

FOR PUBLICATION

**IN THE SUPERIOR COURT FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

GUERRERO FAMILY TRUST, CARMEN)
DELEON GUERRERO BORJA, JOSE C.)
TENORIO TRUST, ESTATE OF SANTIAGO C.)
TENORIO, JUAN T. GUERRERO, JESUS T.)
GUERRERO, and AJT TRUST,)

Plaintiffs,)

v.)

KINKI NIPPON TOURIST CO., LTD., SAIPAN)
HOTEL CORPORATION, PACIFIC)
DEVELOPMENT, INC., PEDRO J.L. IGITOL, in)
his official capacity of Secretary of Saipan Hotel)
Corporation, MORGAN STANLEY JAPAN)
LIMITED, and MARIANAS HOLDINGS, LLC,)

Defendants.)
_____)

Civil Action No. 04-0574D

**ORDER PARTIALLY DENYING
MORGAN STANLEY’S MOTION TO
DISMISS THE THIRD AMENDED
COMPLAINT**

Pursuant to Commonwealth Rules of Civil Procedure 8(a) and 12(b)(6), Defendants Morgan Stanley Japan Securities Co., Ltd. (sued as Morgan Stanley Japan Limited) and Marianas Holdings, LLC (collectively, “Morgan Stanley”) move to dismiss as to Morgan Stanley the Third Amended Complaint (TAC) of Plaintiffs Guerrero Family Trust, et al. Appearing at the hearing and/or on the briefs were Rodney Jacob and William Fitzgerald for Plaintiffs and Lorren Sutton and Robert Bolt for Morgan Stanley. For reasons stated below, the motion is denied with respect to claims for assistance in breach of fiduciary duty and dilution. The claim against Morgan Stanley with respect to injunctive and declarative relief is granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs in this case are the minority shareholders in two corporations, Defendants

Saipan Hotel Corp. (SHC) and its parent Pacific Development Inc., (PDI) in which Defendant Kinki Nippon Tourist Inc. (KNT) is the majority shareholder.

In 2004, Morgan Stanley pursued an investment in SHC. Morgan Stanley prepared for the investment by conducting due diligence tasks and negotiations with the seller, KNT, regarding the form and conditions of the sale. Following the initiation of the instant suit, Morgan Stanley decided not to invest in SHC. KNT paid Morgan Stanley for information garnered during its due diligence. With the help of this information, KNT negotiated a deal with ING Karuizawa Training Institute K.K. (ING). On December 29, 2004, pursuant to an acquisition agreement, ING acquired all of the SHC shares held by KNT.

On December 9, 2004, Plaintiffs filed suit against various defendants on grounds that they had conspired to reorganize SHC, sell the SHC hotel, and dilute the value of Plaintiffs' shares.

Plaintiffs' First Amended Complaint (FAC) added Morgan Stanley to their action, alleging that Morgan Stanley had assisted the majority shareholders in (1) wrongfully diluting Plaintiffs' shares; and (2) breaching the majority shareholders' fiduciary duty to Plaintiffs. This Court dismissed the FAC for failure to allege facts sufficient to maintain a claim against Morgan Stanley. *See* Order Granting Motion to Dismiss, dated November 2, 2005.

Plaintiffs' Second Amended Complaint (SAC), filed November 18, 2005, added ten new allegations pertaining to Morgan Stanley. These included allegations that (1) Morgan Stanley took steps in preparation for a transaction in which Morgan Stanley would acquire KNT's stock in SHC, (2) Morgan Stanley agreed to keep its negotiations confidential, and (3) in the course of

1 working on that potential transaction, Morgan Stanley retained and used the services of an
2 accounting firm (Deloitte and Touche Tohmatsu) and a law firm (Carlsmith Ball) that may have
3 had conflicts of interests.

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5 The Court again dismissed the complaint, but granted Plaintiffs' motion for
6 reconsideration on grounds that the Court had incorrectly declined to infer actual knowledge
7 from the pleadings. The Court noted, however, that such an inference would not have saved the
8 complaint in the absence of specific allegations regarding substantial assistance. The Court
9 granted Plaintiffs leave to file the TAC.

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11 Paragraphs 32-36 of the TAC provide more details than the SAC on the nature of KNT's
12 alleged fiduciary duty to Plaintiffs, and on how this duty was allegedly breached.

