising to make the \$50,000 monetary investment, but they never followed through
13 with the payment. This led Lip Yow in January or February of 2007 to inform
14 Plaintiffs that they could no longer become shareholders of TAC. 4/17/08 Transcript,
15 p. 33, line 8 to 14. However, in a prior declaration filed in this action on Dec. 27,
16 2007, Lip Yow stated that Plaintiffs had until March 2007 to pay for their TAC shares.
17 *See* Exh. 10 at p. 15. Further, in an even earlier declaration filed in this action on June
18 14, 2007, Lip Yow gave yet a third version of this story: He stated that the Plaintiffs’
19 opportunity to purchase TAC shares closed at the end of 2006. *See* Exh. 100 at p. 2.

20 **H. Topway Fully or Substantially Performed On Its Promise To Make**
21 **an Initial Shipment of Goods to TAC for Free**

22 35. As noted at Proposed Findings of Fact paragraph 23, *supra*, Defendants
23 do not deny that Topway contributed – and TAC received – the initial shipment of
24 goods which Topway contends it furnished in consideration for a 50% ownership
25 interest.

26 36. The Court heard Lip Yow testify that the quality and value of the
27 products provided by Topway in this initial shipment were less than what he
28 apparently expected and, accordingly, TAC was not able to sell as many of them, or

1 fetch as high of a price for them, as Defendants expected. 4/17/07 Transcript, p. 12,
2 line 13 to p. 14, line 24.

3 37. However, there is no evidence to corroborate Lip Yow’s testimony on
4 this issue: There is no contemporaneous writing evidencing Defendants’
5 dissatisfaction with the products; there is no documentary evidence that Defendants
6 returned or tried to return the products to Topway; and none of the allegedly inferior
7 products were brought to Court or admitted into evidence. This state of the evidence
8 stands in sharp contrast to the substantial volume of contemporaneous, pre-litigation,
9 documentary evidence prepared by the Defendants which support Plaintiffs’ factual
10 contentions in this case. *See* Proposed Findings of Fact paragraphs 26(a)-(q), *supra*.
11 Accordingly, the Court finds that Lip Yow’s allegation that Topway shipped inferior
12 goods is fabricated and not credible.

13 38. However, even if this testimony were believed, the Court does not find
14 that it shows a failure of consideration, or that Plaintiffs failed to make substantial
15 performance. This is because the Defendants presented no evidence that the parties
16 discussed – or much less agreed on – a specific value or quality for the goods that
17 Topway must contribute.

18 39. The Court heard testimony from the Defendants insinuating that
19 Plaintiffs failed to perform because Topway had in fact charged and received payment
20 from TAC for the initial shipment of goods. In support of this argument, Defendants
21 point to an accounting ledger prepared by Yu and transmitted to Lip Yow in early
22 2007 which appears to indicate that Topway applied payments it received from TAC
23 to the initial shipment of goods. *See* Exh. 56 (hereinafter “the Accounting Ledger”).

24 40. On the other hand, the Court heard testimony from Yu, who explained
25 that Topway issued invoices to TAC for the initial shipment of goods not because it
26 intended to charge TAC for the goods, but only because this is required to clear
27 customs. 3/18/08 Transcript, p. 29, line 7 to 23.

1 41. Yu, who prepared the Accounting Ledger, also testified that the it was
2 not intended to reflect the application of payments to specific invoices or shipments of
3 goods. She explained that, rather than paying off the full amount of any invoice (or of
4 groups of invoices) on a regular basis, it was TAC's practice to pay Topway in
5 arbitrary whole-number dollars, and it did so in whatever amount it chose, whenever it
6 chose. Accordingly, the Accounting Ledger was meant only as a rough tool to keep
7 track of Topway's overall accounts receivable position with respect to TAC. 3/18/08
8 Transcript, p. 87 line 10 to p. 88, line 5; p. 99, line 14 to p. 100, line 3.

