

1. **FOR PUBLICATION**

2. **IN THE SUPERIOR COURT**
3. **OF THE**
4. **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

4. GUERRERO FAMILY TRUST, et al.

CIVIL ACTION NO. 04-0574

5. Plaintiff,

6. v.

7. KINKI NIPPON TOURIST, LTD., et al.

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS, AND
DISMISSING MOTIONS TO STAY
DISCOVERY AND TO COMPEL
DISCOVERY**

8. Defendants.

11.
12. THIS MATTER was last before the Court on March 14, 2006 on Morgan Stanley Japan
13. Limited’s and Marianas Holdings LLC’s (collectively, “Morgan Stanley’s”) motions (1) to dismiss
14. the Second Amended Complaint (SAC) for failure to state a claim; and (2) to stay discovery
15. pending the resolution of the motion to dismiss. Arguments were also heard on Plaintiffs’ Motion to
16. Compel Discovery. Appearing at oral arguments and/or on the briefs were: Loren A. Sutton for
17. Morgan Stanley; and Daniel M. Benjamin for Plaintiffs Guerrero Family Trust, et al. (“Plaintiffs”).

18. **I. FACTUAL AND PROCEDURAL BACKGROUND**

19. Plaintiffs in this case are the minority shareholders in two corporations, Defendants Saipan
20. Hotel Corp. (SHC) and its parent Pacific Development Inc., (PDI) (in which Defendant Kinki
21. Nippon Tourist Inc., (KNT) is the majority shareholder). The SHC hotel is the primary asset of PDI
22. and SHC. SHC owns in fee simple the property underlying the hotel and the staff housing. Plaintiffs
23. allege that Defendants conspired to reorganize SHC and PDI and sell the SHC hotel, in the process
24. seriously diluting the value of the shares held by Plaintiffs.
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1. Plaintiffs' First Amended Complaint (FAC) added Morgan Stanley to their action on
2. grounds that Morgan Stanley assisted the majority shareholders in (1) wrongfully diluting Plaintiffs'
3. shares; and (2) breaching the majority shareholders' fiduciary duty to Plaintiffs. This Court
4. dismissed the FAC for failure to allege facts sufficient to maintain a claim against Morgan Stanley.

5. Following the argument on the motion for dismissal of the FAC, Plaintiffs acquired from
6. KNT additional information relating to Morgan Stanley. Many of these documents, which are in
7. Japanese, were submitted to the Court without a translation as attachments to the Declaration of
8. Noriyasu Horiguchi in Support of Plaintiffs' Opposition to Morgan Stanley/MHL's Motion to
9. Dismiss.
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11. Morgan Stanley did not produce any of the documents requested by Plaintiffs.

12. Plaintiffs' SAC, filed November 18, 2005, added the following allegations pertaining to
13. specific actions taken by Morgan Stanley:

14. 1. During the first half of 2004, Morgan Stanley was engaged in negotiations with the majority
15. shareholders to buy the SHC hotel and two other hotel properties. ¶ 36.
16. 2. Morgan Stanley and KNT entered into a confidentiality agreement requiring Morgan Stanley
17. to refrain from communicating with minority shareholders. ¶ 37.
18. 3. Morgan Stanley hired SHC's legal counsel to assist in due diligence. ¶ 40.
19. 4. Morgan Stanley also hired the accounting firm that had previously been used by minority
20. shareholders. ¶ 38.
21. 5. Morgan Stanley submitted a 4.2 billion yen bid to KNT. ¶ 37.
22. 6. Morgan Stanley knew or should have known that corporate formalities between KNT and
23. SHC were a sham, since Morgan Stanley had access to all of KNT's loans to SHC. ¶ 45.
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1. 7. Morgan Stanley knew or should have known that SHC shares had not been converted to
2. voting stock. ¶ 47.
3. 8. Morgan Stanley knew or should have known that PDI's president lacked authority to vote
4. PDI's shares in SHC in the December 2003 shareholder meeting. ¶ 48.
5. 9. Morgan Stanley's letter of intent suggested it planned to buy only the majority shares, but it
6. was actually pressuring KNT to acquire all of the shares. ¶ 50.
7. 10. Morgan Stanley terminated its agreement to purchase SHC shares. ¶ 57.
- 8.

9. II. DISCUSSION

10. While the SAC adds ten specific factual allegations regarding Morgan Stanley's conduct,
11. Plaintiffs have failed to make direct allegations on every material point necessary to sustain a
12. recovery on any legal theory. Further, the allegations do not support an inference that evidence on
13. material points will be introduced at trial. *See In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990)
14. (describing the requirements for stating a claim).

15. There is an abundance of case law discussing the requisite elements for each of these claims.
16. It is not clear whether the Plaintiffs' failure to plead these elements results from lack of knowledge,
17. lack of tortious activity on the part of Morgan Stanley, or simply deficient pleading.

18. A. Aiding and Abetting Breach of Fiduciary Duty

19. While Plaintiffs appear to have stated a claim for the majority shareholder's breach of duty
20. in violation of Restatement of Torts 874, Plaintiffs have not demonstrated that Morgan Stanley
21. aided and abetted in this tort (as proscribed by the Restatement of Torts 876(b)).