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14 Paragraphs 45 to 58 elaborate on the reasons why KNT's reorganization and issuance of
15 new voting stock were allegedly unauthorized and invalid. Paragraph 62 adds that, given the
16 alleged lack of authorization, KNT allegedly had to find a "buyer who was willing to act not only
17 as a buyer, but as a partner in determining how to carry out the sale of the unauthorized . . .
18 voting stock and of the supposed SHC loans (so that the full tax benefits could be realized). . . .
19 Morgan Stanley agreed to be that partner so that it could obtain three hotels at a beneficial price."

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21 Paragraph 65 is new. It alleges that Morgan Stanley was going to pay ¥2 billion (around
22 \$18.18 million) for the Hafadai Beach Hotel and ¥2.2 billion for the two Japanese properties.
23 "However, the ¥2 billion was to be applied for Morgan Stanley's 'purchase' of SHC's supposed
24 debts to KNT. The SHC stock itself—which purportedly was 640,000 voting shares in SHC—
25 was to be sold by KNT to Morgan Stanley for only ¥1." *Id.*

Paragraphs 73-75 explain the basis for Morgan Stanley's "actual knowledge" of KNT's alleged breach of fiduciary duty, including the allegation that loans from KNT to SHC (to be assumed by Morgan Stanley) were not documented, and that KNT concealed material information regarding the reorganization from the Minority Shareholders in order to prevent them from exercising their rights. Paragraph 81 adds that "the individuals at Morgan Stanley who were in charge of the transaction told KNT that they had concluded that Morgan Stanley's investment committee would reject the deal with KNT if the committee gave substantial consideration to the Minority Shareholder risks."

Paragraph 78 alleges that, in August 2004, Morgan Stanley and KNT contracted to provide Morgan Stanley full access to relevant advisors and documents, and physical access to the hotels. Paragraph 77 alleges that in July 2004, "it was expressly acknowledged that Carlsmith Ball had confidential knowledge regarding SHC that it could transfer to Morgan Stanley." Paragraph 92 adds that Deloitte "was hired so that it could provide to KNT and Morgan Stanley an 'inside' perspective on the Minority Shareholders in planning the next steps of Project Trench."

Paragraphs 86 through 90 describe Morgan Stanley's alleged acts of assistance prior to the termination of the deal: Morgan Stanley "came up with a 'clean up' plan for KNT to share with the Minority Shareholders," "advised KNT regarding the structure for the sale of the Hotel . . . to avoid tax consequences," "assisted in the preparation of documents necessary to carry out" the reorganization, including the preparation of a debt confirmation agreement, "used their

1 employees and experts to conduct hundreds of hours of due diligence,” and provided KNT with
2 its valuation number for the Hotel.

3 Paragraph 101-103 describe the benefits that Morgan Stanley allegedly received in spite
4 of the termination of the deal. “KNT agreed to pay \$556,145.91 to MHL” including “(1)
5 \$120,000 for 700 hours of Morgan Stanley/MHL’s personnel time; (2) \$50,000 for Morgan
6 Stanley/MHL’s engineering report from Dick Pacific; (3) \$25,000 for Morgan Stanley/MHL’s
7 accounting due diligence through Deloitte; (4) \$18,500 for Morgan Stanley/MHL’s appraisal
8 from Captain Company.” ¶101. Paragraph 102 alleges that KNT promised to indemnify Morgan
9 Stanley should they be held liable in this action, and agreed not to enter a settlement without the
10 permission of Morgan Stanley.
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13 Paragraph 104 adds, “The sale to ING by KNT was completed less than a week after
14 cancellation of Morgan Stanley/MHL’s deal with KNT because KNT and ING were able to rely
15 on Morgan Stanley/MHL’s work.”
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17 **II. STANDARD FOR MOTION TO DISMISS**

18 The Court follows the standard described in *In re Adoption of Magofna*, 1 N.M.I. 449
19 (1990). To avoid dismissal, a claim must pass either part of *Magofna’s* two-pronged test: “A
20 complaint must contain either direct allegations on every material point necessary to sustain a
21 recovery on any legal theory . . . or contain allegations from which an inference fairly may be
22 drawn that evidence on these material points will be introduced at trial.” *Id.* at 454.
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III. ANALYSIS

A. PARTICIPATION IN A BREACH OF FIDUCIARY DUTY

Under § 874 of the Second Restatement of Torts, “[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” The tort of participation occurs when one “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.” RESTATEMENT (SECOND) OF TORTS § 876(b). As in prior motions to dismiss, Morgan Stanley argues that the complaint lacks factual allegations that Morgan Stanley knowingly and substantially assisted in the breach.