9 42. The Court accepts Yu's explanation of the purpose and meaning of the
10 Accounting Ledger because it is corroborated by the fact that under the column
11 therein entitled "Payment Status", it indicates that payment for the initial and other
12 recorded shipments of goods was merely "RECEIVED", as opposed to "PAID".

13 43. Further, the Court notes that, as the Accounting Ledger clearly shows, the
14 total outstanding debt owed by TAC to Topway is \$713,114.76. This sum far exceeds
15 the invoice value of the initial shipment of goods, which was approximately \$29,000.
16 Accordingly, as an economic matter, TAC has not paid Topway for the initial
17 shipment of free goods.

18 44. Moreover, the Defendants' own conduct belies their claim that the
19 Accounting Ledger indicates TAC had paid for the initial shipment of free goods.
20 After Lip Yow received a copy of the Accounting Ledger from Yu in early 2007, he
21 nevertheless proceeded to have his lawyer draft the Stock Purchase Agreement (*see*
22 *Exh. 3 at pp. 15-22*), in which Defendants affirmed that Topway and Yu were 50%
23 owners of TAC and sought to buy back those shares.

24 45. It was also after Lip Yow received a copy of the Accounting Ledger from
25 Yu that he proceeded to authorize TAC to make at least another \$200,000 payment to
26 Topway. *See Exh. 38*. There is no evidence that Lip Yow did this under any
27 reservation or protest.
28

1 **I. Plaintiffs’ Alleged Sale to Best Buy of Guitar Gaming Consoles That**
2 **Are Compatible with the “Guitar Hero” Game**

3 46. The Court heard testimony from the Defendants that they purchased one
4 “shredder” style, “Guitar Hero”-compatible gaming guitar from Best Buy in
5 October/November 2006 (*see* Exh. 59A), and then another one sometime during 2008
6 (*see* Exh. 59B). Inside the bodies of these two guitars are plastic imprints bearing
7 marks with the Topway name, address and website URL.

8 47. Defendants claim that these guitar sales are evidence that Topway
9 materially breached the exclusive dealing/non-competition provisions in the parties’
10 agreement for joint ownership in TAC. Defendants further claim that, prior to
11 October/November 2006, they were not aware that Topway caused these sales to take
12 place, and that such sales were done without their authorization.

13 48. Yu testified that, in or around the summer of 2006, Lip Yow told
14 Topway that TAC would stop selling the shredder style guitars in the United States
15 because they were not selling well. Accordingly, TAC returned all such guitars to
16 Topway. Because TAC no longer wanted to sell the shredder guitars, Topway no
17 longer had any use for the molds it had on hand for making said guitars; the molds
18 would presumably cause the Topway name, address and website URL to be imprinted
19 into the plastic bodies of the guitars. At that point, according to Yu, Topway advised
20 Lip Yow that it would transfer its shredder guitar molds to another manufacturing
21 company (one separately owned by Tan’s brother), which could conceivably end up
22 selling the product through American channels. Lip Yow voiced no objection to this.
23 3/18/08 Transcript, p. 52, line 1 to p. 53, line 16.

24 49. The Court rejects any claim by Defendants that Plaintiffs caused the Best
25 Buy sales to be transacted without the Yow brothers’ knowledge and authorization, or
26 that these sales constitute a material breach of the exclusive dealing/non-competition
27 provision in the parties’ agreement for joint ownership of TAC. This is because there
28 is no evidence to corroborate these claims. Specifically, there is not a single

1 contemporaneous writing evidencing Defendants' discovery of the Best Buy sales, or
2 their objection thereto, even though the Defendants decry these sales as a profoundly
3 dishonest act by the Plaintiffs that seriously damaged TAC's business.

4 50. Moreover, the Defendants' own conduct belies their claims. Specifically,
5 even after the discovery of the Best Buy sales in October/November 2006, TAC
6 continued doing substantial business with Topway, including paying some additional
7 \$800,000 to Topway. 4/17/08 Transcript, p. 55, line 18 to 23.

