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DATE: _____ TIME: _____

By [Signature]
CLERK, FSM SUPREME COURT
YAP
TRIAL DIVISION

**IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
TRIAL DIVISION - STATE OF YAP**

THE PEOPLE OF THE MUNICIPALITY OF
EAURIPIK, YAP, by and through SANTUS
SARONGELFEG, JOHN HAGLELGAM,
and MOSES MOGLIG,

Plaintiffs,

v.

F/V TERAKA NO. 168, F/V YUH YOW 606,
F/V FUKUAN 606, their engines, masts,
bowsprits, boats, anchors, chains, cables,
rigging, apparel, furniture, and all
necessaries thereunto pertaining,

In Rem Defendants,

YUH YOW FISHERY COMPANY, LTD.,
MARIN MARAWA, LTD., MASANAGA
SHIMAZU, MALAYAN TOWAGE AND
SALVAGE CORPORATION, HSIN HORNG
FISHERY COMPANY, LTD., EDGAR R.
PELEAZ, and CITY PRO MANAGEMENT,
LTD.,

In Personam Defendants.

FEDERATED STATES OF MICRONESIA,

Plaintiff in Intervention,

v.

F/V TERAKA NO. 168, its engines, masts,
bowsprits, boats, anchors, chains, cables,
rigging, apparel, furniture, and all
necessaries thereunto pertaining,

In Rem Defendant,

YUH YOW FISHERY COMPANY, LTD.,
MARIN MARAWA, LTD., and MASANAGA
SHIMAZU,

In Personam Defendants.

CIVIL ACTION NO. 2011-3002

MEMORANDUM AND ORDER

The court, in its August 31, 2012 Order Vacating Hearing, asked the parties
to brief the following points:

1) Since the current operative pleading is the plaintiffs' second amended complaint and since Masanaga Shimazu's default was entered for the plaintiffs' first amended complaint and the second amended complaint was not served on him, can a default judgment be entered against a party on a superseded pleading?

2) Since it appears that any liability for damages that Masanaga Shimazu may have will be joint and several with the other defendants, on what basis can the court enter a default judgment against Masanaga Shimazu before adjudicating the other defendants' liability?

The parties' filings now before the court are: 1) Defendants Yuh Yow Fishery Company, Ltd., Marin Marawa, Ltd., Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., Edgar R. Peleaz, and City Pro Management, Ltd.'s Joint Brief Pursuant to Court Order of August 31, 2012, filed September 13, 2012; 2) Plaintiffs' Brief Re: Entry of Default Against Masanaga Shimazu, filed September 14, 2012; 3) Defendants Yuh Yow Fishery Company, Ltd., Marin Marawa, Ltd., Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., Edgar R. Peleaz, and City Pro Management, Ltd.'s Joint Reply Brief to Defendants' [sic] Brief Re: Entry of Default Against Masanaga Shimazu, filed September 24, 2012; and 4) Plaintiffs' Reply to Defendants Yuh Yow Fishery Company, Ltd., Marin Marawa, Ltd., Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., Edgar R. Peleaz, and City Pro Management, Ltd.'s Joint Brief Pursuant to Court Order of August 31, 2012, filed September 24, 2012. The court concludes that no default judgment can be entered against Masanaga Shimazu at this time. The reasons follow.

I. DEFAULT JUDGMENT ON A SUPERSEDED PLEADING

The class plaintiffs contend that a default judgment can be entered against Captain Masanaga Shimazu on their second amended complaint and that their

second amended complaint has no effect on his default. They contend that they are not required to serve the second amended complaint on Masanaga Shimazu because he is already in default for failure to appear after being served with the first amended complaint.

