

**FILED**  
 12/20/12 3:30  
 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

CIVIL ACTION NO: 2011-3002

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 127,  
 F/V FUKUAN 606, their engines, masts,  
 bowsprits, boats, anchors, chains, cables,  
 rigging, apparel, furniture, and all  
 necessities 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  
 necessities thereunto pertaining,

In Rem Defendant,

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

In Personam Defendants.

MEMORANDUM AND ORDER  
 ENLARGING TIME TO SERVE  
 F/V YUH YOW 127 AND  
 DISMISSING F/V FUKUAN 606

This comes before the court on 1) Plaintiffs' Motion to Stay Clerk's Notice  
 Filed November 1, 2012, which was filed on November 20, 2012; on 2) Defendant

City Pro Management Ltd.'s Opposition to Plaintiffs' Motion to Stay Clerk's Notice Filed November 1, 2012, which was filed on November 30, 2012; and on 3) the Plaintiffs' Reply to Defendant City Pro Management Ltd.'s Opposition to Plaintiffs' Motion to Stay Clerk's Notice, filed December 11, 2012. The motion is granted for the F/V *Yuh Yow 127*. The reasons follow.

#### I. BACKGROUND

On November 1, 2012, the clerk issued a notice that *in rem* defendants F/V *Yuh Yow 606*<sup>1</sup> and F/V *Fukuan 606* had not been served the Verified Second Amended Complaint filed on July 23, 2012 or any other complaint, and that if service was not effected on those two defendants by November 21, 2012, the case against them was, under FSM Civil Procedure Rule 4(j),<sup>2</sup> subject to dismissal for the lack of service. Civil Rule 4(j) authorizes the dismissal without prejudice of any defendant not served with process within 120 days. Over 120 days have elapsed since the Second Verified Amended Complaint was filed and neither the F/V *Yuh Yow 127* nor the F/V *Fukuan 606* have been served the complaint and summons. Service of process on a vessel is usually effected by the arrest<sup>3</sup> of the vessel, FSM

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<sup>1</sup>F/V *Yuh Yow 606* was a typographical error and should have been F/V *Yuh Yow 127* as noted in the defendants' Response filed on November 1, 2012. Since the parties' filings all refer to F/V *Yuh Yow 127*, no one was misled by this typo.

<sup>2</sup>The FSM Rules of Civil Procedure apply in *in rem* admiralty cases except to the extent they are inconsistent with the FSM Supplemental Rules for Certain Admiralty and Maritime Claims, in which case the supplemental rules govern. FSM Mar. R. A.

<sup>3</sup>When a vessel, such as the *Teraka No. 168*, has been abandoned and is situated "such that the taking of actual possession is impracticable, the FSM National Police shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent." FSM Mar. R. E(4)(b). It is unclear whether the arrest warrant, summons, and complaint were affixed to the *Teraka No. 168* when the national police went to arrest it and found it abandoned on Eauripik

Mar. R. C(3), unless a substitute security, such as a letter of undertaking has been arranged, *see, e.g., People of Gilman ex rel. Tamagken v. M/V Easternline I*, 17 FSM Intrm. 81, 84 (Yap 2010); *People of Rull ex rel. Ruepong v. M/V Kyowa Violet*, 14 FSM Intrm. 403, 414 (Yap 2006).

The class plaintiffs ("Eauripik") move to stay the dismissal of the F/V *Yuh Yow 127*. The F/V *Yuh Yow 127* is an FSM-flagged vessel home-ported in Pohnpei. Eauripik asks and they should be allowed 90 days after the F/V *Yuh Yow 127* has returned to the FSM to serve process on it – to have it arrested – if the vessel can be found in the FSM at any time before the start of trial or, alternatively, to order defendant City Pro Management Ltd. ("City Pro") to return the vessel to the FSM so that it can be subjected to arrest, bonding, and release. City Pro contends that since the vessel has left the FSM, the vessel cannot be made an *in rem* defendant unless it has been validly seized, it should be dismissed. City Pro also contends that the court lacks jurisdiction to order that it be sailed into the FSM to be seized.

