

By:   
CLERK, FSM SUPREME COURT  
POHNPEI  
TRIAL DIVISION

1 Michael J. Sipos, Esq.  
P.O. Box 2069  
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4 Attorney for Plaintiff  
FSM Social Security Administration  
5

6 **IN THE SUPREME COURT OF THE**  
7 **FEDERATED STATES OF MICRONESIA**  
8 **TRIAL DIVISION - POHNPEI STATE**

9 FSM SOCIAL SECURITY ) CIVIL CASE No. 2014-036 \_\_\_\_\_  
ADMINISTRATION, )  
10 )  
Plaintiff, ) MOTION TO STRIKE AND OPPOSITON  
11 ) TO UNTIMELY ANSWER AND  
vs. ) IMPROPERLY FILED MOTION TO  
12 ) ENLARGE TIME  
APSCO CONSTRUCTION CO., APSCO )  
13 CONSTRUCTION CO. (KOSRAE), )  
SHIRO AKINAGA, and TAKURO )  
14 AKINAGA, )  
15 )  
Defendants. )  
16

17 COMES NOW plaintiff Federated States of Micronesia Social  
18 Security Administration ("FSMSSA") and respectfully moves the  
19 court for an order striking defendants' answer to complaint and  
20 moving to strike and opposing their motion to enlarge time to  
21 file answer on the grounds that the defaults of all defendants  
22 had already been taken at the time these papers were filed.  
23

24 The applicable rule of law provides that the court may not  
25 take cognizance of untimely motions or pleadings filed after  
entry of default unless or until the default is set aside

1 (Oceanic Lumber, Inc. v. Vincent & Bros. Constr. Co., 16 FSM  
2 Intrm. 222, 224 (Chk. 2008)). Stated alternatively, a defaulted  
3 party may not file a responsive pleading or any motion except  
4 one to set the default aside under Rule 55(c).<sup>1</sup>

5 Moreover, the defendants' motion to enlarge time to file an  
6 answer, having been made under FSM Civil Rule 6(d), may not be  
7 construed as a motion to set aside default under the applicable  
8 rule (Civil Rule 55) because as it fails to meet the threshold  
9 criteria for a default set aside motion under FSM law.

10 This motion is supported by the attached Memorandum of  
11 Points and Authorities, the pleadings and papers on file, oral  
12 argument if deemed necessary, and such other matters the court  
13 may consider.  
14

15 MEMORANDUM OF POINTS AND AUTHORITIES

16 A. Background

17 On November 20, 2014 an Entry of Default was issued by the  
18 Clerk of Court under Rule 55(a) against the moving defendants.  
19 This occurred following the expiration of time within which they  
20 would have been permitted to appear in the action by filing an  
21 answer or other responsive pleading.

22 On or about November 26, 2014 the undersigned received an  
23 e-mail from opposing counsel Marstella Jack, Esq. acknowledging  
24 that the time to answer the complaint had already lapsed and  
25

<sup>1</sup> "Entry of a defendant's default cuts off his or her right to appear in the  
action or to present evidence." Clifton v. Tomb, 21 F2d 893.

1 requesting an enlargement of time on behalf of Shiro Akinaga,  
2 and presumably the other APSCO related parties, within which to  
3 answer the complaint. In response, the undersigned counsel for  
4 plaintiff FSMSSA informed attorney Jack the defaults of all such  
5 defendants had already been taken. This e-mail exchange is  
6 attached as Exhibit "A".

7 No further communication between counsel took place  
8 regarding this case until the afternoon of December 1, 2014 when  
9 Ms. Jack called the undersigned. Counsel for plaintiff took the  
10 call but was not then able to confer at length due other  
11 pressing matters. The details of this exchange are more fully  
12 described in the e-mail attached as Exhibit "B". Shortly after  
13 receiving the December 1, 2014 phone call plaintiff's counsel  
14 received service of a motion for enlargement of time to answer  
15 and an answer to the complaint.

17 Anticipating having to file this motion to strike and  
18 opposition, plaintiff's counsel wrote the detailed Rule 6(d)  
19 "meet and confer" e-mail attached hereto as Exhibit "B"  
20 explaining why the subject motion to enlarge time and the answer  
21 were untimely and improper and setting forth the applicable law  
22 and procedure. Plaintiff FSMSSA also explained that it would  
23 move to strike the improper pleading unless the moving parties  
24 otherwise agreed to withdraw it.

25 B. The Answer is Untimely and Should be Stricken

1           Once a defendant's default has been entered he may not  
2 appear and defend until or unless the default has been set  
3 aside. The applicable procedure to set aside a default is set  
4 forth in FSM Civil Rule 55(c).

