party expects to introduce, and also

2) to the extent practicable, to stipulate to exhibits' authenticity;

AND IT IS FURTHER ORDERED that trial shall start on Thursday, July 7, 2011, at 9:30 a.m.

VI. CONCLUSION

Yalmer Helgenberger has 30 days from entry of this order to establish that the court has personal jurisdiction over defendants Jackson Ardos and Andres William or they will be dismissed from this action.

The admissions deemed made by defendants Mai Xiong Pacific International, Inc., Weigang Xiong, and Shang Guan Mai because they had not responded by September 30, 2010, are deemed withdrawn and their October 19, 2010 response replaces or amends the deemed admissions.

If, within 30 days of this order's entry defense counsel swears to or verifies the interrogatory responses, defendant Mai Xiong Pacific International, Inc. will be considered to have responded to Helgenberger's interrogatories; otherwise they will be considered stricken. The interrogatory responses of any natural person Mai Xiong defendant who has not signed and verified the interrogatory answers within 30 days will be stricken as to that defendant.

Pretrial briefs are due June 20, 2011. Exhibits will be marked by July 5, 2011, and trial will start at 9:30 a.m., July 7, 2011.

* * * *

FSM SUPREME COURT TRIAL DIVISION

GORDON SMITH, Plaintiff, vs. FABIAN NIMEA, individually and d/b/a FSN FINANCIAL GROUP, INC., d/b/a FFGI CONSULTING GROUP, Defendants.	)	CIVIL ACTION NO. 2005-004

ORDER AND MEMORANDUM DENYING FOURTH AND FIFTH MOTIONS TO RECONSIDER AND MOTION TO RECONSIDER EXCLUSION ORDER

Martin G. Yinug
Acting Chief Justice

Decided: February 14, 2011

APPEARANCES:

For the Plaintiff: Mary Berman, Esq.
P.O. Box 163
Kolonia, Pohnpei FM 96941

For the Defendants: Stephen V. Finnen, Esq.
P.O. Box 1450
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Administrative Law – Judicial Review; Immigration

If the court were to take the plaintiff at his word that November 26, 2010 is the date of the demand for an immigration hearing, that 17 F.S.M.C. 109(4) obliges the court to view December 26, 2010 as the effective date of rejection, and that 51 F.S.M.C. 165 is now applicable, the court must deny his administrative appeal of the rejection because he filed his motion 15 days after December 26, 2010 and, under 51 F.S.M.C. 165(1), he had to make the appeal within 10 days following the date of the effective rejection. Smith v. Nimea, 17 FSM Intrm. 333, 337 (Pon. 2011).

Administrative Law – Judicial Review; Civil Procedure – Pleadings – Supplemental

A party cannot file a civil action in anticipation of an adverse final agency decision and expect, without more, that that civil action works as an administrative appeal of the later-issued final agency decision. In order for a party to include an administrative appeal in a preexisting civil action, he must amend or request leave of court to amend his pleadings. Smith v. Nimea, 17 FSM Intrm. 333, 337 (Pon. 2011).

Employer-Employee; Federalism – National/State Power; Immigration

The Constitution's investment in the national government of the power to regulate immigration, emigration, naturalization, and citizenship does not deprive the states of the ability to regulate employment within their own jurisdictions whenever such employment involves non-residents. To the degree that a state law regulating employment of non-resident workers does not directly conflict with national law, such state law is not preempted; and when there is possible conflict, the state law should be construed so as to avoid such conflict. Smith v. Nimea, 17 FSM Intrm. 333, 337-38 (Pon. 2011).

Administrative Law – Judicial Review

Under both state and national law, the plaintiff's claims for wrongful termination and unpaid wages are not property before the FSM Supreme Court when, under state law, the plaintiff is either statutorily barred from asserting his claims for unpaid wages, overtime and wrongful termination due to his failure to appeal the Director's decision or if the Director was not the proper "Chief" of PL&MD, he is barred by the statute of limitations from further pursuing his claims for his failure to request administrative relief within six years of his employment's termination and when, under national law, he has failed to make a proper and timely appeal, which would have been to file a new civil action or request leave to amend his complaint by March 4, 2005. Smith v. Nimea, 17 FSM Intrm. 333, 338 (Pon. 2011).

