and was not made in bad faith. When there is no apparent bad faith, mere delay is not enough of itself to bar an amendment. *Id.* at 261. Accordingly, leave is hereby granted for PT&S to amend its first amended complaint, and PT&S's motion to amend the complaint is granted.

III. CONCLUSION

The defendant's Motion to Recuse is DENIED. The plaintiff's Motion for Leave to File Second Amended Complaint is GRANTED. The amendment relates back to the original pleading and shall conform to the evidence as presented during Trial. The court's Findings of Fact and Conclusions of Law will follow this Order.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

PEDRUS I. EHSA and TIMAKYO I. EHSA a/k/a TIMAKIO I. EHSA, Appellants, vs. FSM DEVELOPMENT BANK, Appellee.	)	APPEAL CASE NO. P3-2013 Civil Action No. 2007-035

OPINION

Argued: October 8, 2014†
Decided: July 1, 2016

BEFORE:

Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Aliksa B. Aliksa, Specially Assigned Justice, FSM Supreme Court**
Hon. Camillo Noket, Specially Assigned Justice, FSM Supreme Court***

*Chief Justice, State Court of Yap, Colonia, Yap
**Chief Justice, Kosrae State Court, Tofol, Kosrae
*** Chief Justice, Chuuk State Supreme Court, Weno Chuuk

† An Order was issued by the Appellate Panel on July 31, 2015, requesting further briefing

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* * * *

HEADNOTES

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Judgments – Relief from Judgment

The decision to grant or deny a motion for relief from a final judgment is committed to the trial court's sound discretion. Accordingly, the lower court's decision about relief from judgment should be reviewed only upon a showing that the trial judge's ruling manifested an abuse of discretion. Such abuses must be unusual and exceptional; an appellate court will not merely substitute its judgment for that of the trial court. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

An abuse of discretion occurs when 1) the court's decision is clearly unreasonable, arbitrary, or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence on which the court rationally could have based its decision. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

An appellate court will find an abuse of discretion only when there is a definite and firm conviction, upon weighing all the relevant factors, that the court below committed a clear error of judgment in the conclusion it reached. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo

Issues of law are reviewed de novo. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Civil Procedure – Defaults and Default Judgment; Civil Procedure – Res Judicata

The *res judicata* doctrine stands for the proposition that a judgment entered in a case conclusively settles that cause of action, as to all matters that were brought or could have been litigated and adjudged therein. A default judgment constitutes a final judgment with *res judicata* and claim preclusion effect. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Judgments – Relief from Judgment

It is just as important that there should be a place to end litigation, as there should be a place to begin. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Jurisdiction – Subject-Matter

Subject-matter jurisdiction entails a court's power to entertain and adjudicate a given type of case. The fundamental requirement for subject matter jurisdiction is a power derived from the FSM Constitution that specifies the class of cases the FSM Supreme Court is granted authority to hear. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 506 (App. 2016).

Judgments – Void; Jurisdiction – Subject-Matter

A judgment rendered without the requisite subject-matter jurisdiction is void *ab initio*. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Judgments – Void

A void judgment is a legal nullity. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507, 509 (App. 2016).

Judgments – Relief from Judgment; Judgments – Void

Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised after the judgment becomes final. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Judgments – Relief from Judgment – Time Limits; Judgments – Void

The reason for there being no time limit on relief from a void judgment is obvious. If a judgment is void when issued, it is always void. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Civil Procedure – Res Judicata; Jurisdiction – Subject-Matter

Like *res judicata*, the concept of jurisdiction over the subject matter is based upon public policy: one dictates the finality of judgments and the other requires litigation to be addressed in the proper forum. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Judgments – Relief from Judgment

The provisions of Rule 60(b) must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the incessant command of the court's conscience, that justice be done in light of all the facts. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Choice of Law; Common Law

When presented with an issue of first impression and the absence of FSM case law on point, the court will examine relevant U.S. decisions for guidance and may look to authorities from other jurisdictions in the common law tradition. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Judgments – Finality of

One of the basic tenets of our system of jurisprudence is that of finality of judgments. The principle of finality is essential to ensure consistency and certainty in the law. This salutary principle is founded upon the generally recognized public policy that there must be some end to litigation. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Judgments – Void

In the interests of finality, the concept of void judgments is narrowly construed. A judgment is not void merely because it may be erroneous or because the precedent upon which it was based is later altered or even overruled. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507-08 (App. 2016).

