

FILED
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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 127,
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
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

ORDER RULING ON CERTAIN
PRELIMINARY
AFFIRMATIVE DEFENSES

This comes before the court on 1) All Appearing Defendants' Pretrial Motion
Raising Certain Affirmative Defenses Pursuant to the Court's Order Dated January

21, 2013, filed February 14, 2013, with supporting affidavit; 2) the Plaintiffs' Opposition to All Appearing Defendants' Pretrial Motion Raising Certain Affirmative Defenses Pursuant to the Court's Order Dated January 21, 2013, filed March 8, 2013, with supporting affidavits; and 3) defendants' Reply to Plaintiffs' Opposition to Affirmative Defenses, filed March 12, 2013, with supporting affidavit. The plaintiff in intervention, the FSM, did not file a response to the defendants' motion.

Yuh Yow Fishery Company, Ltd. ("Yuh Yow"), Marin Marawa, Ltd. ("Marin Marawa"), Malayan Towage and Salvage Corporation ("Malayan Towage"), Hsin Horng Fishery Company, Ltd. ("Hsin Horng"), Captain Edgar R. Peleaz, and City Pro Management, Ltd. raised in their pleadings certain defenses including the lack of personal jurisdiction, improper venue, insufficient process, insufficient service, failure to join indispensable party, and complaint not properly verified. In answering the Intervenor's Complaint, Yuh Yow and Marin Marawa also raised the defense of lack of statutory notice by the FSM for it to be a receiver. The court, in its January 21, 2013 Order about Raising Certain Defenses, ruled that if these defenses were not raised by pretrial motion by February 14, 2013, they would be deemed waived.

In their motion, the defendants explicitly waived the defenses of improper venue, insufficient process, insufficient service, and failure to join indispensable party, but asserted the defenses of 1) lack of personal jurisdiction over defendants Malayan Towage, Hsin Horng, and Captain Peleaz; 2) the plaintiffs' failure to properly verify the complaint; and 3) the FSM's failure to properly notify the defendants Yuh Yow and Marin Marawa that it was the "receiver" until well after the *F/V Teraka No. 168* was lightered and the crew had left the FSM. The defendants assert that they should prevail on each of these defenses and if they do prevail on all of them, they are then entitled to dismissal of the entire case against them.

I. PERSONAL JURISDICTION

The movants contend that the court lacks personal jurisdiction over defendants Malayan Towage, Hsin Horng, and Captain Peleaz. Malayan Towage, the M/Tug *Trabajador I's* owner, and Captain Peleaz, the M/Tug *Trabajador I's* captain, contend that they do not have sufficient minimum contacts with the FSM to justify invoking the court's long-arm jurisdiction over them because their presence in the FSM was limited to the tug's only entry into FSM waters to try to refloat the grounded F/V *Teraka No. 168* but it only managed to move that vessel 40 centimeters astern within the coral scar that the grounding had already created and because there was no other evidence of injury to the coral. Hsin Horng contends that it lacks sufficient minimum contacts with the FSM for the court to exercise long-arm jurisdiction over it because its vessel, the F/V *Fu Kuan 606*, only briefly entered FSM waters to assist the stranded F/V *Teraka No. 168* and did not manage to move that vessel at all and that since it was equipped with nylon rope, not chains or steel cables, its tow lines could not have dragged on and damaged the bottom. These defendants note that all these attempts to refloat the stranded F/V *Teraka No. 168* were done under the supervision of state government officials and further state that when the M/Tug *Trabajador I's* attempt was made, an FSM national government marine patrol surveillance ship was also present.