8 51. Further, in early March of 2007, when TAC responded to Topway's and
9 Yu's initial requests for shareholder inspections, it did not claim that the Best Buy
10 sales had vitiated Plaintiffs' shareholder status, and nor did it object to the inspection
11 on grounds that Plaintiffs were competing against TAC. Rather, TAC's response was
12 merely that it would gladly accommodate Plaintiffs' inspection so long as they
13 retained new legal counsel. *See* Exhs. 13 and 15.

14 52. Accordingly, the Court finds that Defendants' claim that the Best Buy
15 sales were transacted without their knowledge and authorization, or that the sales
16 constituted a material breach of the exclusive dealing/non-competition provision in the
17 parties' agreement for joint ownership of TAC, were recently fabricated in an effort to
18 gain advantage in this litigation.

19 53. Defendants presented no evidence that they have ever sought a rescission
20 of the parties' agreement for joint ownership in TAC, or that they have ever offered to
21 restore any consideration given by Topway or Yu pursuant thereto.

22 54. The Defendants' Answer and Counterclaim contain no allegation that
23 they have ever sought a rescission of the parties' agreement for joint ownership in
24 TAC, or that they have ever offered to restore any consideration given by Topway or
25 Yu pursuant thereto.

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J. Directors of TAC

55. TAC’s bylaws provide that its directors shall hold office until the expiration of the term for which they were elected and until a successor has been elected and qualified.

56. Defendants concede that, up until her purported removal on or about June 25, 2007, Diana Yu was a director of TAC.

57. There is no evidence that a successor to Yu on the board has been elected or qualified.

58. Neither Yu nor Topway learned of Yu’s purported removal from TAC’s board until August 17, 2007, when TAC’s counsel advised Plaintiffs’ counsel thereof. *See* Exh. 17 at p. 2.

59. There is no evidence that Diana Yu has a criminal record or is of unsound mind, and there is no evidence that Raymond Yow or Lip Yow filed a shareholder derivative action to remove Diana Yu from the TAC board

60. Defendants contend that they never agreed to make Tan a director of TAC, and any writings made or actions taken which tend to show otherwise was an inadvertent mistake.

61. The Court finds Defendants’ denial of Tan’s seat on the TAC board is fabricated and lacking in credibility. This is because, before this litigation was filed, TAC, Raymond Yow and Lip Yow made numerous admissions in which they acknowledged that Tan was a director of TAC. These admissions include the following:

- (a) In October 2006, Lip Yow transmitted to Diana Yu and Topway a document, entitled “Action by Unanimous Written Consent of Shareholders In Lieu of Annual Meeting of The Ant Commandos, Inc.”, for their review and signature. This Written Consent, which was prepared at the Yow brothers’ direction, indicates that the

1 shareholders appointed Steven Tan to TAC’s Board. *See* Exh. 3 at p.
2 30.

3 (b) TAC prepared the minutes of its Board meeting of September 7, 2006.
4 These minutes, which are dated September 10, 2006, indicate that
5 Steven Tan, as well as Diana Yu and Lip Yow, were in attendance at
6 the Board meeting described therein, and Steven Tan is specifically
7 identified therein as one of the “undersigned Directors” of TAC. *See*
8 Exh. 3 at p. 26.

9 (c) In October 2006, Lip Yow transmitted to Diana Yu and Topway a
10 document, entitled “Action by Unanimous Written Consent of the
11 Board of Directors of The Ant Commandos, Inc.”, for their review
12 and signature. This Written Consent, which was prepared at the Yow
13 brothers’ direction, identifies Steven Tan, as well as Diana Yu, as
14 signatories in their capacity as directors of TAC. *See* Exh. 5 at p. 3.