Judgments – Relief from Judgment; Judgments – Void

A judgment is void and therefore subject to relief under Rule 60(b)(4), only if the court that rendered judgment lacked jurisdiction or in circumstances in which the court's action amounted to a plain usurpation of power constituting a violation of due process. The total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction and only rare instances of a clear usurpation of power will render a judgment void. In other words, a court has the power to determine its own jurisdiction and an error in that determination will not render the judgment void. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 508 (App. 2016).

Judgments – Relief from Judgment

A party seeking relief from a final judgment must do so pursuant to Rule 60(b). Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 508 (App. 2016).

Judgments – Relief from Judgment – Time Limits

Under Rule 60(b)(1), (2), or (3), a movant must file the motion within one year from the entry of final judgment. Otherwise, no specific time period is set forth, except that under Rule 60(b)(4), (5), or (6), the motion must be made within a "reasonable time." What constitutes a reasonable time, depends on the facts of each case. The relevant considerations include, whether the parties have been prejudiced by the delay and good reason presented for failing to take action sooner. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 508 (App. 2016).

Judgments – Relief from Judgment – Time Limits; Judgments – Void

Even when the motion for relief from judgment was not filed within the prescribed reasonable time, the court's analysis will not conclude, because if the judgment was void, relief may nevertheless be granted under Rule 60(b)(4). Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 509 (App. 2016).

Jurisdiction – Subject-Matter

While courts do not have the power to extend their subject matter jurisdiction, as a practical matter, they must have the power to interpret and determine whether they have subject matter jurisdiction. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 509 (App. 2016).

Judgments – Relief from Judgment – Time Limits; Judgments – Void

Unlike its counterparts, Rule 60(b)(4), which provides relief from void judgments, is not subject to any time limitation. If a judgment is void, it is a nullity from the outset and any Rule 60(b)(4) motion for relief is therefore filed within a reasonable time. However, the concept of void judgments is narrowly construed. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 509 (App. 2016).

Jurisdiction – Personal; Jurisdiction – Subject-Matter

Unlike personal jurisdiction, which a court can obtain upon the parties' consent or failure to object, the lack of subject-matter jurisdiction is never capable of being waived. In essence, the court either possesses it or it does not; it cannot assert it. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 509 (App. 2016).

Judgments – Void; Jurisdiction – Subject-Matter

Since the requirement of subject matter jurisdiction is never capable of being waived, judgments rendered without such allocation of authority are void *ab initio* and can be attacked at any time. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 509 (App. 2016).

Judgments – Final Judgment; Judgments – Relief from Judgment – Time Limits; Judgments – Void

When the movants have failed to cite any reasons for the elongated delay in filing their motion for relief from judgment, much less extraordinary circumstances that would warrant having their Rule 60(b)(4) motion supersede the doctrine of *res judicata*, prejudice would invariably inure to the judgment creditor, in light of its justified reliance on the relevant December 28, 2007 default judgment's finality. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 509-10 (App. 2016).

Equity – Estoppel

Estoppel constitutes a doctrine which may be only be invoked by parties who themselves have acted properly concerning the subject matter of the litigation, and is a doctrine by which a person may be precluded by his act or conduct or silence, when it is his duty to speak. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 510 (App. 2016).

Equity – Estoppel

When, during a span of four plus years, the judgment debtors never even hinted that subject-matter jurisdiction was an unsettling issue and acquiesced to the trial court's rulings and implied a recognition of the judgment, the venerable legal concept of equitable estoppel applies since the judgment creditor relied on that conduct or more appropriately, lack thereof. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511 (App. 2016).

Appellate Review – Standard – Civil Cases

When neither the doctrine of *res judicata* nor equitable estoppel was addressed by trial court, an appellate court should be reluctant to substitute its judgment for that of the trial judge. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511 (App. 2016).