The plaintiffs allege that Malayan Towage and Captain Peleaz committed a tortious act while operating the M/Tug *Trabajador I* in the FSM's territorial waters by further damaging the Eauripik marine environment without managing to refloat the F/V *Teraka No. 168* and that therefore the court can exercise personal jurisdiction over them. The FSM Supreme Court can exercise personal jurisdiction over persons not found in the FSM under the FSM "long-arm" statute so long as the exercise of jurisdiction does not deny the defendant due process of law as

guaranteed by article IV, section 3 of the Constitution. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 128 (Pon. 1999). The parts of that statute pertinent to this case read:

Any person, corporation, or legal entity, whether or not a citizen or resident of the Federated States of Micronesia, who in person or through an agent does any of the acts enumerated in this section, thereby submits himself or its personal representative to the personal jurisdiction of the Supreme Court of the Federated States of Micronesia as to any cause of action arising from:

... (c) The operation of a vessel or craft within the territorial waters or airspace of the Federated States of Micronesia;

... (e) The commission of a tortious act within the Federated States of Micronesia

4 F.S.M.C. 204. The FSM Supreme Court applies a minimum contacts analysis to determine the extent to which the FSM long-arm statute may be used consistently with due process to exert jurisdiction over a non-forum defendant. New Quick Co., 9 FSM Intrm. at 129. Under the minimum contacts doctrine a defendant must have certain minimum contacts with a forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Yap v. M/V Cecilia I, 13 FSM Intrm. 403, 410-11 (Yap 2005); New Quick Co., 9 FSM Intrm. at 129. The FSM Supreme Court has personal jurisdiction, under 4 F.S.M.C. 204(1)(c), over a cause of action that arises from the operation of a vessel or craft within the FSM territorial waters. M/V Cecilia I, 13 FSM Intrm. at 410.

This dispute arises out of the defendants' contacts with the FSM. When a case or dispute "is related to or 'arises out of' a defendant's contacts with the forum, . . . a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404, 411 (1984). The Helicopteros court referred to a case or dispute arising out of contacts with the forum as specific jurisdiction. *Id.* at 414 n.8, 104 S. Ct. at 1872 n.8, 80 L. Ed. 2d at

411 n.8. "Specific" jurisdiction requires a showing of three distinct elements:

(1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

In re Damodar Bulk Carriers, Ltd., 903 F.2d 675, 680 (9th Cir. 1990).

In this case, Malayan Towage and Captain Peleaz purposefully directed their activities to refloat a vessel stranded in FSM territorial waters and they purposefully availed themselves of the privilege of attempting salvage operations in FSM territorial waters for which the stranded vessel's owners went to considerable expense in hiring them. In other words, they purposefully availed themselves of the opportunity to conduct activities in FSM territorial waters for which they would be remunerated. Hsin Horng directed its vessel, the F/V *Fu Kuan 606*, to FSM territorial waters to assist the F/V *Teraka No. 168* and the plaintiffs' claims arise from that attempted assistance. The plaintiffs' claims against Malayan Towage, Captain Peleaz, and Hsin Horng arise solely out of their activities in FSM territorial waters. And the court's exercise of personal jurisdiction over them is reasonable because, if for no other reason, it would be unreasonable for any other forum to exercise jurisdiction over the plaintiffs' claims.

The movants contend that the one time the M/Tug *Trabajador I* was in FSM territorial waters Malayan Towage and Captain Peleaz did not commit any tortious acts while in the FSM so that they do not have the minimum contacts necessary for the FSM Supreme Court to exercise jurisdiction over them. They base this on their assertion (with supporting exhibits) that what they did at Eauripik, in the presence of and perhaps with the tacit approval of government officials, could not possibly be tortious. The movants' argument is actually not a claim that they did not have

minimum contacts needed for jurisdiction but rather that they did not commit the minimum acts necessary to have committed a tort within FSM territorial waters. This is a defense on the merits — that the plaintiffs cannot prove the elements of damages or of a breach of a duty.