22. Plaintiffs have not adequately alleged that Morgan Stanley actually knew about the breach.¹
23. Plaintiffs argue that constructive knowledge is enough, and a few courts agree.² The majority of
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26. ¹ In response to Morgan Stanley's argument that a breach of fiduciary duty requires actual knowledge, Plaintiffs
27. claim that they *have* pleaded actual knowledge. *See* Plaintiffs' Opposition at 11, citing ¶¶ 47, 48, and 49. However, ¶¶

1. modern courts, however, have held that Section 876(b) requires nothing less than actual
2. knowledge.³ Having failed to plead actual knowledge, the complaint cannot maintain a cause of
3. action for aiding and abetting a breach of fiduciary duty.⁴

4. **B. Aiding and Abetting Wrongful Dilution**

5. Plaintiffs have not stated a claim for aiding and abetting wrongful dilution under
6. Restatement of Torts 876(b), 4 CMC 4106(a), or any other law.

7. First, it is not clear that the majority shareholders actually effectuated their plan to dilute
8. Plaintiffs' shares. Rather, ¶ 84 states that the conduct "will result" in a violation of the minority
9. shareholders' rights.

13. 47 and 48 simply substitute the words "knew or must have known" for "knew or should have known." While "must" is
14. a stronger word than "should", the fact that it is used as an alternative to "knew" suggests that it is not the same thing as
15. "knew." Paragraph 49 states that it was "KNT's intent to make sure that Morgan Stanley . . .knew 'all' facts." An intent
16. to bestow knowledge upon another is not the same as the other's having actual knowledge.

17. Because the complaint does not indicate that there was actual knowledge on the part of Morgan Stanley, the
18. existence of a claim depends on whether constructive knowledge of a breach of fiduciary duty is enough to incur
19. liability.

20. ² Plaintiffs rely heavily on *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992), overruled
21. on other grounds by *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (finding that
22. constructive knowledge is sufficient, based on RESTATEMENT TRUSTS § 297 comment a). *See also Gruby v. Brady*, 838
23. F. Supp. 820 (S.D.N.Y.1993) (having consulted with trustees and administrator in all facets of their administration of a
24. pension fund, served as a consultant to the pension fund, and given advice that trustees solicited and relied on it,
25. defendant should have been aware of the alleged breach of fiduciary duty); *Lehman Bros. Commercial Corp. v.*
26. *Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F.Supp.2d 118, 153 (S.D.N.Y.2000) (citing *Whitney v. Citibank,*
27. *N.A.*, 782 F.2d 1106, 1115-16 (2d Cir.1986)) (a third party can become obligated to investigate an agent's actions where
28. there are indications that the agent's actions are suspicious in nature).

29. ³ *Cohrs v. Salomon Smith Barney, Inc.*, No. 03-505, 2005 WL 2104535 (D. Or. Aug. 31, 2005); *Bergman v.*
30. *Holden*, 857 P.2d 217 (Or. App. 1993) (a contractor who hauled timber cut during a trespass was not liable as aider and
31. abettor to trespass, even though he knew that some timber he transported came from owner's property, and that he was
32. related to other tortfeasors and returned proceeds of timber sale to them); *Higgins v. New York Stock Exchange, Inc.*,
33. 806 N.Y.S.2d 339, 364 (N.Y. Sup. 2005) (plaintiff must demonstrate actual knowledge, as opposed to constructive
34. knowledge); *Design Strategies, Inc. v. Davis*, 384 F.Supp.2d 649, 671 (S.D.N.Y. 2005) (it is necessary to demonstrate
35. actual knowledge, not mere notice or unreasonable unawareness); *In re Lee Memory Gardens, Inc.*, 333 B.R. 76, 79
36. (Bkrcty. M.D.N.C. 2005) (alleged aider and abettor must have actual knowledge of fiduciary's breach of duty).

37. ⁴ The Court does not reach the question of whether the acts alleged constitute "substantial assistance," since such
38. assistance requires knowledge on the part of the attorney that he or she is furthering the breach. *Reynolds v. Schrock*,
39. 107 P.3d 52, 59 (2005).

1. Assuming the majority shareholders had effectuated their plan, Plaintiffs would still be
2. required to show that Morgan Stanley aided and abetted this plan. As discussed above, Plaintiffs
3. have not alleged actual knowledge on the part of Morgan Stanley. Standing alone, the fact that KNT
4. could not have sold the SHC hotel without Morgan Stanley's advice does not make Morgan Stanley
5. liable as an aider and abettor. At the hearing, Morgan Stanley argued that it was seeking a deal in an
6. arms length negotiation. The evidence currently before the court suggests that Morgan Stanley
7. undertook the role of a prospective investor, rather than that of an advisor.
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9. **C. Injunctive Relief**

10. Although Plaintiffs have alleged irreparable injury, they have not pleaded the other elements
11. necessary for injunctive relief. In particular, Plaintiffs have not shown a violation of the law, as the
12. allegations in support of the other claims are inadequate.
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14. **III. CONCLUSION**

15. Because the SAC fails to allege the elements needed to maintain any of the three claims
16. asserted against Morgan Stanley, it must be dismissed. The motions to compel discovery and to stay
17. discovery are dismissed. The dismissal of the complaint renders them moot.

18. So ordered this 26th day of April, 2006.
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20. /s/ _____

21. JUAN T. LIZAMA, Associate Judge
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