Constitutional Law – Case or Dispute – Standing

Although the standing requirement is not expressly delineated within the FSM Constitution, it is implied as an antecedent to the "case or dispute" requirement found in Article XI, § 6 and should be interpreted, so as to implement that requirement's objectives. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo; Constitutional Law – Case or Dispute – Standing

Whether a party has standing is a question of law reviewed *de novo* on appeal. Since standing cannot be waived, an appellate court is obliged to conduct an independent inquiry, with respect to the parties' standing to challenge national laws, even though the parties have not raised, and the trial court not ruled on, the standing issue. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511 (App. 2016).

Constitutional Law – Case or Dispute – Standing

Two factors are central to the determination of whether a party has standing. Initially, a party must allege a sufficient stake in the controversy's outcome and must have suffered some threatened or actual injury resulting from the allegedly illegal action or erroneous court ruling. Next, the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable decision. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511 (App. 2016).

Constitutional Law – Case or Dispute – Standing

While not constitutionally based, three additional rules need to be applied before the question of standing can be resolved. First, generalized grievances shared by substantially the whole population do not normally warrant standing. Second, even when an injury sufficient to satisfy the constitutional requirement is alleged, the party must generally assert its own legal rights and interests and cannot rest its claim to relief on the legal rights and interests of third parties. Third, the interests which the party is seeking to protect, must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511-12 (App. 2016).

Constitutional Law – Case or Dispute – Standing

Generalized grievances shared by the public at large, do not confer standing on specific individuals. An interest in having the government conform to the limitations imposed by the Constitution, without more, is clearly a shared interest and therefore, the government's alleged failure represents a generalized grievance. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 512-13 (App. 2016).

Appellate Review – Standard – Civil Cases

By failing to contest the trial court's legal conclusions, the appellants have essentially capitulated. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 513 (App. 2016).

Appellate Review; Constitutional Law – Case or Dispute

An appellate court does not sit to render decisions on abstract legal propositions or issue advisory opinions. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 513 (App. 2016).

Constitutional Law – Interpretation

Article XII, Section 3(b)'s specific language merely signifies those entities which come within the penumbra of duties/responsibilities incumbent upon the Office of the Public Auditor. By the use of the phrase "every branch . . . of the national government," it is readily apparent the framers were listing a series of entities that would come within the ambit of the Office of the Public Auditor's duties and responsibilities. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 514 (App. 2016).

Civil Procedure; Judgments

Stare decisis is the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points of law arise again in litigation. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 514-15 (App. 2016).

Banks and Banking; Jurisdiction – Exclusive FSM Supreme Court

Since the FSM Development Bank was formed by the national government to undertake a public purpose and is subject to its creator's control, the reconfigured FSM Development Bank constitutes a national government instrumentality within Article XI, § 6(a), and is accorded the status equivalent to that of the national government. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 515 (App. 2016).

Jurisdiction – Subject-Matter

A party may not waive subject-matter jurisdiction. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 516 (App. 2016).

Business Organizations – Corporations; Jurisdiction – Diversity

A corporation's citizenship, for diversity purposes, is the citizenship of its shareholders and only minimal diversity need exist. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 516 (App. 2016).

Jurisdiction – Subject-Matter

Existence of jurisdiction can only be exclusive or non-exclusive/concurrent. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 516 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo

When the case on appeal is subject to *de novo* review, the reviewing court is empowered to affirm a lower court's decision on grounds other than those utilized by the latter. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 516 (App. 2016).

Jurisdiction – Arising Under

Article XI, Section 6(b) grants the national courts concurrent original jurisdiction in cases arising under national law and these forums include the FSM Supreme Court trial division and any other national courts which might be established by statute, but not state courts. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 516 (App. 2016).

Jurisdiction – Arising Under

"Arising under" jurisdiction was limited to those matters, in which four factors exist: 1) a national law issue is an essential element of the cause of action; 2) the issue of national law is disclosed upon the complaint's face; 3) the issue of law is not inferred from a defense which is asserted and 4) the issue of law is a substantial one. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 517 (App. 2016).