This is not a case like National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120 (Pon. 1999) where the defendant was never present in the FSM and where all the acts complained of that allegedly gave rise to liability, with the exception of two letters sent to and received in the FSM, took place outside of the FSM. *Id.* at 129-32. In this case, all of the alleged acts on which the liability of Malayan Towage and Captain Peleaz is premised occurred in FSM territorial waters and all of the damage allegedly caused by the M/Tug *Trabajador I* was in the FSM. It is difficult to see what other forum could adjudicate the plaintiffs' claims against Malayan Towage and Captain Peleaz.

Hsin Horng concedes that its vessel, the F/V *Fu Kuan 606*, entered FSM territorial waters and tried to lend assistance to the stranded F/V *Teraka No. 168*. It contends that the F/V *Fu Kuan 606*'s attempt(s) were not only unsuccessful but failed to have any effect whatsoever on the stranded vessel's position or the marine environment. This is a defense on the merits — a defense that no damages can be proved and that no duty was breached. It is not a defense that they lack the minimum contacts with the FSM so that the litigation against them would offend due process and traditional notions of fair play and substantial justice.

Accordingly, the court concludes that, under the FSM long-arm statute, Malayan Towage, Captain Peleaz, and Hsin Horng have sufficient minimum contacts with the FSM for the FSM Supreme Court to exercise personal jurisdiction over them since the plaintiffs' claims against these defendants arise from their actions within FSM territorial waters which allegedly caused damages to the

interests of FSM citizen — the People of Eauripik. This does not mean that these defendants might not prevail on a summary judgment motion¹ or that the plaintiffs will be able to prove these defendants liable at trial. The court only rules that in this instance it is proper for the court to exercise personal jurisdiction over them.

II. FAILURE TO PROPERLY VERIFY THE COMPLAINT

The movants contend that the second amended complaint has not been properly verified and therefore should be dismissed. "Every complaint in Rule B, C, and D actions shall be verified upon oath or solemn affirmation by a party or by an authorized officer of a corporate party." FSM Mar. R. E(2). Neither Supplemental Admiralty Rule B, which governs actions in personam to attach or garnish a defendant's property when the defendant cannot be found or served in the FSM, nor Rule D, which governs possessory actions where a party seeks to adjudicate the right to possess property wrongfully taken, petitory actions where a party seeks to try title to a vessel independent of the right to possession, and partition actions where the division of a vessel's ownership is sought, apply to this case. This case is in part a Rule C in rem action to enforce maritime liens that allegedly arose on the *F/V Teraka No. 168* because it grounded on Eauripik reef and on the *F/V Yuh Yow 127* because of its alleged negligence in trying to refloat the stranded *F/V Teraka No. 168*. The rest of the case consists of in personam actions against various natural and juridical persons. Complaints alleging these in personam actions do not have to be verified. Therefore this defense applies only to the Eauripik class plaintiffs' claims against the *F/V Teraka No. 168* and the *F/V Yuh*

¹The current motion came before the court as a Rule 12(b) motion to dismiss. When "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." FSM Civ. R. 12(b). The court has excluded this material because the February 14, 2013 deadline was only meant to address preliminary defenses.

Yow 127.

The movants contend that the complaint's verification is improper since the lead class representative, Santus Sarongelfeg, whose affidavit was used to verify the complaint, could not verify the complaint because he had no personal knowledge of any of the facts or allegations in the class plaintiffs' complaint and was not present on Eauripik during or after any of the incidents recited in the complaint. Santus Sarongelfeg testified in his deposition that he has not been on Eauripik since sometime in 2010. The movants contend that most of Sarongelfeg's information was gathered by Joshua Walsh, one of the plaintiffs' attorneys, and relayed to Sarongelfeg for inclusion in his affidavit.

The class plaintiffs contend that Sarongelfeg's verification was not improper because a plaintiff's verification may be based on his good faith belief and reliance on an investigation by others. They contend that verification defects are excused when the parties are absent and it is difficult or impractical to obtain the client's signature. They note that the "extreme technological isolation" and geographical separation of the Eauripik class members who live on Eauripik prevent the class members with the most first-hand or personal knowledge of the grounding incident and its aftermath from being able to verify the class members' complaint. They assert that the court must, as mandated by the Constitution, take into account the FSM's geographical configuration and not penalize the class members for Eauripik atoll's isolation.