15 (d) On or about October 3, 2006, TAC prepared and filed a Statement of
16 Information with the State of California Secretary of State which
17 identifies Steven Tan, along with Diana Yu, Lip Yow and Raymond
18 Yow, as directors of TAC. *See* Exh. 53 at pp. 1-2.

19 62. There is no evidence that TAC’s shareholders or directors took any
20 action to remove Tan from TAC’s Board.

21
22 **II. CONCLUSIONS OF LAW**

23 **A. The Parties Entered Into An Enforceable Contract Whereby Topway**
24 **and Yu Were Made 50% Owners of TAC Upon Topway’s Initial**
25 **Shipment of Goods to TAC**

26 1. The parties do not dispute that they entered into an enforceable,
27 contractual agreement for allocating 50% of TAC’s shares to Raymond and Lip Yow
28 and the other 50% to Topway and Diana Yu. Rather, the parties’ dispute centers

1 around what were the terms or consideration actually agreed upon for the 50/50
2 allocation, and whether Topway and Diana Yu fully performed thereunder.

3 2. For the reasons stated at Proposed Findings of Fact paragraphs 25-31,
4 *supra*, the Court concludes that the parties agreed that Topway and Yu would become
5 50% owners of TAC upon Topway's initial shipment of free goods to TAC.

6 3. For the reasons stated at Proposed Findings of Fact paragraphs 32-35,
7 *supra*, the Court concludes that the Defendants' story that each side had agreed to pay
8 a monetary investment of \$50,000 for ownership of TAC was fabricated to gain
9 advantage in this litigation, and it is thereby rejected as lacking in credibility.

10 4. Defendants contend that, because Topway's initial shipment contained
11 what they felt were inferior goods, they approached Topway and renewed their
12 demand that it make a monetary investment as consideration for TAC shares. This
13 appears to be an effort by the Defendants to modify the parties' agreement. However,
14 the law is clear that an oral modification of an oral contract is valid and enforceable
15 only if there is mutual assent, coupled with additional or new consideration for the
16 modification. *See Wade v. Diamond A Cattle Co.*, 44 Cal. App. 3d 453, 457 (1975);
17 *Healy v. Brewster*, 251 Cal. App. 2d 541, 551 (1967).

18 5. In this case, there is no evidence that Plaintiffs assented to Defendants'
19 renewed demand for a monetary investment. Further, even if Plaintiffs gave such
20 assent, there is no evidence that Defendants gave any new or additional consideration
21 therefor. Accordingly, the Court concludes that Plaintiffs' obligation to provide goods
22 for shares was never modified into an obligation to pay a monetary sum.

23 **B. Plaintiffs Fully or Substantially Performed Their Obligations Under**
24 **the Parties' Agreement**

25 6. Defendants do not dispute the fact that Topway did make an initial
26 shipment of goods in consideration for a 50% interest in TAC. However, Defendants
27 allege that the value or quality of said goods were substantially lower than what they
28 had expected.

1 7. However, even if this allegation was true, it does not constitute a failure
2 to perform or a failure of consideration on the Plaintiffs’ part. This is because the
3 evidence does not indicate that the parties ever discussed or agreed upon a specific
4 level of quality or value for Topway’s initial shipment of goods.

5 8. Moreover, there is no legal basis to challenge the sufficiency of the
6 consideration Topway gave for the shares. Under governing California law, any
7 consideration at all can be deemed sufficient consideration for corporate shares. *See,*
8 *e.g., California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 703 (1912) (“If there is a
9 consideration of some sort . . . that is intended to redound to the benefit of the
10 corporation . . . then . . . the consideration is sufficient and . . . adequate, although it
11 may not be equal in value to that of the stock”).

12 9. Defendants also contend that Plaintiffs failed to perform because
13 Topway actually billed and received payment from TAC for the initial shipment of
14 “free” goods. However, for the reasons stated at Proposed Findings of Fact
15 paragraphs 39-45, *supra*, the Court concludes that TAC did not pay for the initial
16 shipment of goods, and Defendants’ contentions to the contrary were fabricated to try
17 to gain advantage in this litigation.