Constitutional Law – Interpretation; Jurisdiction

Jurisdictional grants of power to the national courts in Article XI, § 6 appear to be self-executing, calling for no action by Congress. Since most U.S. Constitution jurisdictional provisions are not self-executing, determinations of U.S. courts' jurisdiction are typically based on statutory construction rather than constitutional interpretation, as in the FSM. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 517 n.5 (App. 2016).

Jurisdiction – Arising Under

The framers' intent was that "arising under" jurisdiction extend to cases involving the enforcement of a right protected or created by the national constitution, national law, or treaty and cases involving the construction or interpretation of the national constitution, national law, or treaty. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 517 (App. 2016).

Constitutional Law – Interpretation; Jurisdiction – Exclusive FSM Supreme Court

The FSM Supreme Court's exclusive jurisdiction over cases in which the national government is a party is not paralleled in the United States, and such differences presumably reflect a conscious effort by the framers to select a road other than that paved by the United States Constitution. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 517 (App. 2016).

Constitutional Law – Interpretation; Jurisdiction – Arising Under

In light of the self-executing grants of jurisdiction embodied within the FSM Constitution, the United States decisions, which address the underlying congressional intent, provide little guidance, in terms of analysis of the Article XI, Section 6(b) "arising under" language, against the backdrop of a constitutional provision. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 517 (App. 2016).

Jurisdiction – Arising Under

Arising under jurisdiction enables the FSM Supreme Court to explicate the meaning of our Constitution's jurisdictional grants and thereby ensure an appropriate level of uniformity in the applicability thereof. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 518 (App. 2016).

Jurisdiction – Exclusive FSM Supreme Court

The FSM Development Bank is a national government instrumentality under Section 6(a) of Article XI. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 518 (App. 2016).

Jurisdiction – Subject-Matter

Exclusive and concurrent jurisdiction cannot be simultaneously present. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 518 (App. 2016).

Jurisdiction – Arising Under; Jurisdiction – Diversity

Concurrent jurisdiction properly exists given the diverse citizenship of the parties or when consonant with the "arising under" constitutional provision. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 518 (App. 2016).

* * * *

COURT'S OPINION

PER CURIAM:

This appeal stems from an Order issued by the Trial Court on March 19, 2013, that denied a Motion to Vacate a Default Judgment brought by Defendants/Appellants (hereinafter referred to as the

"Ehsas"). The Appellee (henceforth referenced as "FSMDB" or the "bank") had been granted the subject Default Judgment on December 28, 2007.

Oral Argument was held in Pohnpei on October 8, 2014, however we harbored some concern over whether the December 28, 2007 Default Judgment in this matter, coupled with the Order and Memorandum which had been entered on March 7, 2008, were tantamount to a final Judgment and as such, entitled to *res judicata*. We were additionally troubled over whether a Decision addressing the issue that challenged the constitutionality of the bank's creation would essentially constitute an Advisory Opinion. Accordingly, we issued an Order on July 31, 2015, which requested further briefing from the parties, concerning the propriety of FSMDB's creation/establishment by Congress, along with whether the doctrine of *res judicata* would effectively bar this appeal.

I. Background

This case commenced with the filing of a Complaint on October 25, 2007, naming the Ehsas as Defendants, in light of an abdication of their obligation to repay the two loans (on which they were guarantors) extended to Pacific Food & Services Inc. (PFS) by FSMDB on November 29, 1999 (in the respective amounts of $437,184.38 and $800,626.75). Given the failure to answer or otherwise respond to the Complaint, a Default Judgment was entered in favor of FSMDB on December 28, 2007, against the Ehsas in the amount of $2,018,234.28. An Order and Memorandum, issued on March 7, 2008, denied the Ehsas' January 18, 2008 Motion to Set Aside the Entry of Default Judgment and FSMDB then initiated proceedings to enforce the Judgment.

Over four years elapsed since the above-mentioned Order had been issued, when the Ehsas filed a Motion to Vacate on April 11, 2012. This filing alleged the relevant Judgment was void, since the Court lacked subject matter jurisdiction. As noted above, the trial Court's March 19, 2013 Order, which denied the coveted relief from Judgment, constituted the impetus for the appeal before us.