Ordinarily, an amended pleading supersedes the former pleading, Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 15 (App. 1995), and "renders it of no legal effect," International Controls Corp. v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977), *cert. denied* 434 U.S. 1014 (1978); *see also* Dluhos v. Floating & Abandoned Vessel, 162 F.3d 63, 68 (2d Cir. 1998); Bullen v. De Bretteville, 239 F.2d 824, 833 (9th Cir. 1956) ("[o]nce amended, the original no longer performs any function as a pleading"). The Vesco court held that when the plaintiff had had great difficulty serving its original complaint on an individual defendant and the plaintiff thereafter amended its complaint but the amended complaint was not properly served on that same individual defendant although it had to be because it asserted additional claims for relief, the original complaint was not superseded for that individual defendant and therefore a valid default judgment was entered on the original complaint against the individual defendant. When a plaintiff has served a defendant with a complaint before filing an amended pleading, the earlier complaint is superseded only when the plaintiff serves the amended complaint on that defendant. Vesco, 556 F.2d at 669.

Thus, under Vesco, there is nothing improper about holding one defendant in default of one complaint and the other defendants liable on a later amended complaint. *Id.* at 668 n.3 ("It is immaterial that [the plaintiff] is proceeding against certain other defendants on the amended complaint, since they have been properly served with that complaint."). Otherwise, if an amended complaint superseded the prior complaint with respect to all defendants once the plaintiff served it on a single

defendant, a plaintiff might be unable to obtain a judgment against a defendant, who although properly served with the earlier complaint, evades service of an amended complaint because then the plaintiff would no longer have an effective complaint against any defendant who had not yet been served the amended pleading. *See id.* at 669. Requiring a plaintiff "to gamble on the likelihood of obtaining service would discourage amendments," which is contrary to the liberal amendment policy of Civil Procedure Rule 15. Vesco, 556 F.2d at 669.

The first amended complaint therefore remains the operative pleading against Masanaga Shimazu since it was served on him (and he defaulted by failing to appear) before the second amended complaint was filed (and never served on him). The plaintiffs may, given the proper circumstances, obtain a default judgment against Masanaga Shimazu on the first amended complaint while obtaining judgments against other defendants on a later amended complaint.

The class plaintiffs contend that the default judgment should be entered against Masanaga Shimazu on the second amended complaint because he defaulted by failing to appear after being served the first amended complaint so they do not have to serve the second amended complaint on him. Civil Procedure Rule 5(a) provides that "[n]o service need[s] to be made on the parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4."

The defendants contend that the second amended complaint added new and additional claims against Masanaga Shimazu, such as claims for all damages resulting from the negligent grounding incident including negligent entrustment and supervision and the unseaworthiness of the *F/V Teraka No. 168* and of all vessels involved in the grounding or the attempts to refloat the *F/V Teraka No. 168*.

The class plaintiffs assert that no new claims are pled against Masanaga Shimazu because no new facts are alleged against him.

Under Vesco, the class plaintiffs may obtain a default judgment against Masanaga Shimazu on the first amended complaint since that is the one that was served on him and that he failed to appear to answer or otherwise defend. The second amended complaint, even if it alleges no new facts, does contain new or additional claims for relief and potential increased financial liability for Masanaga Shimazu and therefore must be served on Masanaga Shimazu if the class plaintiffs intend to hold him liable on the second amended complaint's new legal theories and claims. This is because a defendant must receive notice of all claims for relief on which the court might find him liable and enter judgment against him. A default judgment, that was rendered against a defendant who never appeared and that included damages for claims not raised in the complaint served on him or sums not prayed for by the plaintiff, would violate due process. Western Sales Trading Co. v. Billy, 13 FSM Intrm. 273, 278 (Chk. 2005).

Accordingly, if the class plaintiffs wish to obtain a judgment against Masanaga Shimazu based on the second amended complaint they must effect service of process of that complaint on him. But if they are content to obtain a default judgment against him based on the first amended complaint, they will not be required to serve the second amended complaint on him.

II. DEFAULT JUDGMENTS WHEN OTHER DEFENDANTS' LIABILITY NOT ADJUDICATED

The class plaintiffs further contend that a default judgment can be entered against Masanaga Shimazu now, without waiting for the court to adjudicate any of the other defendants' liabilities. They note that Civil Procedure Rule 54(b) permits the court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just

reason for delay and upon an express direction for the entry of judgment."

