



E-FILED
CNMI SUPERIOR COURT
E-filed: Apr 4 2008 8:54AM
Clerk Review: N/A
Filing ID: 19268542
Case Number: 07-0152-CV
N/A

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.
- 16.
- 17.
- 18.
- 19.
- 20.
- 21.
- 22.
- 23.
- 24.
- 25.
- 26.
- 27.
- 28.

For Publication

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

**UNITED MICRONESIA
DEVELOPMENT ASSOCIATION, INC.
("UMDA"), and UMDA
LAOLAO LLC,**

CIVIL CASE NO. 07-0152

Plaintiffs,

v.

ROBERT PFAFF, et al.,

**ORDER FOLLOWING FEBRUARY 19,
2008 HEARING**

Defendants.

THIS MATTER came on for hearing February 19, 2008 on a number of different motions presented by both plaintiffs and defendants. Arguing on behalf of plaintiffs, ("UMDA" and "UMDA LaoLao") was Robert O'Connor, Rodney Jacob, Timothy Bellas, and Alex Freeman. Appearing on behalf of the many defendants involved in this case were Colin Thompson, Loren Sutton, Robert Torres, Stephen Nutting, Pamela Brown, and John Pierce. After carefully considering the pleadings and the arguments made at the hearing, the Court will present its rulings.

BACKGROUND

This case is one that involves multiple causes of action, multiple plaintiffs, multiple defendants, and certainly many pleadings and legal arguments. All sides involved present legally compelling arguments in support of their positions. The Court will frame this decision in the following order: service of process arguments made by Makov and the Rothschild defendants, motion to set aside default judgments made by the Rothschild defendants, arguments regarding personal jurisdiction made by Sorenson, KCT, Makov, and the Rothschild defendants, motions to

dismiss made by Makov, Dingee, Pfaff, GET Realty Trust, Sorenson, and KCT Irrevocable Trust, discovery rulings, protective orders, and motions to compel testimony.

The heart of this case involves allegations of corporate malfeasance and fraud. The plaintiffs involved, UMDA and UMDA Lao Lao LLC, allege that the defendants were all participants (in small or large ways) in an effort to deprive and harm UMDA. The plaintiffs group the multiple defendants under the umbrella term of Pfaff defendants. The defendants, who include Pfaff, Makov, Larson, Sorenson, and a large number of trusts and accounts, claim that the allegations, as pleaded, are insufficient to justify continued deliberation. The defendants also challenge personal jurisdiction, entry of defaults, faulty service of process, and have made motions to dismiss based on the insufficiency of the pleadings. Plaintiffs, in contrast, argue that the defendants are using the Court and these motions as dilatory tactics.

This case is not simple. It is a complex web of communications between many different parties whose varying levels of liability as yet remain unclear. Therefore the Court will address each issue in turn.

MOTIONS

Default and Faulty Service of Process Arguments

- I. Defendant *Makov* had filed a motion to dismiss the claims against based upon a faulty service of process argument. However at the hearing his attorney, Loren Sutton, stipulated to service so this issue is **moot**.
- II. Defendants *Rothschild Trust Guernsey*, *Rothschild Trust Guernsey Limited Account 2299*, *Concorde Trust*, and *Davina Limited* had default judgments entered against them by the clerk of court. These defendants, represented by Pam Brown and Stephen Nutting, argued against these entries of default based on their allegation that service was improper due to the plaintiff's failure to follow the Hague Convention and local rules regarding service of process. However, during the course of the hearing counsel agreed to stipulate

to service in order to move the case along as it was clear there was actual notice. Therefore the Court will not rule on this issue as it is also moot because of counsel's consent to accept service. The default judgments entered against these defendants are hereby set aside. The plaintiffs will not be harmed by the setting aside of the default judgment, nor is there any element of surprise for either party if the default judgment is set aside. Therefore the Court grants the motion to set aside the default judgments entered against these four defendants.

Personal Jurisdiction, Insufficient Contacts, and Improper Party Arguments

III. **Thomas Sorenson** contests personal jurisdiction. Sorenson is the trustee of one of the defendants involved in this case and is named in both an individual and trustee capacity. He is contesting personal jurisdiction over himself in an individual capacity. Sorenson, represented by Colin Thompson and John Pierce, argues that as an individual his contacts with the CNMI are too slight to allow personal jurisdiction. He does not contest the propriety of being sued as trustee.