18 10. Accordingly, the Court concludes that Plaintiffs fully or substantially
19 performed their obligation to make an initial shipment of free goods to TAC in
20 consideration for a 50% ownership interest.

21 **C. Contemporaneous, Documentary Evidence Prepared by the**
22 **Defendants Themselves Before Litigation Ensued Conclusively**
23 **Establishes Topway’s and Yu’s Shareholder Status**

24 11. As noted at Proposed Findings of Fact paragraphs 26(a)-(q), *supra*, some
25 of the most powerful evidence in support of Plaintiffs’ claim of shareholder status
26 comes from contemporaneous documents prepared by the Defendants themselves
27 before this litigation ensued. In these documents, the Defendants repeatedly and
28 unambiguously acknowledge the shareholder status of Topway and Yu.

1 12. With respect to certain of these documents – for example, the corporate
2 director and shareholder written consents in Exhs. 3 at pp. 30-32; Exh. 4 at pp. 6-10;
3 and Exh. 5 at pp. 1-3 -- Defendants argue that they are of limited or no legal effect
4 because Yu and Tan did not sign them as TAC had requested. However, this confuses
5 the issue of whether the corporate actions envisioned in the various shareholder or
6 director written consents were validly approved, with whether the statements made
7 therein attesting to Plaintiffs’ shareholder status amount to Defendants’ admission of
8 fact. The documents at issue are certainly relevant and admissible for purposes of
9 addressing the latter inquiry. *See Kendal v. San Pedro Lumber Co.*, 98 Cal. App. 2d
10 242, 244 (1929) (although documents prepared by debtor did not rise to the level of an
11 account stated they nonetheless constituted admissions as to the presence of a debt);
12 Fed. R. Evid. 801(d)(2) (admission/statement of party opponent); Fed. R. Evid.
13 804(b)(3) (statement against interest).

14 13. The Stock Purchase Agreement (*see* Exh. 3 at pp. 15-22) that was
15 tendered by the Yow brothers is particularly damaging to the Defendants’ case. An
16 attempt to buy out Plaintiffs’ TAC shares cannot be reconciled with the contention
17 that Topway and Yu are not owners of the company. In this regard, the Defendants
18 contend that the Stock Purchase Agreement was really an offer to compromise under
19 Fed. R. Evid. 408, and therefore it should not be admitted or accorded weight.
20 However, such a contention is without merit. Not only is the Stock Purchase
21 Agreement without any of the recognizable features of an offer to compromise, it
22 affirmatively acknowledges and warrants Topway’s and Yu’s rightful shareholder
23 status. *See, e.g., Civic Center Drive Apartments Ltd. Partnership v. Southwestern Bell*
24 *Video Services*, 295 F.Supp.2d 1091, 1099 n. 3 (N.D. Cal. 2003) (where there was “no
25 reference to settlement negotiations” in schedule of proposed corrective work given
26 by construction company to customer during their dispute, the document was deemed
27 to be outside the scope of Fed. R. Evid. 408); *City of Honolulu v. Rivera Davila*, 438
28 F.2d 1367, 1369 (1st Cir. 1971) (offer wherein alleged debt guarantor requested only

1 an extension of time and agreed to make full payment was “properly viewed . . . as an
2 admission rather than an offer in compromise”).

3 **D. Actual Delivery of Share Certificates Is Not Necessary to Establish**
4 **Plaintiffs’ Valid Ownership Interest**

5 14. If, as the Court concluded in the foregoing pages, the parties entered into
6 a binding agreement for the allocation of TAC shares, and Plaintiffs has fully or
7 substantially performed their obligations thereunder, then the agreement is fully
8 executed and Plaintiffs are immediately and automatically vested with the ownership
9 interest as a matter of law. *See, e.g., Reeder v. FINDERUP*, 78 Cal. App. 305, 308
10 (1926); *Mitchell v. Beckman*, 64 Cal. 117, 121 (1883).