The court considers Eauripik's motion to be one to enlarge time to serve process on *in rem* defendant F/V *Yuh Yow 127*. Eauripik does not ask that the dismissal of the F/V *Fukuan 606* be stayed. The F/V *Fukuan 606* is accordingly dismissed as a party defendant.

## II. DISCUSSION

Defendant City Pro is correct that the court cannot exercise jurisdiction over the F/V *Yuh Yow 127* (or any other vessel) unless that *in rem* defendant has been validly arrested in the FSM and brought under the court's actual control, *Moses v. M.V. Sea Chase*, 10 FSM Intrm. 45, 51-52 (Chk. 2001); *Kosrae v. M/V Vocea Lomipeau*, 9 FSM Intrm. 366, 370 (Kos. 2000); *In re Kuang Hsing No. 127*, 7 FSM

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reef, but the vessel nevertheless remains within jurisdiction and an arrest could still be perfected if it has not already been.

Intrm. 81, 82 (Chk. 1995), or under its constructive control through the provision of a substitute security, M/V Kyowa Violet, 14 FSM Intrm. at 414; FSM v. Kana Maru No. 1, 14 FSM Intrm. 300, 302 (Chk. 2006). And, unlike *in personam* defendants, who may under certain circumstances be validly served process in foreign countries, 4 F.S.M.C. 204, valid service of process on an *in rem* defendant can only be made within the court's territorial jurisdiction. See M/V Easternline I, 17 FSM Intrm. at 84; Kana Maru No. 1, 14 FSM Intrm. at 302; FSM Dev. Bank v. Iffraim, 10 FSM Intrm. 107, 110 (Chk. 2001); M.V. Sea Chase, 10 FSM Intrm. at 51; M/V Voea Lomipeau, 9 FSM Intrm. at 370; In re Kuang Hsing No. 127, 7 FSM Intrm. at 82.

City Pro is also correct that the court cannot order an *in personam* defendant to bring a vessel into the jurisdiction so that a plaintiff may then have it arrested and brought within the court's jurisdiction and made a separate defendant *in rem*. See R.M.S. Titanic, Inc. v. Haver, 943, 957 (4th Cir. 1999) ("court's authority to exercise *in rem* jurisdiction does not carry with it a concomitant derivative power to enter *in personam* orders").

Rule 4(j) sets a time frame of 120 days from when a complaint is filed for process to be served on the defendant. This time limit, like other time limits in the FSM Civil Procedure Rules, may be enlarged by the court "for cause shown . . . if request therefor is made before the expiration of the period originally prescribed," FSM Civ. R. 6(b)(1), or "upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect," FSM Civ. R. 6(b)(2). Before the 120-day time period expired on November 21, 2012, Eauripik moved for more time to serve process on the F/V Yuh Yow 127. Eauripik may therefore be granted an enlargement for cause shown.<sup>4</sup> For the court

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<sup>4</sup>The U.S. Federal Rule of Civil Procedure Rule 4(j), from which the FSM rule was drawn, contained a provision that the dismissal would occur if the plaintiff

to grant an enlargement under Rule 6(b)(1) for cause shown, "a party must demonstrate some justification for the issuance of the enlargement order. However, an application for the enlargement of time under Rule 6(b)(1) normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1165, at 521-22 (3d ed. 2002).<sup>5</sup> See also Structural Concrete Prods., LLC v. Clarendon Am. Ins. Co., 244 F.R.D. 317, 327 (E.D. Va. 2007).