In order for Sorenson (individual) to prevail on this motion he must show that as an individual there are not enough contacts with the CNMI to justify bringing him before the court.¹ Sorenson asserts that as an individual he has never visited Saipan, conducted business in Saipan, caused injury in Saipan, or committed an act outside of Saipan that affected the jurisdiction. The preceding list of examples is typical indicia of whether a person could reasonably be haled before a court under a long arm statute.

The Court concurs with Sorenson's assertion that his contacts, as an individual, are insufficient to satisfy the requirements for long arm personal jurisdiction. Therefore the Court grants defendant's motion on this count because there are insufficient contacts with the forum as an individual. The First Amended Complaint only names him a

¹ *Monticello v. Di-All Chem. Co.*, 1998 MP 15, ¶ 9 (N. Mar. I. 1998).

handful of times and does not sufficiently allege why Sorenson the individual should be named as a defendant in this matter. Therefore the Court grants Sorenson the individual's motion to dismiss based on failure of personal jurisdiction.

IV. **K.C.T. Irrevocable Trust**, also contests personal jurisdiction based on the well known fact that a trust is an improper party to a lawsuit. This Court has ruled on prior occasions of the impropriety of naming a trust as a defendant. The properly named party in this instance would be the trustee. The defendants are correct in their assertion that an action can not be maintained against a trust; it must proceed in the name of the trustee. Rule 17 is clear and this Court will remain consistent with its prior rulings. Therefore the First Amended Complaint is dismissed with regards to K.C.T. Irrevocable Trust. However, so as not to damage any discovery or claims the plaintiffs may have the Court grants leave to amend the complaint to substitute the name of the trustee of K.C.T. Irrevocable Trust.

V. **David Amir Makov** also appeared through counsel to contest personal jurisdiction based on an alleged lack of minimum contacts with the Commonwealth. Makov is represented in this motion by Loren Sutton. As mentioned earlier, the Court may only exercise jurisdiction over this nonresident defendant if the right is conferred by statute, or if there are sufficient minimum contacts to bring him before the Court.² A defendant's minimum contacts with the CNMI include a multitude of things.³ Although Makov did submit an affidavit challenging the First Amended Complaint, his assertions do not rise to the level of justifying a dismissal. The Court denies this motion because the Court believes the plaintiff's evidence establishes, at the very least, a minimum basis of sufficient contacts

² *Bank of Saipan v. Superior Ct (Connell)*, 2001 MP 1 at ¶ 21, 6 N.M.I. 179, 186 (2001).

³ Under the CNMI long-arm statute the court can gain jurisdiction over a non resident defendant if he transacts any business in the CNMI, causes tortious injury or damage within the Commonwealth by an act or omission done outside of the Commonwealth has an impact on the Commonwealth, does any act outside of the Commonwealth which causes or results in any harmful impact, injury, or damages within the Commonwealth, or does any act within or outside the Commonwealth from which a cause of action arises and for which it would not be unreasonable, unfair, or unjust to hold the person doing the act legally responsible in a Court in the Commonwealth. *See* 7 CMC §1102 (a)(1), (5), (7), and (8).

with the Commonwealth to justify the claim. Some of these contacts include his ownership in both the LLC and UMDA. Therefore the Court denies Makov's motion to dismiss based on a lack of personal jurisdiction.

VI. **Davina, Concorde, Rothschild Limited, and Rothschild Account 2299** (hereinafter collectively referred to as the Rothschild Defendants) also appeared at the hearing to contest personal jurisdiction. These four defendants were represented at the hearing by Pamela Brown and Richard Pierce. Because the Court set aside their default judgment it can now rule on whether these four defendants should be dismissed for personal jurisdiction reasons. Defendants claim that there are insufficient contacts to justify personal jurisdiction and that two of the parties are not proper parties to a lawsuit.

Initially the plaintiffs must establish the jurisdictional arguments against the defendants. The plaintiffs in this case stated enough evidence to justify the inclusion. If the allegations made by plaintiffs regarding the actions of the defendants in this case are true then the Rothschild Defendants would have enough contacts with the Commonwealth to bring them into our courts. If these defendants are in fact fronts for the main "triad" of defendants (Makov, Larson, and Pfaff) as the plaintiffs allege then the Court does have jurisdiction. At this time the Court denies the motions to dismiss the First Amended Complaint against the Rothschild defendants.