Civil Procedure – Motions

When the plaintiff has made five motions to reconsider, all of which this court has denied and when, including the original order, the court has ruled six times that his claims for unpaid wages,

overtime and wrongful termination were not properly before the court, he is well within his rights, if he continues to feel that the court has committed error, to appeal this decision, but the trial court will not entertain further motions to reconsider the dismissal of the wrongful termination, unpaid wages and overtime claims. Smith v. Nimea, 17 FSM Intrm. 333, 338 (Pon. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

This matter is before the Court on two motions from the plaintiff: a January 10, 2011 "Request for Review of Denial of Administrative Relief on Employment Claims" and a January 26, 2011 "Request for Reconsideration of (1) Motion in Limine and of (2) Denial of Trial for Wage and Hour Claims." For the reasons below, this court denies all these motions.

I. PROCEDURAL BACKGROUND

This matter is a dispute between Gordon Smith ("Smith") and Fabian Nimea ("Nimea") arising out of Nimea's termination of Smith's employment late in 2004. This court laid out the factual details several times, most recently in the Order and Memorandum Denying Third Motion to Reconsider, and provides only the most relevant details here.

Smith pursued this matter in three venues: the Pohnpei State Division of Personnel, Labor and Manpower Development ("PL&MD"), a state agency; FSM Division of Immigration & Labor ("Immigration"), a national agency; and the FSM Supreme Court, a national court.

Smith began with informal hearings with both the state and national agencies. As a formal matter, Smith began with Immigration. On February 1, 2005, Aurelio Joab ("Joab"), a Hearing Officer (and not, as Smith has claimed in the past, the "chief" of Immigration), issued a "Final Assessment and Decision" ("Joab decision") in which he denied Smith's claims for wrongful termination and unpaid wages. Joab gave Smith five (5) days to appeal the matter to his superior, Mohner A. Esiel ("Esiel"), Chief of Immigration. Pl. Mot. for Summ. J., Ex. at 1-7 (Apr. 9, 2007). Smith appealed the matter by a letter dated February 7, 2005. Esiel responded by letter ("the Esiel letter") on February 22, 2005, in which he declined to make further determinations in the matter, and recommended that Smith take the matter up with the courts. *Id.* at 40-41.

At the state agency level, Smith obtained a Decision from PL&MD on April 17, 2006, in which Director Finley S. Perman ("Perman") denied Smith's claims for wrongful termination, unpaid wages and overtime. Smith did not appeal this Decision to the Pohnpei Supreme Court as required under 19 Pon. C. §§ 2-117(7), 2-119(2).

At the national court level, Smith filed the complaint in this matter on February 18, 2005. On June 22, 2005, Nimea took Smith's testimony at deposition ("Smith Deposition"). Through the spring of 2007, Smith and Nimea both filed Motions for Summary Judgment. On November 17, 2008, this court issued an order disposing of these and other motions. Specifically, this court granted Nimea's summary judgment motion with regard to Smith's claims for unpaid wages, overtime, wrongful termination and criminal penalties for nonpayment of wages, citing Smith's failure to exhaust his administrative remedies with regard to those claims; the court denied summary judgment on all other claims.

On November 24, 2008, Smith asked this court to reconsider, arguing that because this court had jurisdiction, the Pohnpei Supreme Court could not obtain jurisdiction, and that therefore Smith had no legal obligation to appeal Perman's decision to the Pohnpei Supreme Court. On December 22, 2008, this court denied the motion to reconsider.

On April 29, 2010, more than sixteen (16) months later, Smith attempted to revive the claims the court had dismissed, by filing a second motion to reconsider. On May 11, 2010, this court denied the second motion to reconsider. On September 9, 2010, Smith filed a third motion to reconsider, arguing that the court had applied an outdated version of the relevant law in its denial of the second motion to reconsider. On September 17, 2010, Nimea filed a motion in limine, seeking to exclude evidence in the Smith Deposition. On November 19, 2010, this court denied the third motion to reconsider. On December 15, 2010, this court ruled on Nimea's motion in limine, and excluded portions of the Smith Deposition based on its own review of the transcript.