In sum, this Order refuted the arguments advanced by the Ehsas, *to wit*: that the FSM Constitution did not empower the FSM Supreme Court Trial Division to oversee the instant matter, since the bank was not equivalent to the "national government" and failed to qualify as an instrumentality thereof. The Ehsas further contend, that even assuming FSMDB could be considered part and parcel of the national government, Congress restructured the development bank in 1994 (pursuant to FSM Pub. L. No. 8-47). In light of this metamorphosis, resulting in more autonomy for the bank, the Ehsas claim it could no longer qualify as an offshoot of the national government. Finally, the Ehsas claim the statute creating the reconstituted FSMDB was unconstitutional, as Congress did not possess authority to create/establish a development bank. In essence, the gravamen of the appeal, is that without subject matter jurisdiction, the trial Court's Judgment should be deemed void and thereby, vacated.

II. Issues on Appeal

A. Whether the doctrine of *res judicata* yields to a Rule 60(b)(4) claim, that subject matter jurisdiction was lacking; rendering the trial Court Decision void and therefore a nullity?

B. "Whether the FSMDB is the National Government, within the meaning of FSM Const. art. XI, § 6(a) and if not, whether the exercise of jurisdiction over this case was reversible error, since for jurisdictional purposes, the National Government was never a party?"

C. "Whether or not the FSMDB is a national Government agency or instrumentality and if not, whether the Trial Division's holding that it is, constitutes reversible error?"

D. "Whether or not the Federated States of Micronesia Constitution authorizes the Congress to create or establish a Development Bank and if not, whether the FSMDB[,] as party Plaintiff to the case below[,] had the legal capacity to invoke the jurisdiction of the Trial Division of the Supreme Court[,] pursuant to Article XI, Section 6(a) of the Constitution?"

III. Standard of Review

The decision to grant or deny a motion for relief from a final Judgment is committed to the sound discretion of the trial Court. Accordingly, the lower Court's Decision should be reviewed only upon a showing that the trial Judge's Ruling manifested an abuse of discretion. Such abuses must be unusual and exceptional; an Appellate Court will not merely substitute its judgment for that of the trial Court. Simina v. Kimeuo, 16 FSM R. 616, 619 (App. 2009); Panuelo v. Amayo, 12 FSM R. 365, 372 (App. 2004). An abuse of discretion occurs when 1) the Court's Decision is clearly unreasonable, arbitrary or fanciful; 2) the Decision is based on an erroneous conclusion of law; 3) the Court's findings are clearly erroneous; or 4) the Record contains no evidence, on which the Court rationally could have based its Decision. Arthur v. FSM Dev. Bank, 16 FSM R. 653, 657-58 (App. 2009). As such, this Court will find an abuse of discretion only when there is a definite and firm conviction, upon weighing all the relevant factors, that the Court below committed a clear error of Judgment in the conclusion it reached. Finally, "[i]ssues of law are reviewed de novo on appeal." Iriarte v. Individual Assurance Co., 18 FSM R. 340, 351 (App. 2012).

IV. Analysis

A. Res Judicata *in Juxtaposition to Subject Matter Jurisdiction*

The doctrine of *res judicata* stands for the proposition that a Judgment entered in a case conclusively settles that cause of action, as to all matters that were brought or could have been litigated and adjudged therein. Sorech v. FSM Dev. Bank, 18 FSM R. 151, 156 (Pon. 2012). Furthermore, a Default Judgment constitutes a final Judgment, with *res judicata* and claim preclusion effect. Mori v. Hasiguchi, 17 FSM R. 630, 644 (Chk. 2011). Although the primary focus of the instant appeal is whether subject matter jurisdiction was present, conspicuous by its absence, is an underlying reason for this issue never having been broached by the Ehsas within their January 18, 2008 Motion to Set Aside the Entry of Default Judgment. AHPW Inc. v. Pohnpei, 18 FSM R. 1, 10 (Pon. 2011).