The Court does however agree with the Rothschild defendants that the Rothschild Account 2299 is an improper party to this action. A bank account, a mere repository for money, is not a proper named party to this lawsuit. If the plaintiffs want to proceed against these parties they must name the correct persons, the trustees of these accounts and trusts. As the Court has advised earlier, the plaintiffs have leave to amend their complaint to name the correct parties. The Court does not think this will impose an

undue burden on either party because plaintiffs may still name the correct parties and defendants are already aware of the claims being made against them.

In sum, the Court denies the motion to dismiss based on insufficient contacts with the jurisdiction. Concorde is a trust and the proper means by which to bring them into this suit is through naming the trustee. This Court has found that a trust is an improper party unless specifically authorized by statute, and so it is the trustee who must be named as the real party in interest. The First Amended Complaint as it applies to Account 2299 is dismissed, as the bank account is not a proper party. The First Amended Complaint as it applies to Concorde is also dismissed until plaintiff's amend their complaint and names the trustee instead of the trust.

Insufficient Pleadings in First Amended Complaint Arguments

VII. **David Amir Makov, Paul Dingee, Robert Pfaff, GET Realty Trust, Sorenson, and KCT Irrevocable Trust** have all filed or joined motions to dismiss the First Amended Complaint based upon challenges to the form and sufficiency of the pleadings in the document itself as well as individual specific challenges to charges made therein. As Plaintiffs state, the standard for a motion to dismiss is “all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party”.⁴ Because the defendants are the parties that are moving for dismissal, the facts (as alleged) are taken as true in the light most favorable to the plaintiffs. Therefore any of the facts alleged by the plaintiffs would have to be taken as true, unless rebutted with evidence or affidavits provided by the defendants. The defendants did not provide enough rebuttal evidence or affidavits to justify dismissal.

The essence of the argument that these defendants propose is that the pleadings in the First Amended Complaint were not pleaded with sufficient particularity or clarity to

⁴ Com. R. Civ. Pro. 12 (b) (6) and 12(c)

allow the case and its claims to proceed. Grouping all the named defendants throughout the complaint as the Pfaff defendants for reasons of economy and non repetition does not doom the First Amended Complaint. The plaintiffs plead throughout the complaint the actions that these defendants are alleged to have committed in concert with each other. Without allowing the plaintiffs any discoveries to disprove their theories the defendants deprive UMDA of the chance to make the allegations more specific and particularized. Defendants also argue that the First Amended Complaint, as it is currently written, does not provide them with any warning as to what charges are against them. This argument holds no merit. Defendants surely understand from the First Amended Complaint that they are alleged to have acted in concert with each other to deprive UMDA of money, corporate opportunities, and exposed them to financial liability. Without discovery there is no way for them, or the Court, to dismiss these allegations as unfounded. From the evidence that plaintiffs have provided the Court it is clear that there is some wrongdoing that occurred. What is uncertain at this juncture is who or what entities committed acts that exposed them to legal liability. This is why the Court will allow these actions to proceed. Defendants also argue against plaintiff's use of the phrase "on information and belief". The Court finds this phrase entirely appropriate at this stage as defendants have not allowed plaintiffs to conduct any discovery. Therefore how else would they suggest the plaintiffs phrase their allegations?

While it is accurate to claim that the CNMI does not recognize the tort of civil conspiracy, this alone does not give sufficient reason to dismiss plaintiff's action and deny them the right to any discovery. While conspiracy may not be recognized here, it does not mean the corporate wrongdoing is allowed. The plaintiffs should be allowed to proceed procure any documents and depositions that can ultimately prove or disprove their allegations.

The Court also believes it is premature to grant these dismissal motions. Very little discovery has, as yet, occurred. It would cause undue burden to deny plaintiffs, at least initially, the opportunity to conduct discovery to find out if the claims they allege have evidence to prove their theories. As the facts are alleged by the plaintiffs, a dark picture of corporate malfeasance, insider secrets, and usurped opportunities is painted. However, their allegations require at least initial discovery to see if there is legal liability. If proven to be true then the defendants they have named would have been in the position to commit these acts as well as have intimate knowledge of the occurrences. Therefore, at this time the Court denies all of the motions made by the above named defendants to dismiss the First Amended Complaint as it relates to them.

