

compel production of documents is granted. The defendants shall produce them within 30 days. The court anticipates trial sometime early in 2014.

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FSM SUPREME COURT TRIAL DIVISION

PEOPLE OF THE MUNICIPALITY OF EAURIPIK,)	CIVIL ACTION NO. 2011-3002
YAP, by and through SANTUS SARONGELFEG,)	
JOHN HAGLELGAM, and MOSES MOGLIG,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
F/V TERAKA NO. 168, its engines, masts,)	
bowsprits, boats, anchors, chains, cables, rigging,)	
apparel, furniture, and all necessaries thereunto)	
pertaining,)	
)	
In Rem Defendant,)	
)	
CHEN-JIN TYAN, CHEN-CHAO TING, CHEN CHAO)	
YOU, YUH YOW FISHERY COMPANY, LTD.,)	
MARIN MARAWA, LTD., MASANAGA SHIMAZU,)	
MALAYAN TOWAGE AND SALVAGE)	
CORPORATION, HSIN HORNG FISHERY)	
COMPANY, LTD., EDGAR R. PELEAZ, and CHEN)	
JIA YEN,)	
)	
In Personam Defendants.)	
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FEDERATED STATES OF MICRONESIA,)	
)	
Plaintiff in Intervention,)	
)	
vs.)	
)	
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.)	
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ORDER REJECTING SUPPOSED SETTLEMENT AGREEMENT

Martin G. Yinug
Chief Justice

Decided: November 7, 2013

APPEARANCES:

For the Plaintiffs: Daniel J. Berman, Esq.
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Hagatna, Guam 96910

For the Defendants: Helkei Hemminger, Esq. (pro hac vice)
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HEADNOTES

Civil Procedure – Class Actions – Settlement

Generally, a non-settling defendant lacks standing to object to approval of a settlement because the non-settling defendant is not affected by that settlement. Standing exists only where the non-settling defendant can show that it will sustain some formal legal prejudice as a result of the settlement. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 (Yap 2013).

Civil Procedure – Class Actions

While the court must first look to FSM sources of law rather than start with a review of other courts' cases, when the court has not previously construed certain aspects of FSM Civil Procedure Rule 23 which is similar to U.S. Federal Rule of Civil Procedure 23, it may look to U.S. sources for guidance in interpreting the rule. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 n.1 (Yap 2013).

Civil Procedure – Class Actions – Settlement

The defendants do suffer some formal legal prejudice as a result of a proposed settlement between the class plaintiffs and an intervenor when the class plaintiffs, if the settlement is approved, will bring legal claims against the defendants that the class plaintiffs had not previously been able to assert against them and will seek forms of relief that the class plaintiffs have not been able to assert against the defendants while certain defendants will still face claims brought by the intervenor. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 (Yap 2013).

Civil Procedure – Class Actions – Settlement

When the class plaintiffs ask the court to approve a settlement between them and the plaintiff-intervention; when the class plaintiffs have not pled any claims against the intervenor; when the class plaintiffs have not alleged any causes of action against the intervenor; when the class plaintiffs have not pled a cross-claim against the intervenor; when the class plaintiffs have not prayed for any relief against the intervenor; and when the intervenor is neither a defendant nor a cross-defendant, the court is unable to give a proposed settlement agreement preliminary approval and set a fairness hearing date

because the class plaintiffs ask the court to give preliminary approval to a "settlement" between plaintiffs. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 (Yap 2013).

Civil Procedure – Class Actions – Settlement

Fairness hearings are required when a claim by a plaintiff class is compromised against one or more defendants so that the court must review the compromise for fairness, adequacy, and reasonableness. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 (Yap 2013).

Civil Procedure – Class Actions – Settlement; Constitutional Law – Case or Dispute

A motion for preliminary approval of a settlement must be denied when the class plaintiffs seek approval of a compromise of a hypothetical cause of action that they have not pled against a party that is neither a defendant nor a cross-defendant. Because there is no case or dispute for the settlement agreement to settle, the settlement agreement cannot be approved since there is no real settlement to approve or reject and since the court cannot make hypothetical rulings. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 (Yap 2013).

Civil Procedure – Class Actions – Settlement

The law generally favors and encourages the settlement of class action lawsuits. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231 (Yap 2013).