In Amstar Corp. v. M/V Alexandros T., 431 F. Supp. 328, 336-37 (D. Md. 1977), *aff'd*, 664 F.2d 904 (4th Cir. 1981), the court rejected a formalistic construction of Supplemental Rule C and ruled that the verification of the complaint

by the plaintiff corporation's attorney was sufficient compliance with Rule C.² The court considers that, since a plaintiff class is analogous to a corporate body and a class representative is analogous to a corporation's officer or attorney and with due deference to the Constitution's Judicial Guidance Clause, FSM Const. art. XI, § 11 ("Court decisions shall be consistent with . . . the social and geographical configuration of Micronesia."); cf. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 495-96 (Chk. 2004) (court decisions are constitutionally required to be consistent with Micronesia's geographical configuration, which includes the relative isolation of various outer island communities), Santus Sarongelfeg's verification of the complaint was sufficient compliance with Supplemental Rule C's requirement that the in rem complaint be verified.

Accordingly, the second amended complaint will not be dismissed on this ground.

III. FSM'S FAILURE TO PROPERLY NOTIFY DEFENDANTS THAT IT WAS THE RECEIVER

The movants also contend that the FSM failed to properly notify defendants Yuh Yow and Marin Marawa by not complying with the statutory notice requirements in 19 F.S.M.C. 907 before Yuh Yow and Marin Marawa removed equipment, fuel, bait, and other items from the stranded F/V *Teraka No. 168* and transported this material out of FSM waters. The movants further contend that while the FSM surveillance patrol boat was present on August 31, 2011, and conducting a preliminary investigation of the August 28, 2011 grounding, no one informed the *Teraka No. 168*'s captain or crew that the vessel was now in

²While the court must first look to FSM sources of law and not begin with a review of other courts' cases when the court has not previously construed an FSM supplemental admiralty and maritime rule which is similar to a U.S. counterpart, it may look to U.S. sources for guidance in interpreting the rule. *People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III*, 16 FSM Intrm. 633, 635 n.1 (Yap 2009).

receivership or that they could not remove any items or personal belongings from the vessel. The movants contend that, at the least, the FSM was required to give notice of the FSM's receivership during the August 31, 2011 initial investigation. The movants further assert that the FSM receiver never undertook the requisite public notice required by 19 F.S.M.C. 907, or, if it did, it was not done before the F/V *Teraka No. 168* was lightered³ between September 7 and September 16, 2011. The movants also note that, although the FSM has declared itself the receiver, it has made no effort to secure or contain the F/V *Teraka No. 168* or to take possession of the removed items currently in safe storage at Subic Bay, Philippines. The movants further contend that it would be inequitable for the \$100,000 fine in 19 F.S.M.C. 908 to be imposed on them under the circumstances.

The FSM Secretary of Transportation and Communications is designated by statute as the Receiver of wreck. 19 F.S.M.C. 902(1). "When any vessel is wrecked, stranded or in distress, the Receiver may take command of all persons present, assign duties, issue directions, requisition assistance, and demand the use of any nearby vehicle or equipment, if necessary to preserve the vessel, the cargo, and lives." 19 F.S.M.C. 903(1).

When the Receiver takes possession of wreck, he shall cause a description of the wreck to be:

- (1) broadcast on at least one radio station in each state;
- (2) published in the local newspaper, if any;
- (3) posted by notice describing the wreck at the Department and in appropriate public places in each state capital.

19 F.S.M.C. 907. It is unclear exactly when the Receiver exercised his statutory prerogative and became the receiver in possession of the F/V *Teraka No. 168* wreck.

