IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

GLEN DALE HUNTER, Plaintiff v. MICRO PACIFIC DEVELOPMENT INC., dba Grand Hotel, Defendant	Civil Action No. 94-00027 ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the court on Friday, June 30, 1995, for hearing of defendant's motion for summary judgment. Plaintiff appeared by and through his attorney, G. Anthony Long; defendant appeared by and through its attorneys, Theodore R. Mitchell and Jeanne Rayphand. The court previously received two amicus briefs, one from the United States and one from the Commonwealth of the Northern Mariana Islands. Both plaintiff and defendant requested and were granted until Friday, July 7, 1995, to file responses to portions of the amicus briefs. This time limit was subsequently extended, at the request of both parties, until Monday, July 10, 1995, at 3:00 p.m.

THE COURT, having considered the written and oral arguments of counsel, and

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being otherwise advised, rules on defendant's motion for summary judgment as follows:

The Applicability of the Treaty Within and To the Commonwealth

The initial issue is the applicability within and to the Commonwealth of the Northern Mariana Islands of the Treaty of Friendship, Commerce and Navigation[1] entered into between the United States and Japan and effective October 30, 1953. The court concludes that the Treaty does apply, by virtue of both general principles of international law and by the terms of the Covenant.[2]

Generally, when one party to a treaty acquires new territory, the treaty automatically applies to the newly-acquired territory. See e.g. Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 581, 28 S.Ct. 337 (1908)(pre-Empire treaty recognized by both governments as still in force after the formation of the German Empire); Terlinden v. Ames, 184 U.S. 270, 282-85, 22 S.Ct. 484 (1902)(treaty dating from 1852 not terminated by subsequent formation of German Empire). Under this principle, the terms of the Treaty became applicable to the Commonwealth on November 3, 1986, when, by virtue of the proclamation[3] of President Reagan, the Trust Territory of the Pacific

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[1] 4 U.S.T. 2063 (Apr. 2, 1953).

[2] "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," Pub.L. 94-241, 90 Stat. 263 (Mar. 24, 1976), codified at 48 U.S.C. § 1981.

[3] Presidential Proc. No. 5564, 51 Fed.Reg. 40399 (Nov. 3, 1986).

Islands[4] ended as to the Northern Mariana Islands and the Commonwealth came instantly into being under the sovereignty of the United States.

This conclusion is buttressed by Covenant §§ 101 and 102. Section 101 provided that the Northern Mariana Islands became a self-governing commonwealth upon the termination of the Trusteeship Agreement (in November, 1986). Section 102 provided in relevant part that "those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." The court finds that the United States-Japan Friendship Treaty at issue here automatically became applicable to the CNMI on the date the Commonwealth came under United States sovereignty.

Do the Terms of the Treaty Supersede Commonwealth "Local Preference" Hiring Laws?

The Treaty, together with the Covenant and those provisions of the United States Constitution and laws applicable to the Northern Mariana Islands, is the "supreme law of the Northern Mariana Islands" pursuant to Covenant § 102. Commonwealth labor laws,

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[4] The court believes it would be error to begin analysis of this issue with the mention of the Trust Territory of the Pacific Islands in Article XXIII of the Treaty. The Trust Territory of the Pacific Islands was never under United States sovereignty and no presidential proclamation ever extended the provisions of the Treaty to the Trust Territory. It was the act of the people of the Northern Mariana Islands, as expressed in Covenant §§ 101 and 102, in choosing to become a part of and live under the sovereignty of the United States that automatically extended the Treaty's applicability to the Commonwealth.

when in conflict, are superseded by applicable Treaty terms.[5] Summary judgment is GRANTED on the issue of whether or not the Treaty supersedes Commonwealth labor laws which conflict with it. It does. However, each instance of a party claiming Treaty rights will have to be adjudicated on its own facts until the Commonwealth provides guidance, legislatively or by administrative rule-making, to investors, employers, prospective employees, and this court.

May a Subsidiary Assert the Treaty Rights of Its Parent Company?

Defendant Micro Pacific Development is a Commonwealth corporation and a subsidiary of Nagoya Railroad Company, Ltd. of Japan. Nagoya Railroad Company owns 51.7% of the common stock of Micro Pacific Development. Defendant argues that it must be allowed to assert its parent's Treaty rights, or else such rights are essentially meaningless, because defendant claims that its alleged discriminatory conduct toward plaintiff was caused by the assignment from its parent company of a person to occupy the position of front desk supervisor at the hotel.

In Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 102 S.Ct. 2374 (1982), the Court construed Articles VIII(1) and XXII(3) of the United States-Japan Treaty of Friendship, Commerce and Navigation. Petitioner Sumitomo was a wholly-owned subsidiary of its Japanese parent company. Respondents alleged that Sumitomo's

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[5] While it is true that the Commonwealth controls its own immigration pursuant to Covenant § 503(a), this is a separate issue and one not squarely before the court at this time. It is to be hoped that the Commonwealth will take steps to protect its rights under Covenant § 503(a) by quickly addressing the new immigration issues raised by the Treaty.

practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated both 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, et seq. (Title VII).

The Court began its analysis with the language of the Treaty itself, following the well-established precedent that the language controls unless its literal application would lead to a result inconsistent with the intent or expectations of the signatories.

Section VIII(1) of the Treaty provides in pertinent part:

> Companies of either Party shall be permitted to engage, within the territory of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

Article XXII(3) provides:

> As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

The Court found that, because Sumitomo had been incorporated in New York, it was "a company of the United States," and not a company of Japan, pursuant to Article XXII(3). Thus, it could not invoke the rights provided in Article VIII(1), which "are available only to companies of Japan operating in the United States[.]" Sumitomo Shoji, 457 U.S. at 183-84. Both governments supported the Court's interpretation. Id. The Court further held that:

> "[t]he purpose of the [Friendship] Treaties was not to give foreign corporations greater rights than domestic corporations, but instead to

> insure them the right to conduct business on an equal basis without suffering discrimination based on their alienage. * * * These local subsidiaries are considered for purposes of the Treaty to be companies of the country in which they are incorporated; they are entitled to the rights and subject to the responsibilities of other domestic corporations."

Id. 457 U.S. at 189.

The Court in Avagliano left open the question of whether a subsidiary corporation, admittedly not a "Japanese company" in the technical sense used in Article XXII(3) of the Treaty, could nonetheless assert the Treaty rights of its parent company. 457 U.S. at 190 n.19.[6] In addressing this question, defendant here urges the court to adopt the approach used in Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

In Fortino, the Seventh Circuit held that the subsidiary company must be allowed to assert its parent's Treaty rights if the parent company dictated the subsidiary's discriminatory conduct. Fortino, 950 F.2d at 393. Not to allow the subsidiary to do so would be to treat discrimination based on national origin (prohibited by federal law) the same as discrimination based on national citizenship (allowed by the Treaty). The court

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[6] The Court stated:

> We express no view as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo [Shoji America] or as to whether a business necessity defense may be available. There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country.

The Court noted that the court of appeals had found the evidentiary record insufficient to determine whether Japanese citizenship was a bona fide occupational qualification for any of Sumitomo's positions within the reach of Article VIII(1).

held that a judgment that forbade the subsidiary from giving preferential treatment to expatriate executives sent by its parent company would effectively prevent the parent company from assigning its executives to the subsidiary, thus abrogating the terms of the Treaty. Id. Accordingly, the court of appeals held that the subsidiary must be allowed to assert the Treaty rights of the parent "at least to the extent necessary to prevent the treaty from being set at naught." Id. The court agrees that this approach would at least allow introduction of evidence of the normal parent-subsidiary relationship and whether or not the employee in question was assigned to the subsidiary by the parent company.

Defendant maintains that the male Japanese citizen now occupying the position of front desk supervisor was assigned to the position by its parent company in Japan. Plaintiff counters that the position was advertised locally and that the advertisement gave no indication that any special qualifications were necessary beyond the high school education and two years experience specified in the advertisement. Because there is a genuine issue of material fact surrounding the extent to which the parent company was responsible for the allegedly discriminatory conduct of its subsidiary, summary judgment is DENIED.

Is the Position of Front Desk Supervisor Covered by the Treaty?

For reasons similar to those given in the preceding paragraph, summary judgment on this question must be DENIED. While there is nothing before the court to indicate that the position of front desk supervisor is a position falling within the ambit of the Treaty, in the absence of any guidance from existing Commonwealth law, each case will

need to be decided on its own particular facts, and the court will hear evidence on this issue.[7]

For the reasons stated above, defendant's motion for summary judgment is GRANTED as to the issue of the applicability of the Treaty within and to the Commonwealth, GRANTED as to the question of whether the Treaty supersedes conflicting Commonwealth labor laws, GRANTED as to the proposition that a subsidiary has at least a limited right to attempt to assert the Treaty rights of its parent company but DENIED due to the genuine issues of material fact remaining for decision regarding the parent company's role in assigning personnel to defendant, and DENIED as to the claim that the position of front desk supervisor is covered by the Treaty, since there remain genuine issues of material fact.

DATED this 11th day of July, 1995.

ALEX R. MUNSON
Judge

[7] It is to be hoped that the Commonwealth will soon address this issue, in order to protect the rights established for it by the Covenant and to aid the court when this issue again is presented.