11 15. Defendants contend that Plaintiffs were never lawful shareholders of
12 TAC because they never received TAC share certificates. However, the law is clear
13 that when an agreement for the distribution or sale of shares is fully executed, actual
14 delivery of the share certificates is not necessary to create ownership interest in its
15 intended holder. *See, e.g., United States Nat’l Bank of Los Angeles v. Stiler*, 216 Cal.
16 324, 333-34 (1932); *Western Pacific Paper Co. v. Hollywood Tropics*, 113 Cal. App.
17 305, 308 (1931).

18 **E. Plaintiffs’ Alleged Sales of Guitars to Best Buy Do Not Vitate Their**
19 **Shareholder Status**

20 16. For the reasons stated at Proposed Findings of Fact paragraph 49-54,
21 *supra*, this Court does not give credence to Defendants’ claim that Plaintiffs caused
22 the guitars depicted in Exhs. 59A and 59B to be sold to Best Buy without Defendants’
23 knowledge and authorization. The Court also rejects Defendants’ contention that such
24 sales, if they occurred at all, were viewed as a material breach of the exclusive
25 dealing/non-competition provision in the parties’ agreement for joint ownership of
26 TAC. Chief among the reasons for the Court’s conclusion is the utter lack of
27 contemporaneous evidence showing Defendants’ objection to the Best Buy guitar
28 sales. *See, e.g., Bohman v. Berg*, 54 Cal. 2d 787, 795 (1960) (“When one party

1 performs under the contract and the other party accepts his performance without
2 objection it is assumed that this was the performance contemplated by the
3 agreement”).

4 17. The sale of the guitar depicted in Exh. 59B cannot, as a matter of law,
5 serve as the basis for any breach of contract allegation against the Plaintiffs. That sale
6 occurred during 2008, at which time Plaintiffs were already relieved from any
7 obligation to honor the parties’ agreement because it came well after Plaintiffs filed
8 this suit on April 20, 2007 in response to Defendants’ failure to honor the Plaintiffs’
9 shareholder rights. *See, e.g., Harlan v. Harlan*, 74 Cal. App. 555, 561-62 (1946)
10 (“Defendant may not deprive plaintiff of the sole consideration for her promises and at
11 the same time hold her to those promises”).¹

12 18. As for the sale of the guitar depicted in Exh. 59A under the
13 circumstances of this case that can in no way vitiate Plaintiffs’ shareholder status.
14 The parties’ agreement for the joint ownership of TAC is bilateral in nature expect in
15 one respect: Before it gains a 50% interest, Topway must first make the initial
16 shipment of free goods. *See, e.g., Davis v. Jacoby*, 1 C. 2d 370, 378 (1934) (a
17 bilateral contract is one in which there are mutual promises, a promise being given in
18 consideration of another promise). Once that shipment is made, however, the contract
19 is fully executed and Plaintiffs are immediately and automatically vested with the
20 ownership interest as a matter of law. *See, e.g., Reeder v. FINDERUP*, 78 Cal. App. 305,
21 308 (1926); *Mitchell v. Beckman*, 64 Cal. 117, 121 (1883).

22 19. Here, an alleged violation of the exclusive dealing/non-competition
23 provision that took place in October/November 2006 in no way negates the fact that
24 the agreement making Plaintiffs’ 50% shareholders was already fully executed back in
25 April 2006, when the shipment of goods was made.

26
27 ¹ For the same reason, Exhibit 58 is irrelevant. That purports to be an agreement,
28 entered into on May 15, 2007, whereby Topway (through Tan) conferred exclusive
distributorship rights upon Griffin International Companies for the sale of guitar
gaming consoles manufactured by Topway.