Plaintiffs refer the Court to its July 21, 2006 ruling stating that it could “infer that there was actual knowledge on the part of Morgan Stanley.” July 21, 2006 Order at 4. Plaintiffs argue that the only remaining issue is whether Plaintiffs have complied with the Court’s instruction that they amend their complaint to “allege acts of Morgan Stanley that provided substantial assistance to the Majority Shareholders.” *Id.* at 6. Whether Morgan Stanley is liable for providing substantial assistance, however, depends on whether the assistance contributed to the alleged underlying breach of duty, i.e., whether the timing was relevant, and whether the assistance proximately caused damage to Plaintiffs.

1. Underlying Breach of Fiduciary Duty

Morgan Stanley argues that the TAC fails to classify the sale of stock to ING as the underlying breach of fiduciary or the cause of damage. The conduct described as KNT’s alleged breaches include the mistreatment of the minority shareholders and dilution of their interests in

1 2003, *see* ¶¶ 32-72, but does not refer to the ultimate sale of KNT’s shares to ING as a breach,
2 *see* ¶¶ 99-108, 109-115, ¶¶ 146-151. Morgan Stanley points out that Plaintiffs have not asserted
3 any claims against ING for participating in the breach of fiduciary duty with respect to the stock
4 transfer, other than to make it a successor in interest to KNT. *See* ¶¶ 146-151.

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6 Plaintiffs counter that the TAC alleges: “With the sale of KNT’s stock in SHC to ING,
7 the scheme to dilute the value of the Minority Shareholders’ stock was completed. KNT had
8 succeeded in depriving the Minority Shareholders of the true value of their shares, and instead
9 obtained that value for itself.” ¶ 107. In other words, but for Morgan Stanley’s assistance, the
10 pre-Morgan Stanley acts of KNT allegedly could not have resulted in the damage that ultimately
11 ensued (the alleged deprivation of Plaintiffs’ voting rights).

12 13 **2. Substantiality of Assistance**

14 a. Nature of Morgan Stanley’s Conduct

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16 Morgan Stanley argues that its conduct cannot be considered “assistance” in the context
17 of the Restatement, as the TAC does not allege what information was provided or how it
18 substantially helped KNT breach fiduciary duties to the Minority Shareholders.

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20 The Court finds that there was assistance in effectuating KNT’s alleged scheme. The
21 TAC alleges that Morgan Stanley conducted thousands of hours of work to prepare the hotel for
22 sale, and then accepted a half million-dollar payment to give those documents to KNT for the
23 purpose of selling the property within the same tax year. ¶¶ 100-102, 107, 111. Morgan Stanley
24 allegedly provided valuation figures and other information KNT needed to be able to sell the
25 Hotel. ¶¶ 89-90. Morgan Stanley allegedly advised KNT regarding local shareholder issues and

advised KNT in developing a strategy to ensure that Plaintiffs would not prevent the transaction.

¶ 85. Morgan Stanley allegedly retained accountants as well as SHC's counsel to gain information on the shareholders and close the deal. (TAC ¶¶ 77, 91-92).

b. Level of Assistance

Substantial assistance requires a defendant's participation to be the proximate (legal) cause of plaintiff's injury. *Dubai Islamic Bank v. Citibank*, N.A., 256 F.Supp.2d 158, 167 (S.D.N.Y.2003). Morgan Stanley argues that its assistance does not rise to the high level required for liability, and suggests that the imposition of liability based on a low level of assistance would discourage potential investors from pursuing business in the CNMI.¹

Plaintiffs counter that the pleading of assistance claims need only meet the Commonwealth Rule of Civil Procedure 8 standard. Plaintiffs argue that Morgan Stanley is relying on the higher pleading standard used in a Delaware court to dismiss an action similar to that of the Plaintiffs. *See Oliver v. Boston University*, No. 16570, 2000 WL 1091480 (Del. Ch. July 25, 2000). The issue is not whether the complaint conforms to particularity standards of Rule 8, however, but whether it survives the standard for dismissal under Rule 12(b)(6). The Delaware standard for dismissal is not unlike that of the CNMI.²

¹ Unfortunately, the CNMI Business Code offers little detail as to what measures an investor should undertake before attempting to acquire a divided corporation.