5           Under the authority of Oceanic Lumber, Inc. v. Vincent &  
6 Bros. Constr. Co., 16 FSM Intrm. 222, 224 (Chk. 2008), when  
7 defendants' defaults are entered before they file their answer  
8 and when the default is not subsequently set aside under Civil  
9 Procedure Rule 55(c), the court cannot take cognizance of the  
10 later-filed answer. It is therefore subject to being stricken.

11  
12           C. The Motion to Enlarge is Procedurally Improper

13           Prior to filing an appearance a defaulted party must first  
14 move to set aside the default. The standard for doing so under  
15 Rule 55(c) is not the same one that applies to a Rule 6(d)  
16 motion to enlarge. Indeed, as the court stated in FSM Dev. Bank  
17 v. Gouland, 9 FSM Intrm. 375 (Chuuk 2000), "[i]n determining  
18 whether good cause to vacate an entry of default exists a court  
19 evaluates "whether the default was willful, whether setting it  
20 aside would prejudice the adversary, and whether a meritorious  
21 defense is presented.'" One Parcel, 763 F.2d at 183; Traguth v.  
22 Zuck, 710 F.2d 90, 94 (2d Cir. 1983) (quoting Meehan, 652 F.2d  
23 at 277). "[A] court may also examine into such things as the  
24 proffered explanation for the default, the good faith of the  
25 parties, the amount of money involved, and the timing of the

1 motion." Coon, 867 F.2d at 76; see also Pontarelli, 713 F.  
2 Supp. at 528.

3 As the court can see from Exhibit "A", the undersigned  
4 asked defense counsel whether the failure to defend prior to  
5 entry of default was deliberate and also asked whether the  
6 defendants had a meritorious defense. The facts of this case  
7 involving unpaid social security taxes made this inquiry  
8 particularly apt since such taxes are imposed by law and the  
9 failure to pay taxes due and owing constitutes a per se breach  
10 of the applicable FSM Code provisions compelling quarterly  
11 reporting and payment of SS taxes. Opposing counsel never  
12 replied with an answer.  
13

14 Moreover, the motion to compel presently before the court  
15 does not offer anything in the way of excusable neglect  
16 establishing that the failure to defend was not deliberate, and  
17 it fails to address all of the other criteria required by law  
18 prior to a default set aside. Indeed, a review of the  
19 explanations provided reveals that the attempted excuses  
20 surround actions taken by opposing counsel after the defaults  
21 were already taken, which occurred *before* she was retained.  
22 Thus nothing she has offered can possibly justify the  
23 defendants' failure to timely appear and defend.  
24

25 Similarly, the defendants have offered nothing in the way  
of a meritorious defense. A review of the untimely answer

1 (which must be stricken regardless) shows the absence of any  
2 affirmative defenses and nothing by way of facts to counter  
3 plaintiff's proof of taxes owed.

4 It should further be noted that the FSMSSA will still be  
5 required to establish a valid basis for the taxes it claims are  
6 owing through the submission of affidavits prior to entry of  
7 judgment. Such a motion for entry of default judgment must be  
8 made pursuant to Rule 55(b) with further safeguards as the court  
9 deems proper available under Rule 55(b)(2).

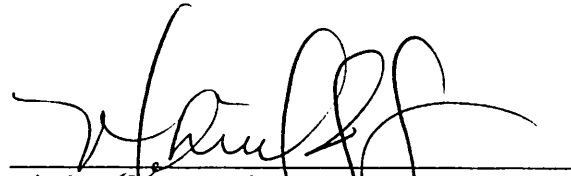
11 D. Conclusion

12 The moving defendants' failure to move to set the entry of  
13 default aside pursuant to Rule 55(c), combined with the lack of  
14 any showing that the default was not deliberate or that a  
15 meritorious defense exists, plaintiff submits that the untimely  
16 answer must be stricken and the motion to enlarge denied as  
17 procedurally improper and stricken accordingly. Thereafter,  
18 should the defendants seek to have their defaults set aside they  
19 should be ordered to file the appropriate motion as required by  
20 rule or face exposure to damages under a later filed motion for  
21 entry of default judgment by plaintiff FSMSSA.