1 20. Thus, the sale of the guitar depicted in Exh. 59A to Best Buy can serve
2 only as the basis for a breach of contract claim against the Plaintiffs. To the extent
3 Defendants may seek damages for such breach, that is not a subject of this trial and it
4 will not affect Plaintiffs' shareholder status. To the extent Defendants may try to
5 vitiate Plaintiffs' shareholder status by seeking a rescission remedy for said breach, it
6 is not a legally viable option here. This is because the law requires that, to attain
7 rescission, it must be promptly announced by the promisee and consideration offered
8 to be restored. *See, e.g., Brunzell Const. Co. v. G.J. Weisbrod, Inc.*, 134 Cal. App. 2d
9 278, 283 (1955). In this case, there is no evidence that Defendants have ever
10 demanded rescission, or offered to restore consideration. Further, Defendants'
11 Answer and Counterclaim also do not plead any of these requisite preconditions for
12 rescission.

13 21. Under the circumstances of this case, even if Defendants' allegation is to
14 be believed that Plaintiffs caused competing guitar consoles to be sold at Best Buy, it
15 does not provide any legal basis to strip Topway or Yu of their ownership interest in
16 TAC.

17 **F. Tan Was Appointed and Remains a TAC Director**

18 22. It is controverted whether the parties agreed, as part of the formation of
19 TAC, to install Tan, along with Yu and the Yow brothers, on the TAC Board.
20 However, the Court need not resolve this factual conflict in order to conclude that Tan
21 was duly appointed to the Board. The Court bases its conclusion on the October 2006
22 "Action by Unanimous Written Consent of Shareholders In Lieu of Annual Meeting
23 of The Ant Commandos, Inc.", which indicates that shareholders appointed Tan to the
24 board, effective immediately, until the next annual meeting of shareholders and until
25 his successor is elected. *See* Exh. 7 at p. 1. There is no evidence that a successor to
26 Tan's board seat has been elected.

27 23. Although the aforesaid shareholder written consent was not fully
28 executed by TAC's shareholders, the law is clear that, in close corporations like TAC,

1 the law favors substance over form such that corporate actions can be deemed valid
2 even if they were not formally enacted – especially if the action in question was later
3 ratified by word or conduct. *See, e.g., Brainard v. De La Montanya*, 18 Cal. 2d 502,
4 511 (1941) (in cases of close corporations where the directors are in frequent contact
5 with each other, it is unnecessary to hold formal meetings in order to reach decisions);
6 *In re Ostwald's Estate*, 189 N.Y.S.2d 472, 480 (1959) (directors of small corporations
7 may transact their business by conversation and without formal votes); *American*
8 *Center for Education, Inc. v. Cavnar*, 80 Cal. App. 3d 476, 490 -491 (1978) (“The
9 law favors substance over form. (*Civ. Code*, § 3528)”); *Teperman v. Atcose Baths,*
10 *Inc.* 182 N.Y.S.2d 765, 768 (1959) (an action taken at an incorporator’s meeting was
11 held to be effective even though the minutes of the meeting were not signed);
12 *McCarthy v. U.S.I. Corp.*, 678 A. 2d 48, 52 (1996) (an unsigned unanimous
13 shareholder consent terminating certain employees was later validated by ratification
14 and therefore was held to be valid nunc pro tunc).

15 24. Here, there is substantial evidence that TAC ratified Tan’s appointment
16 to the board:

17 (a) TAC prepared the minutes of its Board meeting of September 7, 2006.

18 These minutes, which are dated September 10, 2006, indicate that
19 Steven Tan, as well as Diana Yu and Lip Yow, were in attendance at
20 the Board meeting described therein, and Steven Tan is specifically
21 identified therein as one of the “undersigned Directors” of TAC. *See*
22 *Exh. 21* at p. 1.

