

FILED
Clerk
District Court

AUG 04 1995

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

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 GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
ON ISSUE OF SUBSIDIARY'S RIGHT
TO ASSERT THE TREATY RIGHTS
OF ITS PARENT COMPANY

THIS MATTER came before the court on Wednesday, July 19, 1995, and Wednesday, July 26, 1995, for continuation of the hearing of defendant's motion for summary judgment on the issue of whether defendant Micro Pacific Development, Inc. can assert the rights of its parent company, Nagoya Railroad Company Ltd., under the United States-Japan Treaty of Friendship, Navigation, and Commerce.¹ Plaintiff appeared by and through his attorney, G. Anthony Long; defendant appeared by and through its attorneys, Theodore R. Mitchell and Jeanne Rayphand.

¹ 4 U.S.T. 2063 (Apr. 2, 1953), entered into force and effective October 30, 1953.

1 In the court's decision of July 11, 1995, summary judgment on this issue was
2 denied because there remained a genuine issue of material fact about the extent to which
3 the parent company, Nagoya Railroad Company Ltd. of Japan, was responsible for the
4 allegedly discriminatory conduct of its subsidiary, defendant Micro Pacific Development,
5 Inc. Based upon the representations of the parties that the prospects of settling this
6 lawsuit would be greatly enhanced if a decision were rendered on this question, and the
7 court's own conviction that resolution of this issue was a matter of law for the court's,
8 and not the jury's, determination, the court agreed to hear testimony and consider
9 evidence.
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12 THE COURT, having now considered the testimonial and documentary evidence
13 submitted and the written and oral arguments of counsel, and being otherwise advised,
14 rules as follows:

15 As stated in the court's earlier discussion of this issue, defendant maintains that
16 the male Japanese citizen² now occupying the position of front desk supervisor was
17 assigned to the position by its parent company in Japan. The Treaty has been interpreted
18 to mean that "companies have a right to decide which executives and technicians will
19 manage their investment in the host country, without regard to host country law." Spieß
20 v. Itoh & Co., Inc., 642 F.2d 353, 361 (5th Cir. 1981), vacated on other grounds, 457
21 U.S. 1128, 102 S.Ct. 2951 (1982).
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25 ² Mr. Shunsuke Kondo was the person who filled the position for which plaintiff
26 applied. Although Mr. Kondo has now returned to Japan (and his position has been
taken by another Japanese citizen assigned by the parent company), he will be referred
to herein in the present tense.

1 In Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 102 S.Ct. 2374
2 (1982), the Court construed Articles VIII(1)³ and XXII(3)⁴ of the United States-Japan
3 Treaty of Friendship, Commerce and Navigation, but left unanswered the question of
4 whether a subsidiary corporation, admittedly not a "Japanese company" in the technical
5 sense used in Article XXII(3) of the Treaty, could nevertheless assert the Treaty rights of
6 its parent company.⁵ The Court stated:

8 We express no view as to whether Japanese citizenship may be a bona
9 fide occupational qualification for certain positions at Sumitomo [Shoji
10 America] or as to whether a business necessity defense may be available.
11 There can be little doubt that some positions in a Japanese controlled

12 ³ Section VIII(1) of the Treaty provides in pertinent part:

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

17 ⁴ Article XXII(3) provides:

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

25 ⁵ Petitioner Sumitomo was a wholly-owned subsidiary of its Japanese parent
26 company. Respondents alleged that Sumitomo's 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 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.

1 company doing business in the United States call for great familiarity
2 with not only the language of Japan, but also the culture, customs, and
3 business practices of that country. * * * We also express no view as
to whether Sumitomo may assert any Article VIII(1) rights of its parent.

4 457 U.S. at 190 n.19.