Civil Procedure – Class Actions – Settlement

When there is no class action lawsuit against the plaintiff in intervention to be compromised or settled, no preliminary approval can be given and no fairness hearing can be held since the class plaintiffs' proposed settlement with the intervenor is not a dismissal or compromise within the meaning of Civil Rule 23(e). People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 231-32 (Yap 2013).

Civil Procedure – Class Actions – Settlement

Even if there were actual class action claims against the FSM by a certified plaintiff class, the court still could not approve a compromise and settlement when the FSM's statutory claims are not claims that are held in common with the claims of the class plaintiffs and the agreement contains unlawful provisions. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 232 (Yap 2013).

Public Officers and Employees; Statutes

While rights are often freely assignable, duties are not freely delegated. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 232 (Yap 2013).

Admiralty – Salvage; Public Officers and Employees

The statutorily created Receiver of Wreck has certain powers and duties and the Receiver of Wreck may delegate all or any authority and responsibility as Receiver to the relevant state authority but class plaintiffs are not a relevant state authority. People of Eauripik *ex rel.* Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 232 (Yap 2013).

Civil Procedure – Class Actions – Adequacy; Civil Procedure – Class Actions – Commonality; Public Officers and Employees

If chiefs were considered state officers and thus a state authority and were permitted to espouse the Receiver of Wreck's claims, then they would have claims that they do not share with the other class members and since a person whose claims are not common to the class would have to be removed as

class representatives of, and membership in, the certified class and some other person(s), who could adequately protect the class interests, would have to be named as class representative(s), the chiefs would then not be permitted to participate in, or receive, or share any of the damages awarded to the certified class. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 232 (Yap 2013).

Admiralty – Salvage; Civil Procedure – Class Actions – Settlement

No statute authorizes the Secretary of Transportation and Communications to delegate his statutory duties as Receiver of Wreck to private persons, let alone named and unnamed persons in a plaintiff class. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 232 (Yap 2013).

Admiralty – Salvage; Civil Procedure – Class Actions – Settlement; Public Officers and Employees

Since a statutory receiver or public officer cannot, even with a court's approval, delegate his powers or duties, or surrender assets which the law compels him to administer and since the Receiver of Wreck is both a statutory receiver and a public officer (the Secretary of Transportation and Communications), the delegation of the Receiver's duties to private persons (the class plaintiffs) would be unlawful because the statute only permits delegation to "relevant state authority" and cannot be approved as a class action settlement agreement. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 232-33 (Yap 2013).

Civil Procedure – Class Actions – Settlement

The court cannot approve any class action settlement agreement that includes an obviously illegal provision. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 233 (Yap 2013).

Civil Procedure – Class Actions – Settlement

A court cannot approve only the part of a proposed class action settlement agreement that is not illegal because the court cannot modify the proposed settlement's terms; rather, the court must approve or disapprove of the proposed settlement as a whole. People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 227, 233 (Yap 2013).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

On July 19, 2013, the class plaintiffs, the People of the Municipality of Eauripik ("Eauripik") and the plaintiff in intervention, the Federated States of Micronesia, filed a notice of settlement. This now comes before the court on: 1) Plaintiffs' Motion for Approval of Proposed Settlement Agreement with supporting memorandum and exhibits, filed August 22, 2013; 2) Defendants' Opposition to Plaintiffs' Motion for Approval of Proposed Settlement Agreement and Fairness Hearing Date, filed September 2, 2013; and 3) Joint Plaintiffs and FSM National Government's Reply to Opposition to Plaintiffs' Motion for Approval of Proposed Settlement Agreement and Fairness Hearing Date, filed September 9, 2013. The motion is denied. The reasons follow.

I. THE MOTION AND STANDING TO OBJECT

Eauripik asserts that the FSM and Eauripik have settled a dispute between them and ask that the court conduct a fairness hearing to determine whether the settlement is fair, adequate, and reasonable.

Under the settlement agreement's terms, Eauripik's counsel will represent the FSM in its interests in this litigation. The FSM will assign its rights and delegate its duties to Eauripik and Eauripik's counsel. Eauripik will then pursue the FSM's claims against defendant Marin Marawa, Ltd. and assert whatever rights the FSM may have had.