In the wake of the December 28, 2007 Default Judgment having been entered against them, the Ehsas filed a Motion to Set Aside on January 18, 2008. On March 7, 2008, the trial Court issued an Order and Memorandum denying the requested relief and over four years elapsed before the Ehsas filed a 60(b)(4) Motion to Vacate; alleging an absence of subject matter jurisdiction. It warrants noting, that the aforementioned filing constituted the second Rule 60(b) motion brought by the Ehsas, thereby running afoul of the holding in AHPW, which prohibits successive 60(b) motions

In issue therefore, is whether the doctrine of *res judicata* applies, to bar the Ehsas from asserting a lack of subject matter jurisdiction? Conversely stated, does an appeal questioning the existence of subject matter jurisdiction, trump the doctrine of *res judicata*, with respect to the recognized finality of Judgments? As aptly noted in Stoll v. Gotleib, 305 U.S. 165, 172, 59 S. Ct. 134, 138, 83 L. Ed. 104, 109 (1938), "It is just as important that there should be a place to end [litigation], as there should be a place to begin."

Subject matter jurisdiction entails the power of a Court to entertain and adjudicate a given type of case. The fundamental requirement for subject matter jurisdiction is a power derived from the FSM Constitution (discussed in detail below), that specifies the class of cases the Court is granted authority

to hear. Consequently, a Court has subject matter jurisdiction only over this delineated genre of disputes and Judgments rendered sans this requisite authority are void *ab initio*. Bualuay v. Rano, 11 FSM R. 139, 145 (App. 2002).

"A void judgment is a legal nullity. Although the term 'void' describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised after the judgment becomes final." United Student Aid Funds Inc. v. Espinosa, 559 U.S. 260, 270, 130 S. Ct. 1367, 1377, 176 L. Ed. 2d 158, 169 (2010). Ruben v. Petewon, 13 FSM R. 383 (Chk. 2005) similarly found: "There is no time limit on relief from a void Judgment. The reason for this is obvious. If a Judgment is void when issued, it is always void." *Id.* at 389. Nevertheless, in Stoll, the United States Supreme Court held, that even if a Court's determination of its jurisdiction is erroneous, it will still be binding, unless the error is timely raised, because of the interest in finality. 305 U.S. at 172, 59 S. Ct. at 137-38, 83 L. Ed. at 109.[1]

Like *res judicata*, the concept of jurisdiction over the subject matter is based upon public policy: one dictates the finality of Judgments and the other requires litigation to be addressed in the proper forum.[2] The Ehsas seek to utilize this jurisdictional argument to pierce the *res judicata* effect of a final Judgment. As articulated in Griffin v. Swim-Tech Corporation, 722 F.2d 677, 680 (11th Cir. 1984), the provisions of Rule 60(b) must be carefully interpreted to preserve the delicate balance between the sanctity of final Judgments and the "incessant command of the Court's conscience, that justice be done in light of all the facts."

Whether the failure of subject matter jurisdiction supersedes *res judicata* and all other timeliness requirements, presents an issue of first impression. Given the absence of case law in this jurisdiction on point, we will examine relevant U.S. Decisions for guidance. When prior FSM cases have not addressed a precise point, the Court, in such instances, may look to authorities from other jurisdictions in the common law tradition. Individual Assurance Co. v. Iriarte, 16 FSM R. 423, 438 (Pon. 2009).

1. *Finality of Judgments*

One of the basic tenets of our system of jurisprudence is that of finality of Judgments. The principle of finality is essential to ensure consistency and certainty in the law. This salutary principle is founded upon the generally recognized public policy that there must be some end to litigation. Angel v. Bullington, 330 U.S. 183, 192-93, 67 S. Ct. 657, 662, 91 L. Ed. 832, 838-39 (1947); Heiser v. Woodruff, 327 U.S. 726, 733, 66 S. Ct. 853, 856, 90 L. Ed. 970, 976 (1947). It is well settled, that Courts will not disturb final Judgments unless the moving party demonstrates the existence of "extraordinary circumstances." United States v. Swift & Co., 286 U.S. 106, 119, 52 S. Ct. 460, 464, 76 L. Ed. 999, 1008 (1932). *See also* Ackerman v. United States, 340 U.S. 193, 202, 71 S. Ct. 209, 213, 95 L. Ed. 207, 212 (1950); Lepore v. Vidockler, 792 F.2d 272, 274 (1st Cir. 1986).