22 /  
23 /  
24 /  
25

1 Respectfully submitted.

2  
3 DATED: December 11, 2014

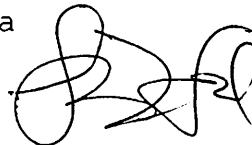
4   
5 Michael J. Sipos, Esq.  
6 Attorney for Plaintiff  
7 FSM Social Security  
8 Administration

9  
10 **Certificate of Service**

11 I certify that on December 11, 2014 I hand-served a true  
12 and correct copy of this motion to strike compel by delivering  
13 it to defendants' counsel of record as follows:

14 Marstella E. Jack, Esq. HAND DELIVERY  
15 P.O. Box 2210  
16 Kolonia, Pohnpei FM

17 Attorney for Defendants  
18 APSCO Construction Co.,  
19 APSCO Construction Co. (Kosrae),  
20 Shiro Akinaga and Takuro Akinaga

21   
22 \_\_\_\_\_  
23 Kehlen Halbert

# EXHIBIT A





Michael Sipos &lt;siposlaw@gmail.com&gt;

**Enlargement for SS new complaint**

2 messages

Marstella E. Jack <ejacklaw@gmail.com>  
To: Michael Sipos <msipos@mail.fm>

Wed, Nov 26, 2014 at 12:34 PM

Hi Mike,

Shiro Akinaga approached me last Friday to represent them in a new suit you filed on behalf of your client FSMSSA. I am not in the office this week due to funerals but will be able to file the Answer next week Tuesday. I know the time to answer has lapsed and I seek your kind understanding in agreeing to this enlargement of time. Thank you Mike.

Cheers

*s/Marstella E. Jack  
Law Office of Marstella E. Jack  
P.O. Box 2210  
2nd FL. John Sonden Building  
Kolonja, Pohnpei, FSM 96941  
Ph: (691)320-7400; M (691)922-3311  
ejacklaw@gmail.com*

This message is confidential. It may also be privileged or otherwise protected by work product immunity or other legal rules. If you have received it by mistake, please let us know by email reply and delete it from your system; you may not copy this message or disclose its contents to anyone.

Michael Sipos <msipos@mail.fm>

Wed, Nov 26, 2014 at 2:45 PM

To: "Marstella E. Jack" <ejacklaw@gmail.com>, Maiumy Halbert <myumatilla@gmail.com>, "Alexander R. Narruhn" <ssadmin@mail.fm>

Dear Marstella:

The defaults of all defendants haV already been taken.

Please kindly indicate what defense, if any, your client has, as opposed to a defense that is intended solely to delay.

It would also appear the failure to defend to this point was deliberate. If I am wrong please explain with facts and I will confer with my client as part of my Rule 6 "meet and confer" obligations.

Please also understand in advance that the FSMSSA is facing financial challenges caused largely by employers who chose to break the law and fail to pay their tax obligations. If these defendants fall into that category know in advance the my client will not be inclined to contribute to needless delay and/or obfuscation as it has encountered with some of your other clients such as Roselyn Reyes / Miralles Pohnpei Arts and Crafts.

Let me know.

Mike

P.S. I am in Hawaii on my way back to Pohnpei at present so I have limited access to the Internet.

[Quoted text hidden]

Michael J. Sipos, Esq.  
Attorney at Law  
Federated States of Micronesia  
P.O. Box 2069  
Pohnpei, FM 96941  
Phone: 691-320-6450  
Email: msipos@mail.fm

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# EXHIBIT B



Michael Sipos <siposlaw@gmail.com>

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**Re: Enlargement for SS new complaint - FSMSSA v. APSCO Construction, FSM CA No. 2014-036; and FSMSSA v. APSCO, FSM CA No. 2014-037**

1 message

---

Michael Sipos <msipos@mail.fm>

Tue, Dec 2, 2014 at 4:48 AM

To: "Marstella E. Jack" <ejacklaw@gmail.com>, "Alexander R. Narruhn" <ssadmin@mail.fm>, Cathrine Jonas <sstax@mail.fm>, Maiumy Halbert <myumatilla@gmail.com>

Dear Marstella:

This is to acknowledge that you called my office over the phone late in the afternoon on December 1, 2014. I took your call and explained that I did not have much time to talk, as I was in the process of drafting papers that had to be filed by the end of the day.

You suggested that you would call me back after 4 p.m. and also let me know that you were calling about the FSMSSA's lawsuits against the APSCO/Akinaga defendants. I agreed to take your call after 4 o'clock.

After I hung up, however, I was informed by Maiumy that her notary expired a few days ago and that she would not be able to notarize my supporting affidavit. Thus, I was required to leave my office and go to the court to get my affidavit authenticated. I directed Maiumy to call and let you know I was leaving the office and would not be able to take your call after 4 p.m. as previously agreed. I also told her to tell you that I would be glad to talk to you tomorrow morning, December 2, 2014.

Shortly thereafter my office received service of motions to enlarge time to answer the complaints and out-of-time answers for filing in both of the APSCO related cases addressed by this e-mail string - FSMSSA v. APSCO Construction, FSM C.A. No. 2014-036 and FSMSSA v. APSCO, FSM C.A. No. 2014-037.