² *See Oliver* (citations omitted):

1 The greatest point of contention between litigants appears to be whether the court should
2 infer substantial assistance from the generalized descriptions of Morgan Stanley’s attempts to
3 finalize and then to terminate a deal with KNT. Plaintiffs maintain that their allegations are
4 sufficiently specific, and point to Paragraph 98 as an example of a specific action taken by
5 Morgan Stanley: “Morgan Stanley/MHL and SHC’s shared counsel (the Carlsmith law firm)
6 represented that SHC’s corporate actions would not diminish the Minority Shareholders’
7 interests.” This allegation, however, refers to an action taken by Morgan Stanley’s *counsel* rather
8 than by Morgan Stanley.
9

10 Plaintiffs also suggest that the money taken pursuant to the termination agreement was
11 indicative of substantial assistance. Morgan Stanley points out that the fees were itemized
12 expenses it accrued in pursuing the deal; there were no undocumented transfers of money.
13 Plaintiffs counter that while such conduct might be permissible if considered in isolation, it is
14 “substantial assistance” in the context of Morgan Stanley’s knowledge of KNT’s alleged breach
15 of fiduciary duty.
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17 The line between *assistance* and *substantial assistance* is thin. Courts in similar situations
18 have reached opposite conclusions. In *In re OODC, LLC*, 321 B.R. 128 (Bkrcty. D. Del. 2005),
19 the court declined to dismiss a claim for assistance in breach of fiduciary duty against a bank
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23 In evaluating Defendants’ Motion to Dismiss, I assume the truthfulness of all well-pleaded,
24 nonconclusory allegations found in the Complaint and extend the benefit of all reasonable
25 inferences that can be drawn from the pleading to the non-movant, plaintiff. To dismiss a claim, I
must find that plaintiff has either utterly failed to plead facts supporting an element of the claim or
that under no reasonable interpretation of the facts alleged in the Complaint (including reasonable
inferences) could plaintiff state a claim for which relief might be granted. Notwithstanding
Delaware’s permissive pleading standard, I am free to disregard mere conclusory allegations made
without specific allegations of fact to support them

where a co-defendant committed acts intended to defraud creditors, and the bank was allegedly aware of these activities and participated in them by extending loans to the debtor to facilitate the actions of the co-defendant. *Id* at 144.

In *Oliver v. Boston University*, No. 16570, 2000 WL 1091480 (Del. Ch. July 25, 2000), a case involving dilution of shareholder interests, a claim for assistance in a breach of fiduciary duty against the acquirer-defendants was dismissed because plaintiffs failed to allege that the acquirers took any action to effectuate the wrongdoing, aside from paying the merger consideration.

In *Gilbert v. El Paso Co.*, 490 A.2d 1050 (Del.Ch.1984), the court declined to grant summary judgment on a civil conspiracy claim to a defendant who agreed to purchase shares from a corporation's directors. While the defendant owed no fiduciary duty directly to the Plaintiffs, it could not knowingly participate in the majority shareholder's alleged breach of fiduciary duty by promoting terms which require the majority shareholders to prefer their interests at the expense of its shareholders. *Id.* at 1058.

In *In re Sharp Intern. Corp.*, 403 F.3d 43 (2d Cir. 2005), the Second Circuit found that omissions or failures to act were not "substantial assistance" in a breach of fiduciary duty, because the defendant was not affirmatively assisting, helping to conceal or failing to act when required to do so.

Unlike the *Sharp Intern Corp.* complaint, the TAC alleges that Morgan Stanley actively *concealed* its negotiations from the Minority Shareholders. See ¶ 70. The fact that Morgan Stanley has a legal defense (that disclosure prior to a potential sale could coincide with a sudden

1 change in stock price that would subject the company to scrutiny for insider trading³) does not
2 mean that Plaintiffs have failed to adequately plead substantial assistance. The TAC's ability to
3 overcome a Rule 12(b)(6) challenge with evidence on material points is a different question from
4 its ability to survive a motion for summary judgment.⁴ There are enough allegations for the Court
5 to *infer* that Morgan Stanley knowingly offered substantial assistance to the majority
6 shareholders in their alleged breach of fiduciary duty and thereby caused harm to Plaintiffs.
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8 **B. PARTICIPATION IN DILUTION**

9 Title 4 CMC § 4106(a) provides that “the value of a shareholder’s ownership in a
10 corporation shall not be changed through merger or any form of corporate reorganization.”).