The defendants object to the proposed settlement. They contend that it violates FSM law; that the FSM has no rights or duties to assign because it cannot avoid its statutorily-assigned duties; and that the settlement agreement is illusory. Eauripik contends that the defendants, who are not parties to the settlement agreement, have no standing to object and that their contentions should be ignored.

"Generally, a non-settling defendant lacks standing to object to approval of a settlement because the non-settling defendant is not affected by that settlement. Standing exists only where the non-settling defendant can show that it will 'sustain some formal legal prejudice as a result of the settlement.'" In re Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99, 103 (S.D.N.Y. 1997) (citing Zupnick v. Fogel, 989 F.2d 93, 98 (2d Cir. 1993)).¹ It is difficult to see how the defendants do not suffer some formal legal prejudice as a result of this settlement. Eauripik, the class plaintiffs, if the settlement is approved, will bring legal claims against the defendants that Eauripik has not previously been able to assert against them and Eauripik will seek forms of relief that Eauripik has not been able to assert against the defendants while Marin Marawa, Ltd. and Yuh Yow Fishery Company, Ltd. will still face claims by the FSM, the plaintiff in intervention.

II. LACK OF CASE OR DISPUTE TO SETTLE

But even if the defendants have no standing to object to this settlement, the court would still be unable to give the settlement agreement preliminary approval and set a fairness hearing date. Eauripik asks that the court approve a settlement between them, as class plaintiffs, and the plaintiff-in-intervention, the FSM. Eauripik has not pled any claims against the FSM. Eauripik has not alleged any causes of action against the FSM. Eauripik has not pled a cross-claim against the FSM. And Eauripik has not prayed for any relief against the FSM. The FSM is neither a defendant nor a cross-defendant. Eauripik thus asks the court to give preliminary approval to a "settlement" between plaintiffs.

Fairness hearings are required when a claim by a plaintiff class is compromised against one or more defendants, *see* FSM Civ. R. 23(e), so that the court must review the compromise for fairness, adequacy, and reasonableness. *See* People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 202 (Yap 2010). The class plaintiffs here are seeking approval of a compromise of a hypothetical cause of action that they have not pled against a party that is neither a defendant nor a cross-defendant. The court cannot make hypothetical rulings. When there is no case or dispute for the settlement agreement to settle, the settlement agreement cannot be approved because there is no real settlement to approve or reject. *See* Wainwright v. Kraftco Corp., 53 F.R.D. 78, 84 (N.D. Ga. 1971). For that reason alone the motion must be denied.

While the law generally favors and encourages the settlement of class action lawsuits, *see, e.g.,* Reed v. Rhodes, 869 F. Supp. 1274, 1279 (N.D. Ohio 1994), there is no class action lawsuit against the FSM to be compromised or settled. No preliminary approval can be given and no fairness hearing

¹ While the court must first look to FSM sources of law rather than start with a review of other courts' cases, when the court has not previously construed certain aspects of FSM Civil Procedure Rule 23 which is similar to U.S. Federal Rule of Civil Procedure 23, it may look to U.S. sources for guidance in interpreting the rule. *People of Weloy ex rel. Pong v. M/V CEC Ace*, 15 FSM Intrm. 151, 158 n.1 (Yap 2007); *People of Rull ex rel. Ruepong v. M/V Kyowa Violet*, 12 FSM Intrm. 192, 196 n.2 (Yap 2003).

can be held since Eauripik's proposed settlement with the FSM is not a dismissal or compromise within the meaning of Civil Rule 23(e).

III. SETTLEMENT AGREEMENT CANNOT BE APPROVED

But even if there were actual class action claims against the FSM by a certified plaintiff class, the court still could not approve this compromise and settlement. The FSM's statutory claims are not claims that are held in common with the claims of the class plaintiffs and the agreement contains unlawful provisions.

While rights are often freely assignable, duties are not freely delegated. By statute, the Receiver of Wreck is the FSM Secretary of the Department of Transportation and Communication. 19 F.S.M.C. 902(1); 19 F.S.M.C. 106(33); People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 307, 312 (Yap 2012). The statute grants certain powers to and imposes certain duties on the Receiver of Wreck. The FSM's claims are based on the Receiver's statutory duties and rights. The statute also provides that the Receiver of Wreck "may delegate all or any authority and responsibility as Receiver . . . to the relevant state authority." 19 F.S.M.C. 902(2). The People of Eauripik are not a "relevant state authority."