5 The court indicated in its July 11th decision that, in addressing this question, it
6 would adopt the approach used in Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).
7 The Seventh Circuit in Fortino held that a subsidiary company must be allowed to assert
8 its parent's Treaty rights if the parent company dictated the subsidiary's discriminatory
9 conduct.⁶ Fortino, 950 F.2d at 393. This court agreed with the Seventh Circuit's
10 reasoning that not to allow the subsidiary to assert its parent's Treaty rights would be to
11 treat discrimination based on national origin, which is prohibited by federal law, the same
12 as discrimination based on national citizenship, which is allowed by the Treaty.
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14 In addressing this problem, the Fortino court asked these questions: Are the
15 assigned executives employees of the subsidiary and under its day-to-day control or do
16 they retain their status as employees of the parent company? On which company's books
17 are the employees carried, the parent or the subsidiary? Which company evaluates the
18 employee's performance? Which company keeps the personnel records of the assigned
19 executives? Which company fixes the employee's salary? Which company helps the
20 family relocate? Does the parent company have substantial trade or investment relations
21 with the host country? And, is the work being performed authorized by the Treaty?
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25 ⁶ In Fortino, the parent company, Matsushita Electric Industrial Company, Ltd. of
26 Japan, assigned financial and marketing executives on a temporary basis to its American
subsidiary, Quasar Company, a Division of Matsushita Electric Corporation of America.

1 Other questions relevant to the instant case include: Who is Mr. Kondo's
2 employer: Nagoya Railroad Company or Grand Hotel? What was Mr. Kondo's position
3 at the parent company? Did he have any previous hotel experience? Did he have any
4 previous experience as a front desk supervisor? To what other positions at the Hotel has
5 Nagoya Railroad Company assigned personnel? Does Mr. Kondo speak English? (If not,
6 how does he communicate with non-Japanese speaking staff?) Which portions of Mr.
7 Kondo's job require "great familiarity with not only the language of Japan, but also the
8 culture, customs, and business practices of that country"? Is this knowledge something
9 that can never be taught to or absorbed by a non-Japanese? To whom does the front
10 desk supervisor answer? Should tourists to a foreign country not expect to encounter
11 foreigners at business places? What sort of problems do front desk supervisors encounter
12 that require the position to be held by a Japanese citizen assigned by the parent
13 company? Has the position always been held by a Japanese citizen assigned by the
14 parent company? What hotel positions in the administrative/supervisory hierarchy are
15 above front desk supervisor? Are they all held by Japanese citizens assigned by the
16 parent company? Were they all assigned by Nagoya Railroad Company? If not, why not?
17 What is Mr. Kondo's educational and work experience background? How long has Mr.
18 Kondo worked for the Nagoya Railroad Company? What positions has he held? Who at
19 Nagoya Railroad Company assigned him to the Grand Hotel? Why was he assigned and
20 what particular concerns led to his assignment? What sort of entry documents did Mr.
21 Kondo have when he entered the CNMI? And, is Mr. Kondo's assignment of finite
22 duration or is it open-ended? (Have others preceded him to Saipan for one or two year
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1 stints, as part of being groomed for higher positions?)

2 While not all of these questions were answered, after the hearing there was no
3 genuine issue concerning these following material facts: Defendant Micro Pacific
4 Development, doing business as the Grand Hotel, is a Commonwealth corporation and a
5 subsidiary of Nagoya Railroad Company Ltd. of Japan. Nagoya Railroad Company⁷
6 comprises approximately 294 different companies, of which approximately 40 are hotels.
7 Of the hotels, three are located outside Japan. Ex. A.
8

9 Nagoya Railroad Company owns a controlling interest in Micro Pacific
10 Development by virtue of holding more than fifty percent of the common stock.⁸ Six of
11 the eleven board members of defendant are also board members of Nagoya Railroad
12 Company. Ex. E. Defendant's directors meet once a year in Nagoya, either at a hotel
13 owned by Nagoya Railroad Company or at one of its office buildings. Defendant's
14 shareholders meet once a year in Nagoya, at a hotel owned by Nagoya Railroad Company.
15 Testimony of Yoshimi Takanaka, General Manager, defendant Grand Hotel.
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17 Of the 140-plus employees at the Grand Hotel, thirteen are assigned by Nagoya
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20 ⁷ The testimony of Mr. Takanaka, General Manager of the Grand Hotel, was that
21 Nagoya Railroad Company is the "core" company of, and is essentially synonymous with,
22 the Meitetsu Group. For clarity, when the court refers to the parent company of
defendant, it will refer to Nagoya Railroad Company Ltd.