"In the interests of finality, the concept of void Judgments is narrowly construed." United States v. Berenguer 821 F.2d 19, 22 (1st Cir. 1987); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453

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[1] *See* Stephen E. Ludovici, *Rule 60(b)(4): When the Courts of Limited Jurisdiction Yield to Finality*, 66 FLA. L. REV. 881, 886-87 (2014).

[2] The basis for this concept originated with the idea that a Court is an instrument of the sovereign and consequently, subject to such limitation as have been politically imposed. *See* Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386 (1932).

F.2d 645 (1st Cir. 1972). A Judgment is not void merely because it may be erroneous, V.T.A., Inc. v. Airco Inc., 597 F.2d 220, 224 (10th Cir. 1979), or because the precedent upon which it was based is later altered or even overruled. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374-78, 60 S. Ct. 317, 318-20, 84 L. Ed. 329, 332-35 (1940); Marshall v. Board of Educ., 575 F.2d 417, 422 (3d Cir. 1978).

A Judgment is void and therefore subject to relief under Rule 60(b)(4), only if the Court that rendered Judgment lacked jurisdiction or in circumstances in which the Court's action amounted to a plain usurpation of power constituting a violation of due process. V.T.A., Inc., 597 F.2d at 224. It is essential to note, that total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction and only "rare instances of a clear usurpation of power" will render a Judgment void. Lubben, 453 F.2d at 649. In other words, a Court has the power to determine its own jurisdiction and an error in that determination will not render the Judgment void. V.T.A., Inc., 597 F.2d at 224; Stoll, 305 U.S. at 172, 59 S. Ct. at 137-38, 83 L. Ed. at 108-09.

2. *Timeliness*

A party seeking relief from a final Judgment must do so pursuant to Rule 60(b). Under 60(b)(1), (2), or (3), a movant must file the motion within one year from the entry of final Judgment. Otherwise, no specific time period is set forth, except that under Rule 60(b)(4), (5), or (6), the motion must be made within a "reasonable time." Thirty days after the Judgment was entered has been found to be reasonable. Limerick v. Greenwald, 749 F.2d 97, 99 (1st Cir. 1984). However, what constitutes a reasonable time, depends on the facts of each case. Berenguer, 821 F.2d at 21; United States v. Holtzman, 762 F.2d 720, 725 (9th Cir. 1985). The relevant considerations include, whether the parties have been prejudiced by the delay and good reason presented for failing to take action sooner. In re Pacific Far East Lines Inc. 889 F.2d 242 (9th Cir. 1989).

The Ehsas contend that relief from Judgment is appropriate pursuant to Rule 60(b)(4), because the trial Court was bereft of subject matter jurisdiction and its Ruling therefore void. The Ehsas additionally claim, that since the relevant Judgment is therefore deemed a nullity, no time constraint is present, in terms of bringing their motion to vacate. The subject motion was filed more than four years after the entry of Judgment. Even if some measure of leniency be afforded, with respect to the belated filing, the Ehsas provide no reason for delaying the request for relief over such an inordinate length of time.

In contrast, FSMDB provided ample reasons to buttress their position that this protracted delay was unreasonable. The bank posits, among other things, the overarching concern, that altering the Judgment at this late juncture would be inconsistent with the principle regarding finality of Judgments. Furthermore, prejudice would invariably redound to the bank's detriment by allowing such an untimely attack, not only in the present matter, but because it would portend opening the floodgates to other similar, less than punctual, challenges.

In addition, the Ehsas have failed to demonstrate the existence of "extraordinary circumstances" or that without the coveted relief, "extreme" and "unexpected" hardship would result. Swift & Co., 286 U.S. at 119, 52 S. Ct. at 464, 76 L. Ed. at 1008; Ackerman, 340 U.S. at 202, 71 S. Ct. at 213, 95 L. Ed. at 212; Lepore, 792 F.2d at 274.

It is noteworthy, that the Promisor on the underlying loan: PFS, (in which the Ehsas were Incorporators, Directors, Officers and shareholders)filed for Bankruptcy and therefore the claims of FSMDB against this entity were transferred and continued in Bankruptcy Case No. PB 001-2009. As a result, PFS was removed from the underlying case and thus, not a party to this appeal. Implicit

therein, was the recognition by the Ehsas/PFS, that subject matter jurisdiction was proper.