This shall also confirm that your only previous efforts to "meet and confer" with me in compliance with FSM Civil Rule 6 prior to filing the referenced motions occurred by way of the November 26, 2014 e-mail appended below. I replied to that e-mail on the same day informing you that defaults had already been taken in both cases and asking you to explain whether your clients had a valid defense or if they were interested in a defense based on delay alone. The full content of my reply e-mail is also appended below.

Had we engaged in further "meet and confer" discussions regarding your intended motions to enlarge and proposed filing of untimely answers, I would have informed you that the court may not consider an answer filed out-of time once a default is entered. Under the authority of Oceanic Lumber, Inc. v. Vincent & Bros. Constr. Co., 16 FSM Intrm. 222, 224 (Chk.

2008), when defendants' defaults are entered before they file their answer and when the default is not subsequently set aside under Civil Procedure Rule 55(c), the court cannot take cognizance of the later-filed answer.

Moreover, the required procedure before filing a post-default untimely answer is not a Rule 6 Motion to Enlarge. Rather, it is a Rule 55(c) Motion to Set Aside Entry of Default. Until such time as an entry of default is set aside a defaulted party is out of court and may not appear and defend. A post-default answer is therefore subject to being stricken. "Entry of a defendant's default cuts off his or her right to appear in the action or to present evidence." Clifton v. Tomb, 21 F2d 893.

Under this rule and the authority of Oceanic Lumber the court may not accept an out of court answer for filing. Should the clerk do so, the court will order it stricken. The only procedure available to a defaulted defendant is to file a motion to set aside the default under FRCP 55(c).

My November 26, 2014 "meet and confer" e-mail asked whether your clients had a defense - as opposed of simply wanting to use you to help induce delay - because this is a required part of the standard for setting a default aside. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375 (Chuuk 2000), "[i]n determining whether good cause to vacate an entry of default exists a court evaluates "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." One Parcel, 763 F.2d at 183; Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983) (quoting Meehan, 652 F.2d at 277). "[A] court may also examine into such things as the proffered explanation for the default, the good faith of the parties, the amount of money involved, and the timing of the motion." Coon, 867 F.2d at 76; see also Pontarelli, 713 F. Supp. at 528.

As it stands, your clients have not offered any explanation for their failure to respond prior to the time defaults were entered in both of these cases on November 20, 2014. The excuses related to your personal issues are irrelevant as you were not retained until after the defaults were entered.

Please accept this e-mail as a formal request under FSM Rules of Civil Procedure, Rule 6(d) for acquiescence to my client's intended motion to strike the untimely filed answers. Whether you agree to this request or not, please also know that the FSMSSA will oppose your procedurally inappropriate motion to enlarge on the grounds outlined above. Since you knew that the defaults had already been taken based on my e-mail of November 26, 2014 it does not appear that your motion to enlarge was legally or procedurally justified at the time of signing and filing.

I look forward to hearing from you on the request to agree to the issuance of an order striking the answers.

Regards, Mike

On Wed, Nov 26, 2014 at 12:34 PM, Marstella E. Jack <ejacklaw@gmail.com> wrote:

Hi Mike,

Shiro Akinaga approached me last Friday to represent them in a new suit you filed on behalf of your client FSMSSA. I am not in the office this week due to funerals but will be able to file the Answer next week Tuesday. I know the time to answer has lapsed and I seek your kind understanding in agreeing to this enlargement of time. Thank you Mike.

Cheers

*s/Marstella E. Jack*  
*Law Office of Marstella E. Jack*  
*P.O. Box 2210*  
*2nd FL. John Sonden Building*  
*Kolonia, Pohnpei, FSM 96941*  
*Ph: (691)320-7400; M (691)922-3311*  
*ejacklaw@gmail.com*

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**Michael Sipos** <msipos@mail.fm>

Nov 26 (6 days ago)

to Maiumy, Alexander, Marstella

Dear Marstella:

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Please also understand in advance that the FSMSSA is facing financial challenges caused largely by employers who chose to break the law and fail to pay their tax obligations. If these defendants fall into that category know in advance the my client will not be inclined to contribute to needless delay and/or obfuscation as it has encountered with some of your other clients such as Roselyn Reyes / Miralles Pohnpei Arts and Crafts.

Let me know.

Mike

P.S. I am in Hawaii on my way back to Pohnpei at present so I have limited access to the Internet.

Michael J. Sipos, Esq.

Attorney at Law  
Federated States of Micronesia  
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Pohnpei, FM 96941  
Phone: 691-320-6450  
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