On November 26, 2010, Smith notified the court that he had requested an administrative rehearing with Immigration, pursuant to 51 F.S.M.C. 162, as amended. On January 10, 2011, Smith requested this court to review Esiel's February 22, 2005 denial of administrative relief. On January 26, 2011, Smith requested this court to reconsider its exclusion of portions of the Smith Deposition as well as its grant of summary judgment in Nimea's favor on November 17, 2008.

II. Arguments

In the January 10, 2011 motion, Smith argues that he has exhausted all administrative review requirements provided under the FSM Labor and Immigration Act, 51 F.S.M.C. 153 *et seq.*, and requests judicial review of the wage provisions in his employment contract.

In the January 26, 2011 motion, Smith argues that because he has exhausted all administrative review requirements, he is entitled to trial on his wage and overtime claims. Smith further argues that this court committed error in its November 17, 2008 order, because: (1) all along, Smith had requested review of the FSM Employer's Non-Resident Worker Agreement ("NRWA"), not the State agreement; (2) Immigration has plenary power to regulate matters of immigration under FSM Const. art. IX, § 2(c); (3) Smith was admitted to work in the FSM pursuant to the NRWA, which means that (a) the NRWA involves only questions of national law and not state law and (b) Pohnpei State's Non-Resident Employer's Agreement is an unconstitutional interference in the national government's power to regulate matters of immigration; (4) the NRWA is a contract between the National Government and the employer; and (5) states have no power to interpret contracts involving the National Government.

III. Analysis

A. *Characterization of Motions*

This court previously explained how to characterize motions to reconsider. *See* Smith v. Nimea, 17 FSM Intrm. 125, 128-29 (Pon. 2010). In the January 10, 2011 motion, Smith asks this court to review the Esiel letter, which denied further determination of Smith's claims for wrongful termination and unpaid wages. These were among the claims which this court dismissed in granting partial summary judgment in favor of Nimea on November 17, 2008 [Smith v. Nimea, 16 FSM Intrm. 186 (Pon. 2008)], and which Smith has asked the court to reconsider three times now. Therefore, the January 10, 2011 motion is properly characterized as a Fourth Motion to Reconsider.

In the January 26, 2011 motion, Smith asks this court to reconsider the exclusion order of December 15, 2010 as well as the dismissal of the claim for unpaid wages on November 17, 2008.

This is properly characterized as a Fifth Motion to Reconsider, and with regard to the exclusion order, as a Motion to Reconsider Exclusion Order.

B. *Fourth Motion to Reconsider*

In the Fourth Motion to Reconsider, Smith seeks judicial review of the Esiel letter under 51 F.S.M.C. 165. Smith alleges that he demanded a hearing with Immigration on November 26, 2010, and argues that, because Immigration has not responded within 30 days of the demand, and because under 17 F.S.M.C. 109(4) the hearing should have been held within 30 calendar days after the submission of the demand, the court may deem that Immigration has denied the petition. Smith also cites 51 F.S.M.C. 165 for his right to appeal an adverse agency decision to this court. The court infers from these arguments that Smith means that Immigration constructively denied his demand for a hearing on December 26, 2010, or 30 calendar days after he submitted the demand.

If the court is to take Smith at his word that November 26, 2010 is the date of the demand for hearing, that 17 F.S.M.C. 109(4) obliges the court to view December 26, 2010 as the effective date of rejection, and that 51 F.S.M.C. 165 is now applicable, the court must deny Smith's administrative appeal of the rejection. Smith filed this Fourth Motion to Reconsider on January 10, 2011–15 days after December 26, 2010. Under 51 F.S.M.C. 165(1), Smith had to make the appeal "within 10 days following the date of the [effective] order."