As the Court sees it, at this early stage in the litigation the plaintiffs have pleaded their claims with sufficient particularity to survive a motion to dismiss. Defendants and plaintiffs are hereby ordered to conduct the requisite discovery. If after this discovery occurs, there is no further proof of the allegations then the defendants may move again for dismissal. At this time the Court denies the motions made by Makov, Dingee, Pfaff, GET, Sorenson, and KCT to dismiss based on the general argument of failure to state a claim or failure to plead with enough particularity.

VIII. **KCT and GET Trusts** argue for dismissal of the First Amended Complaint Against them based on the fact that they are named in the complaint as trusts. In order to maintain an action against a trust the plaintiff must name the trustee, and not the trust as the proper party. Plaintiff's assertion that these are entities and therefore can be sued is not convincing. The Court gives leave for the plaintiffs to amend their complaint and name the correct parties, the trustees of these trusts. KCT and GET can not be proper defendants and so will be dismissed from the First Amended Complaint.

IX. **Discovery** – The Court is pleased to learn of the pending scheduled depositions that have been agreed upon by the various parties. However the Court would implore all parties to work a little harder to schedule all requested discovery and depositions in the near future so as to move this case forward. The Court approves the scheduled depositions of :

Deponent	Date	Time	Location
Paul Dingee	March 27, 2008	9:00 a.m.	San Francisco, California
Thomas Sorenson	April 16, 2008	9:00 a.m.	Lakeland, Florida
30(b)(6) Deposition of Sasquatch II ¹¹	April 18, 2008	9:00 a.m.	Denver, Colorado
Robert Pfaff	April 21, 2008	9:00 a.m.	Los Angeles, California

Protective Order, 30 (b)(6) Objections, and Confidentiality Issues

X. **Defendants GET, Sorenson, KCT, and Pfaff** all moved for a protective order which stated that discovery would be stayed until all parties involved are added to the case, or mandating that discovery may only be had under certain terms and conditions with certain confidential information to not be revealed, or only revealed in specific, protected ways. The Court is cognizant of the sensitivity of the information that would presumably be included in the discovery request documents. The Court agrees that personal information such as social security numbers, banking information, and other such personal and private information should certainly be redacted from any documents. However, the Court does not find defendants assertion that plaintiffs want to use discovery as a means of publicity compelling. Plaintiffs have a right to access documents relating to discovery in this case, and the Court believes counsel's promises that public dissemination for purposes of prejudice against defendants is not their purpose. The Court asks that counsel for all parties stipulate to a confidentiality agreement regarding the discovery documents and deposition

information. If after reasonable and diligent efforts to come to a mutually agreed upon confidentiality agreement then the parties should again move for the Court to enter an order.

The Court disagrees that keeping some of the information included in discovery and depositions as confidential would cause an undue burden. This case has dragged on far too long already. The Court admonishes both plaintiffs and defendants to come up with a preliminary agreement as to discovery requests and depositions so this case may move forward. The Court is mindful of the defendant's concerns regarding personal and banking information. However, closing off court proceedings or sealing all records would defy the spirit of an open court. Due to the local interest in this case the Court will deny the request to seal the case and all documents. However the Court does agree that any confidential or sensitive information must be redacted from the discovery and depositions before it may be introduced.

The Court believes it is in all parties' best interests to stipulate to a confidentiality agreement. If the parties can not do so then the Court gives leave to file another motion for the Court to decide. However, keeping confidentiality issues in mind, the Court orders both sides to comply with preliminary discovery as best they can. Plaintiffs correctly point out that the Court has already ordered discovery to go forward and so there should be no further delay. The Court does not see any problems with the plaintiffs' offer of a use restriction confidentiality agreement. However, at this time, the Court leaves it to the parties to agree on this point. As for the challenged depositions of GET and KCT for 30 (b)(6) reasons, the Court orders these defendants to comply with deposition and discovery requests.

Motion to Compel Pfaff's Testimony

XI. Plaintiffs have also made a motion to compel Pfaff's testimony because they believe his assertion of the Fifth Amendment for nearly all of their questions was improper. In sum they argue that he should not be permitted to use the Fifth Amendment as a sword and a shield. The Court would implore Pfaff's counsel to advise his client that he should certainly answer questions that