23 ⁸ Although the documentary evidence in this area appeared somewhat confusing due
24 to typographical errors in defendant's filings made with the Commonwealth's Corporate
25 Registrar, the records were internally consistent if construed to show that Nagoya
26 Railroad Company at all times owned more than fifty percent of the outstanding shares
of defendant Micro Pacific Development, Inc. After examining the documents and hearing
the testimony, the court is confident that there is no genuine issue of material fact as to
this conclusion of law.

1 Railroad Company. All of the higher echelon positions are filled by personnel assigned
2 by Nagoya Railroad Company; these positions include the general manager, the assistant
3 general manager, the operations manager, the purchasing manager, the front manager,
4 the restaurant manager, the head chef, and some assistant managers, including the
5 assistant front manager, the assistant restaurant manager, and the assistant chef. Some
6 supervisors are also appointed by Nagoya Railroad Company. The general manager must
7 accept all employees assigned to the Grand Hotel by the parent company unless a very
8 compelling reason can be given for not accepting a particular person. The general
9 manager of the Hotel makes the final hiring decision as to all other employees.
10
11 Testimony of Yoshimi Takanaka, General Manager, Grand Hotel.
12

13 Nagoya Railroad Company assigns employees to critical positions in its overseas
14 subsidiaries to protect and maximize its investments. The investment in the Grand Hotel
15 is approximately 7-8 billion yen, or approximately \$82-94 million at current exchange
16 rates.
17

18 Nagoya Railroad Company determines the salary of all employees it assigns to the
19 Grand Hotel, but the Grand Hotel actually pays the salary. All persons assigned by
20 Nagoya Railroad Company to the Grand Hotel remain employees of Nagoya Railroad
21 Company. Assignments typically last two to five years, with people occupying lower
22 positions rotating in and out more quickly than those at higher positions. One issue of
23 Nagoya Railroad Company's in-house newsletter mentioned that Mr. Kondo had been
24 assigned to the Grand Hotel as assistant manager, effective April 1, 1993. Ex. B. This
25 assignment was made by the Division of Personnel, Nagoya Railroad Company. A later
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1 edition of the company's newsletter stated that Mr. Kondo had been later assigned to the
2 Personnel Department at the main office in Nagoya, effective June 1, 1995. Ex. C.

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4 Mr. Takanaka testified that at the Grand Hotel there is one "front manager,"
5 under whom works two or three "assistant front managers," under whom work a total of
6 four or five supervisors. All supervisors must be able to speak Japanese, because more
7 than 90% of the Hotel's guests are Japanese.

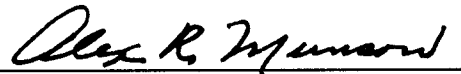
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9 Mr. Takanaka could not state unequivocally from the copy of Nagoya Railroad
10 Company's employment file for Mr. Kondo whether or not Mr. Kondo had had hotel
11 experience prior to his stint at the Grand Hotel. Mr. Kondo's English skills are limited.
12 When Mr. Kondo was re-assigned back to Japan by Nagoya Railroad Company, his
13 position at the Hotel was taken by another Japanese citizen, again assigned by Nagoya
14 Railroad Company.

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16 The uncontradicted evidence presented shows a strong parent-subsidary
17 relationship between Nagoya Railroad Company and defendant Micro Pacific
18 Development, Inc. There is no question that Mr. Kondo was assigned to the Grand Hotel
19 by Nagoya Railroad Company. Accordingly, the alleged discriminatory conduct engaged
20 in by the Hotel was a direct result of the assignment of Mr. Kondo to the Hotel by
21 Nagoya Railroad Company. The Hotel may, and has, asserted the Treaty rights of its
22 parent company, and summary judgment in its favor is GRANTED on this issue.

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24 Remaining for decision is the reach to which the full Treaty protections should
25 extend. Is the position under consideration an integral and essential part of the parent-
26 subsidiary relationship, as contemplated by the Treaty, or is it merely a position which

1 the parent company might find desirable to fill as part of its normal corporate routine?
2 Here, can it be said that the fate of Nagoya Railroad Company's investment hinges to any
3 meaningful degree under the Treaty on the performance of the front desk supervisor at
4 the Grand Hotel in Saipan? That will be an issue for the jury to decide.
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6 DATED this 4th day of August, 1995.
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9 ALEX R. MUNSON
10 Judge
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