However, the analysis is even simpler than that. Despite Smith's evident self-confusion, his November 26, 2010 request for hearing was not the relevant agency appeal within the meaning of either 17 F.S.M.C. 108-109 or 51 F.S.M.C. 162, 164. The relevant agency appeal was Smith's February 7, 2005 letter to Esiel requesting review of the Joab decision. Thus, the relevant final agency decision which is the proper focus of Smith's administrative appeal would have been the Esiel letter.

The Esiel letter is dated February 22, 2005. Smith filed this civil action on February 18, 2005, *four days before* the final agency decision. An appeal cannot begin before the judgment which is being appealed. A party cannot file a civil action in anticipation of an adverse final agency decision and expect, without more, that that civil action works as an administrative appeal of the later-issued final agency decision. In order for a party to include an administrative appeal in a preexisting civil action, he must amend or request leave of court to amend his pleadings. Smith's argument that the preexisting civil action "constitutes an 'appeal' from the denial for relief" fails the simple test of logic.

C. *Fifth Motion to Reconsider*

In the Fifth Motion to Reconsider, Smith argues that the court committed error in the November 17, 2008 order, for the reasons given above. The thrust of Smith's arguments seems to be that the court should never have cast the employment claims as questions of state law, because Smith was a non-resident, because all issues involving non-residents involve immigration, and because immigration is an area of exclusive national power, and that at a minimum, states have no power to regulate employment of non-resident workers. All of these arguments appear to be an attempt to undo this court's rulings over the past two (2) years because Smith is unhappy with the rulings made based on Pohnpei state employment law.

The court does not accept the argument that the Constitution's investment in the National Government of the power to regulate immigration, emigration, naturalization and citizenship, FSM Const. art. IX, § 2(c), deprives the states of the ability to regulate employment within their own jurisdictions whenever such employment involves non-residents. To the degree that a state law regulating employment of non-resident workers does not directly conflict with national law, such state

law is not preempted; and where there is possible conflict, the state law should be construed to avoid such conflict. The proper authority for interpreting state law is the highest court of that entity. Thus, under both Pohnpei's Administrative Procedures Act and our own constitutional law, Smith should have pursued his claims in the Pohnpei Supreme Court.

This court concludes that under both state and national law, Smith's claims for wrongful termination and unpaid wages are not property before this court. Under state law, as this court ruled in the Order Denying Third Motion to Reconsider, either Smith is statutorily barred from asserting his claims for unpaid wages, overtime and wrongful termination due to his failure to appeal Perman's decision, or if Perman was not the proper "Chief" of PL&MD, Smith is barred by the statute of limitations from further pursuing his claims for his failure to request administrative relief within six (6) years of the termination of his employment. 58 Pon. C. § 3-101 *et seq.* Under national law, Smith has failed to make a proper and timely appeal of the Esiel letter, which would have been to file a new civil action or request leave to amend the complaint in this civil action by March 4, 2005.

D. *Motion to Reconsider Exclusion Order*

Smith's Motion to Reconsider Exclusion Order depended on a successful Fifth Motion to Reconsider. Because this court denies the Fifth Motion to Reconsider, the Motion to Reconsider Exclusion Order must also fail.

IV. Conclusion

Smith has now made five motions to reconsider, all of which this court has denied. Including the original order of November 17, 2008 resolving the competing motions for summary judgment, this court has now ruled six (6) times that Smith's claims for unpaid wages, overtime and wrongful termination are not properly before this court. Through the course of over two (2) years, Smith has tried attacking the jurisdiction of all and sundry before whom these claims have appeared. Nevertheless, as the court noted in Part III section C above, ultimately, it is Smith, or his counsel, who has been remiss in pursuing his rights. His course of action has evinced an unwarranted eagerness to premature litigation and an impatience with administrative procedure, not to mention a refusal to accept the rulings of this court. He is well within his rights, if he continues to feel that this court has committed error, to appeal this decision to the appellate division; this court will entertain no further motions to reconsider the dismissal of the wrongful termination, unpaid wages and overtime claims.

The court HEREBY DENIES the Fourth Motion to Reconsider, the Fifth Motion to Reconsider, and the Motion to Reconsider Exclusion Order.

* * * *