23 (b) In October 2006, Lip Yow transmitted to Diana Yu and Topway a
24 document, entitled “Action by Unanimous Written Consent of the
25 Board of Directors of The Ant Commandos, Inc.”, for their review
26 and signature. This Written Consent, which was prepared at the Yow
27 brothers’ direction, identifies Steven Tan, as well as Diana Yu, as
28 signatories in their capacity as directors of TAC. *See Exh. 8* at p. 3.

1 (c) On or about October 3, 2006, TAC prepared and filed a Statement of
2 Information with the State of California Secretary of State which
3 identifies Steven Tan, along with Diana Yu, Lip Yow and Raymond
4 Yow, as directors of TAC. *See* Exh. 53 at pp. 1-2.

5 **G. The Ninth Cause of Action**

6 25. Plaintiffs' Ninth Cause of Action challenges the validity of TAC's June
7 25, 2007 Action, whereby Raymond Yow and Lip Yow voted to purportedly remove
8 Diana Yu from TAC's board.

9 26. Under governing California law, a director of a California corporation
10 may be removed only as prescribed in *Cal. Corp. Code* §§ 302, 303 or 304. *See Cal.*
11 *Corp. Code* § 303(c); DeGarmo v. Goldman, 19 Cal. 2d 755, 760 (1942).

12 27. In this case, because there is no evidence that Diana Yu has a criminal
13 record or is of unsound mind (*Cal. Corp. Code* § 302), and there is no evidence that
14 Raymond or Lip Yow filed a shareholder derivative action to remove Diana Yu from
15 the board (*Cal. Corp. Code* § 304), Yu's removal from the Board is valid only if
16 Topway and Diana Yu are not shareholders of TAC. If they are shareholders,
17 however, then Yu's removal is invalid because there is no evidence that Topway or
18 Diana Yu received timely notice of the June 25, 2007 Action. *See Cal. Corp. Code* §§
19 303, 603(a), 603(b).

20 28. For all of the foregoing reasons, the Court concludes that Yu and Topway
21 are combined 50% shareholders of TAC and, accordingly, finds in favor of Plaintiffs
22 as to the Ninth Cause of Action. Specifically, the Court finds that (a) the June 25,
23 2007 Written Action removing Yu from the Board is illegal and fraudulent because
24 Yu and Topway, as TAC shareholders, was not given any notice of the vote, and
25 therefore was not given an opportunity to cast their vote thereon; and (b) that Yu shall
26 therefore be immediately reinstated as a director of TAC.

27 **H. The Tenth Cause of Action**

1 29. For all of the foregoing reasons, the Court concludes that Yu and Topway
2 are combined 50% shareholders of TAC and, accordingly, finds in favor of Plaintiffs
3 as to the Tenth Cause of Action. Specifically, the Court declares, and grants
4 injunctive relief reasonably necessary to effectuate, the following: (a) Yu and
5 Topway are 50% shareholders of TAC; (b) Yu is a director of TAC; (c) Tan is a
6 director of TAC; and (d) any votes terminating Yu and/or Tan as directors (including
7 the June 25, 2007 Written Action) which was taken by shareholders that did not
8 include Topway and Yu is illegal, null and void.²

9
10 APPROVED AND ADOPTED BY THE COURT,

11 Dated: November 06, 2008



12
13
14 STEPHEN LARSON
15 United States District Judge
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23

24 ² As a logical and necessary consequence of the foregoing, the Court also declares,
25 and grants injunctive relief reasonably necessary to effectuate, the following: That the
26 Amendment to Bylaws reflected in Exhibits 31 and 32, dated August 14, 2007,
27 whereby Raymond Yow and Lip Yow, voting as the “sole shareholders” of TAC,
28 reduced the number of directors to two, is null and void. The TAC bylaws provide
that the bylaws may be amended by shareholders only if approved by at least a
majority of the outstanding shares entitled to vote in the election of directors at any
annual or special meeting of shareholders. See Exh. 20 at p. 6. Neither Yu nor
Topway, as shareholders, received notice of this vote or had an opportunity to
participate therein.