The defendants contend that a default judgment against Masanaga Shimazu at this time raises the danger that the results would be logically inconsistent judgments where the plaintiffs allege one single indivisible harm caused by Masanaga Shimazu and some or all of the other defendants. The plaintiffs reply, relying on Shanghai Automation Instrument Co. v. Kuei, 194 F. Supp. 2d 995 (N.D. Cal. 2001), that when uniformity of liability is not logically required by the case's facts and theories, the risk of inconsistent judgments is not extreme enough to bar the entry of a default judgment and that this true in this case.

In Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 554, 21 L. Ed. 60, 61 (1872), the U.S. Supreme Court held that a default judgment cannot be entered against one of several defendants when the theory of liability is joint or when the relief, to be effective, would be granted against each defendant. The Frow rule has been limited to situations "where the liability of one defendant necessarily depends upon the liability of the others." International Controls Corp. v. Vesco, 535 F.2d 742, 746-47 n.4 (2d Cir. 1976). "As a general rule then, when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted." 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2690, at 73 (3d ed. 1998).

In this case, the class plaintiffs allege that defendant Marin Marawa, Ltd. is Masanaga Shimazu's principal and employer and the owner of the F/V *Teraka No. 168* that Masanaga Shimazu captained, and that defendant Yuh Yow Fishery Company, Ltd. is Marin Marawa's alter ego and thus their liability is vicarious and dependent on Masanaga Shimazu's liability. When the relationship between the parties requires vicarious liability, finding one defendant liable and the others not

liable would be an inconsistent judgment. In re Uranium Antitrust Litig., 617 F.2d 1248, 1257 (7th Cir. 1980). This is true even though once Masanaga Shimazu's liability and damages are determined Marin Marawa and Yuh Yow Fishery intend to seek to reduce their exposure through the statutory limitation of liability defense. And, if Masanaga Shimazu is ever served the second amended complaint, his liability for damages allegedly caused by the attempts to refloat the F/V *Teraka No. 168* is alleged to be joint with the defendants who were involved in those attempts.

But even if a default judgment could be entered against just Masanaga Shimazu, instead of included in a later judgment with all defendants, damages should not be established against defaulting defendant Masanaga Shimazu until the other defendants' liability has been determined in order to avoid the possibility of inconsistent damage awards. In re Uranium Antitrust Litig., 617 F.2d at 1262; Montcalm Publ'g Corp. v. Ryan, 807 F. Supp. 975, 977-78 (S.D.N.Y. 1992). That could be possible in this case. The court might be able to enter a "default judgment" against Masanaga Shimazu on liability alone without establishing any damages amount, or taking any evidence on damages, and (as there would be no damages amount) no Rule 54(b) language directing its entry as a final judgment. This would leave the "default judgment" against Masanaga Shimazu "subject to revision at any time before the entry of [a final] judgment adjudicating all the claims and the rights and liabilities of all the parties." FSM Civ. R. 54(b). This "default judgment" since it would not be final and would be subject to revision would be an interlocutory order that is neither enforceable nor appealable.

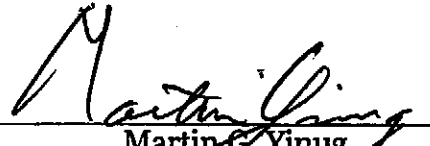
III. CONCLUSION

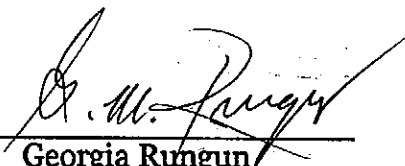
The current operative pleading against Masanaga Shimazu is the first amended complaint and if the class plaintiffs wish to obtain a judgment against him based on their second amended complaint, the second amended complaint must be

properly served on him. No final and appealable or enforceable default judgment will be entered against Masanaga Shimazu until all claims are adjudicated and the rights and liabilities of all parties determined. If the class plaintiffs obtain a "default judgment" against Masanaga Shimazu establishing only his liability, that "judgment" will not determine damages and will not be enforceable or appealable and will be subject to revision at any time before final judgment.

So ordered the 2nd day of October, 2012.

Entered this 2nd day of October, 2012.


 Martin G. Yinug
 Chief Justice


 Georgia Rungun
 Assistant Clerk of Court

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