11 Assuming that Plaintiffs have stated a claim for dilution against KNT, Plaintiff’s claim against
12 Morgan Stanley requires a demonstration that Morgan Stanley “[knew] that the other’s conduct
13 constitutes a breach of duty and [gave] substantial assistance or encouragement to the other.”
14 RESTATEMENT (SECOND) OF TORTS § 876(b).
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16 Morgan Stanley argues that they cannot be responsible for any dilution of Plaintiffs’
17 interests in SHC if the TAC fails to allege that the KNT-ING transaction resulted in dilution.
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21 ³ See NYSE Listed Company Manual, § 202.01 Internal Handling of Confidential Corporate Matters (last
22 modified 7/1/92) (“extreme care must be used in order to keep the information on a confidential basis.”).

23 ⁴ Morgan Stanley’s successful finalization of the deal, with knowledge of a breach of fiduciary duty, would
24 have provided a basis for direct allegations on every material point necessary to prove the tort without the need for
25 the Court to infer substantial assistance. This was not the case, however, as Plaintiffs filed a motion for a temporary
restraining order to prevent the finalization of the transaction. The motion was denied, but Morgan Stanley
nevertheless decided to terminate the deal. It is unclear whether Morgan Stanley would have decided to terminate
the deal on its own accord, in the absence of the TRO motion. Ultimately, ING bought the shares, based on the
information Morgan Stanley had gathered in its due diligence. The Court observes that Plaintiffs apparently did not
perceive ING’s action as substantial assistance.

Again, Plaintiffs perceive this transaction as the conclusion of a larger scheme of dilution. Plaintiffs are not alleging that Morgan Stanley precipitated the dilution, but that the dilution would not have caused harm in the absence of Morgan Stanley's later assistance.

The Court agrees that the alleged tort did not accrue until harm allegedly resulted from Morgan Stanley's alleged substantial assistance. *See Fetzer v. Wood*, 569 N.E.2d 1237 (Ill. App. 1991) (tort cause of action accrues when all the elements are present, i.e., duty, breach, and resulting injury or damage); *Nowotny v. L & B Contract Industries, Inc.*, 933 P.2d 452 (Wyo.1997) (same); *Skewes v. Masterchem Industries, Inc.*, 164 S.W.3d 92 (Mo. App. 2005) (cause of action originates where damages are sustained and capable of ascertainment).

The Court reaches the same conclusions regarding the knowledge and substantiality of the alleged assistance that it reached in the analysis of the latter claim.

C. DECLARATIVE AND INJUNCTIVE RELIEF

In addition to the above claims, Plaintiff has included Morgan Stanley and all defendants in its claims for an injunction and declaratory relief. Plaintiffs have not shown evidence or given the Court reason to infer that there is evidence that *Morgan Stanley's* current actions threaten Plaintiffs with the irreparable loss of SHC's alleged ownership interest in the hotel. The requested declaration that ownership of shares be vested in the Minority Shareholders or SHC, and not KNT, ING, or any of their successors, has nothing to do with Morgan Stanley. Thus, Plaintiff cannot maintain a claim for declaratory or injunctive relief against Morgan Stanley.

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IV. CONCLUSION

While the Court has no “duty to strain to find inferences favorable to the non-moving party,” *Magofna*, 1 N.M.I. at 173, the Court is liberal in construing allegations as inferences of the evidence needed to win at trial. The TAC provides enough allegations for the Court to infer that Moran Stanley substantially assisted in defendants’ alleged breach of fiduciary duty and dilution of Plaintiffs’ shares. Thus, these claims cannot be dismissed with respect to Morgan Stanley.

Because the allegations do not allow the Court to infer that Morgan Stanley’s conduct continues to threaten harm to Plaintiffs, the Court dismisses claims against Morgan Stanley for declarative and injunctive relief.

So ordered this 4th day of December, 2006.

/S/

JUAN T. LIZAMA, Associate Judge