If, instead of the class as a whole, the chiefs were, as Eauripik suggests, considered state officers and thus a state authority² and were permitted to espouse such claims,³ then they would have claims that they do not share with the other class members. A person whose claims are not common to the class would then have to be removed as class representative of, and membership in, the certified class and some other person(s), who could adequately protect the class interests, would then have to be named as class representative(s) and the chiefs would then not be permitted to participate in, or receive, or share any of the damages awarded to the certified class. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 419 (Yap 2006) (when the chiefs have a claim that is not in common with the other class members or a claim within the class claims as the class was certified but is a very different claim, the chiefs if this claim were permitted, would have to pursue it outside the certified class, either as a separate class or individually), *aff'd sub. nom.*, M/V Kyowa Violet v. People of Rull ex rel. Mafel, 16 FSM Intrm. 49, 61-62 (App. 2008); *see also* People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 262, 268 (Yap 2012); People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

Nor has Eauripik shown any authority to support the position that a public official's statutory duty can be delegated to a plaintiff class in a class action and exercised by class counsel. No statute authorizes the Secretary of Transportation and Communications to delegate his duties as Receiver of Wreck to private persons, let alone named and unnamed persons in a class. "[A] statutory receiver or public officer cannot, even with the approval of a court, delegate his powers or duties, or surrender assets which the law compels him to administer." Hentschel v. Fidelity Deposit Co. of Md., 87 F.2d 833, 838 (E.D. Mo. 1937). Here the Receiver of Wreck is both a statutory receiver and a public officer (the Secretary of Transportation and Communications). The court therefore concludes that the

² Even then they still would not be a "relevant" state authority.

³ The court at this time expresses no opinion on whether class counsel could also represent the FSM or other party espousing the FSM's claims when the plaintiff class has indicated that its interests currently conflict with the FSM's. For future reference, counsel may wish to review Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 679 (N.D. Ohio 1995); Kuper v. Quantum Chem. Corp., 145 F.R.D. 80, 83 (S.D. Ohio 1992); and Sullivan v. Chase Inv. Servs. of Boston, Inc., 79 F.R.D. 246, 258 (N.D. Calif. 1978).

delegation of the Receiver’s duties to private persons – the class plaintiffs – would be unlawful since the statute only permits delegation to "relevant state authority." 19 F.S.M.C. 902(2).

The court cannot approve any class action settlement agreement that includes an obviously illegal provision. *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 319 (D. Md. 1979). And the court cannot approve only the part of the agreement that is not illegal. "[T]he court cannot modify the terms of the proposed settlement; rather, the court must approve or disapprove of the proposed settlement as a whole." *Neff v. VIA Metro Transit Auth.*, 179 F.R.D. 185, 208 (W.D. Tex. 1998); *see also Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989). Thus, even if this were a settlement agreement between a plaintiff class and an adverse defendant, which it is not, the court still could not approve it.

IV. EFFECT ON OTHER MOTIONS

This order denying Eauripik’s request for preliminary approval and for a fairness hearing for its "settlement" with the FSM also implicitly denies any pending Eauripik motion premised on Eauripik’s supposition that it has succeeded to all of the FSM’s rights, claims, and statutory duties in this matter. The parties shall therefore file and serve, no later than November 15, 2013, a list of which motions or parts of motions are still viable and pending and need to be decided. Any party may file and serve a response by November 25, 2013.

V. CONCLUSION

The motion seeking preliminary approval of the supposed settlement between the class plaintiffs, the People of the Municipality of Eauripik, and the plaintiff in intervention, the Federated States of Micronesia, is denied.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2007-008
)	
Plaintiff,)	
)	
vs.)	
)	
MARIANNE B. SETIK, THE ESTATE OF MANNEY)	
SETIK, ATANASIO SETIK, VICKY SETIK IRONS,)	
IRENE SETIK WALTER, MARLEEN SETIK,)	
JUNIOR SETIK, ELEANOR SETIK SOS, PATRICIA)	
SETIK, JOANITA SETIK PANGELINAN,)	
individually and d/b/a C-STAR APARTELLE,)	
)	
Defendants.)	
_____)	

ORDER DENYING MOTION TO DISMISS

Martin G. Yinug
Chief Justice