³Lightering or lighterage is the "loading and unloading of goods between a ship and a smaller vessel, called a lighter." BLACK'S LAW DICTIONARY 1011-12 (9th ed. 2009). In this case, the lightering was done to lighten the F/V *Teraka No. 168* so that it would be easier to tow it off the reef and refloat it.

The notice required in 19 F.S.M.C. 907 is notice to the public or the world. Notice to the owner, captain, and crew is another matter. The class plaintiffs assert that the owner's September 9, 2011 receipt of documents about the arrest of the F/V *Teraka No. 168* and its participation in the September 12, 2011 arrest proceedings before the court was adequate notice that articles could not be removed from the vessel.

Regardless of the effect of those proceedings on the Eauripik class plaintiffs' claims against certain defendants, that could not constitute notice to anyone that the Receiver had taken possession of the stranded F/V *Teraka No. 168*. The court concludes that even if the 19 F.S.M.C. 907 notice was never given to the public actual notice to the owner is sufficient for a claim against the owner. The earliest place in the record where the FSM asserts that it is the Receiver of Wreck is in its November 22, 2011 motion to intervene. Yuh Yow and Marin Marawa would have had actual notice of the FSM's status as Receiver when that motion was served on them. When a party has had actual notice of the receivership it cannot complain that the notice is defective because it did not also get notice by publication or constructive notice that, if given, might still never come to the party's attention. *Cf. Setik v. Sana*, 6 FSM Intrm. 549, 553 (Chk. S. Ct. App. 1994) (one who receives actual notice cannot assert a constitutional claim that the method of notice was not calculated to reach him).

The FSM has not opposed the motion. By rule, the failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d), but even if there is no opposition, the court still needs good grounds before it can grant the motion. *Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440, 442 (App. 1994).

With respect to the \$100,000 penalty imposed by 19 F.S.M.C. 908(2), good grounds exist. Section 908 provides that

(1) No person shall remove or attempt to remove a wrecked vessel, its cargo, or apparel from the custody of the Receiver without written authorization of the Receiver.

(2) Violation of subsection (1) of this section shall be a national

offense, punishable by a fine not exceeding \$100,000 or imprisonment for not more than one year, or both.

As should be apparent from the language in subsection 908(2) the \$100,000 penalty is a criminal penalty — punishment — that can be imposed only upon conviction of the national offense (crime) of violating 19 F.S.M.C. 908(1). This is a civil case, not a criminal prosecution. Civil liability may be imposed under 19 F.S.M.C. 905 and the duty to deliver items removed from a wreck is imposed under 19 F.S.M.C. 903(3). It cannot be imposed under 19 F.S.M.C. 908(2) (or 19 F.S.M.C. 912). Those are provisions for criminal liability and must be sought through a criminal prosecution.

The movants have thus had actual notice that the FSM is the Receiver of the stranded *F/V Teraka No. 168* notwithstanding the lack of statutory notice to the public that would be necessary to enforce the receivership against the general public. The FSM's Amended Verified Complaint thus states a civil cause of action. The extent to which Yuh Yow and Marin Marawa may avoid civil liability because they did not have actual notice of the receivership until after the refloating attempts is question on the merits left for another day as is whether liability is avoided or lessened because material was removed, as part of the government permitted and supervised attempt to refloat the *F/V Teraka No. 168*, from that vessel to make it easier to refloat and to lessen the chance of pollution of the marine environment.

IV. CONCLUSION

Accordingly, the motion to dismiss for lack of personal jurisdiction over defendants Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., and Captain Edgar R. Peleaz; for the plaintiffs' failure to properly verify the complaint is denied. The motion to dismiss the FSM's complaint in intervention for the failure to give statutory notice is denied but the court notes that the criminal punishment sought cannot be imposed in this civil case.

So ordered the 20th day of May, 2013.

Entered this 22nd day of May, 2013.

Martin G. Yinug
Martin G. Yinug
Chief Justice

Georgia Rungun
Georgia Rungun
Assistant Clerk of Court

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