Although the Eauripik class plaintiffs have not sought an arrest warrant for the F/V *Yuh Yow 127*, the vessel is not currently in the FSM, having left for dry dock in Taiwan in July 2012 before the Second Verified Amended Complaint was filed. Therefore, even if Eauripik had an arrest warrant for the F/V *Yuh Yow 127*, no effort by them would have succeeded in effecting a valid arrest of the vessel in FSM jurisdiction. Since Eauripik has no control over the F/V *Yuh Yow 127*'s movements while it is absent from the FSM Supreme Court's jurisdictional waters, Eauripik has presented some justification to enlarge time to serve process on the F/V *Yuh Yow*

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"cannot show good cause why such service was not made within that [120-day] period," U.S. Fed. R. Civ. P. 4(j) (relocated at U.S. Fed. R. Civ. P. 4(m)). This provision was omitted when the FSM Supreme Court adopted its version of Civil Procedure Rule 4(j). The FSM Civil Rule 6(b) standards for an enlargement of time are thus applicable to enlargement of the 120-day period for the service of process. The Rule 6(b)(1) "cause shown" standard is a lower standard than the "good cause shown" standard in U.S. Federal Rule 4(j) (now 4(m)), for which the relevant factors are whether reasonable efforts at effecting service have been made and whether the defendant has suffered prejudice as a result of the delay. *Itel Container Int'l Corp. v. Atlanttrafik Express Serv., Ltd.*, 686 F. Supp. 438 444 (S.D.N.Y. 1988).

<sup>5</sup>Although the court must first look to FSM sources of law rather than begin with a review of foreign sources, FSM Const. art. XI, § 11, when an FSM court has not previously construed an FSM civil procedure rule which is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance in interpreting the rule. See, e.g., *George v. Albert*, 17 FSM Intrm. 25, 31 n.1 (App. 2010); *Berman v. College of Micronesia-FSM*, 15 FSM Intrm. 582, 589 n.1 (App. 2008). The court has not previously considered the standard to determine "cause shown" under Rule 6(b)(1).

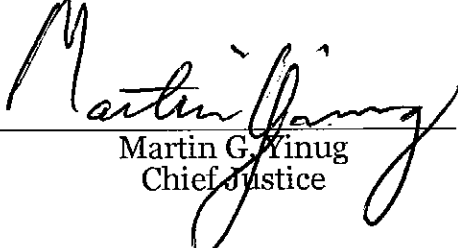
127. Eauripik cannot be said to be acting in bad faith. No prejudice to the adverse party, the F/V *Yuh Yow 127*, from the added time to serve it process is apparent either. Its owners and operators are already *in personam* defendants in this class action and they thus have actual notice of the civil action against the vessel. Furthermore, an *in rem* defendant ought not to be able to have the complaint against it dismissed for lack of service merely by keeping the *res* out of the court's jurisdiction for 120 days. Itel Container Int'l Corp. v. Atlantrafik Express Serv., Ltd., 686 F. Supp. 438 444 (S.D.N.Y. 1988).

Eauripik has shown more than ample cause for an enlargement of time for process to be served on the F/V *Yuh Yow 127*. The time for Eauripik to serve process on the F/V *Yuh Yow 127* (for which it must first obtain an arrest warrant) will be enlarged until the start of trial in this matter. *Id.* at 445; Louisiana v. Kition Shipping Co., 653 F. Supp. 2d 633, 639 (M.D. La. 2009); *cf.* M/V Easternline I, 17 FSM Intrm. at 84-85 (defendant vessels that were never served process were dismissed without prejudice after the start of trial).

### III. CONCLUSION

Accordingly, the time for the Eauripik plaintiffs to serve process on the *in rem* defendant F/V *Yuh Yow 127* is enlarged so as to allow the Eauripik plaintiffs to perfect service *in rem* on it if, at any time before the *in personam* action goes to trial, the vessel may be found and arrested within the court's jurisdiction. Eauripik not having asked that the time to perfect service *in rem* on the F/V *Fukuan 606* be enlarged, party defendant F/V *Fukuan 606* is therefore dismissed without prejudice.

So ordered the 20th day of December, 2012.

  
Martin G. Yinug  
Chief Justice

Entered this 20th day of December, 2012.

*G.M. Rungry*  
Georgia Rungry  
Assistant Clerk of Court

served this Memo & Order  
on (attorney) (trial counselor)  
D. Berman, Esq. by mailing (him) (her)  
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111, Chateau Santa Rosa, 19  
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