The aggregate effect of the above-mentioned factors, inexorably lead us to the conclusion, that the Ehsas' Motion to Vacate the Judgment was untimely. Although this motion was not filed within the prescribed "reasonable time," our analysis is hardly concluded, because if the Judgment was void, relief may nevertheless be granted under 60(b)(4).

3. *Voidness*

"A void judgment is a legal nullity." Espinosa, 559 U.S. at 270, 130 S. Ct. at 1377, 176 L. Ed. 2d at 169. With this principle in mind, we must consider the argument proffered by the Ehsas *to wit*: that since the Judgment was void and hence, from its inception a legal nullity, relief is proper, regardless of the time that had elapsed. Espinosa recognized that Rule 60(b)(4) motions, which assert that a Judgment is void because of a jurisdictional defect, have been limited to the exceptional case in which the Court that rendered Judgment lacked, even an "arguable basis" for jurisdiction (essentially equating this with a clear usurpation of power). With that said, the United States Supreme Court has also acknowledged, that while Federal Courts do not have the power to extend their subject matter jurisdiction, as a practical matter, they must have the power to interpret and determine whether they have subject matter jurisdiction. Stoll, 305 U.S. at 171, 59 S. Ct. 137, 83 L. Ed. at 108-09.

There exists a split in authority in the Federal Circuits of Appeal, in relation to whether a time limitation can be ascribed to a party seeking relief from a purportedly void Judgment and the concomitant impact upon finality. Unlike its counterparts, Rule 60(b)(4), which provides relief from void Judgments, is not subject to a 'reasonable' time limitation . . . . If a judgment is void, it is a nullity from the outset and any 60(b)(4) motion for relief is therefore filed within a reasonable time." V.T.A., Inc., 597 F.2d at 224 n.9. *See also* Venable v. Haislip, 721 F.2d 297, 299-300 (10th Cir. 1983).

On the other hand, to prevent Rule 60(b)(4) from expanding, so as to threaten finality, "the concept of void judgments is narrowly construed." *See* Days Inns Worldwide Inc. v. Patel, 445 F.3d 899, 907 (6th Cir. 2006); Carter v. Fenner, 136 F.3d 1000, 1007 (5th Cir.); Raymark Indus. Inc. v. Lai, 973 F.2d 1125, 1132 (3d Cir. 1992). *Accord* Lubben, 453 F.2d at 649-50 (noting the *res judicata* effect of a determination that there was jurisdiction, protects a Judgment from Rule 60(b)(4) (citing Stoll, 305 U.S. at 171-72, 59 S. Ct. at 137, 83 L. Ed. at 108-09)).

The Ehsas maintain the jurisdictional concept, that subject matter jurisdiction is an allocation of authority from the FSM Constitution, prescribing which Court can hear a particular type of case, is dominant. Unlike personal jurisdiction, which a Court can obtain upon the parties' consent or failure to object, lack of subject matter jurisdiction is never capable of being waived. In essence, the Court either possesses it or it does not; it cannot assert it. Since the requirement of subject matter jurisdiction is never capable of being waived, Judgments rendered without such allocation of authority are void *ab initio* and can be attacked at any time.

Notwithstanding the aforementioned disagreement within the Federal Courts of Appeal, in terms of reviewing an Order granting or denying a Rule 60(b)(4) motion, we find the Ehsas have failed to cite any reasons for the elongated delay in filing the motion to vacate, much less "extraordinary circumstances," which would warrant having their 60(b)(4) motion supersede the doctrine of *res judicata*. In lieu thereof, a syllogistic deduction is utilized by the Ehsas, *to wit*: since the trial Court did not have subject matter jurisdiction, the Judgment rendered was void *ab initio* and *res judicata* does not apply. In other words, this argument contains a pragmatic defect, in that the premise: that subject matter jurisdiction was wanting, is just as much in need of proof, as the conclusion: the Judgment is void and the doctrine of *res judicata* yields.

In short, the issues raised in the appeal before us, were all ripe when the Ehsas brought their initial Motion to Set Aside on January 18, 2008, yet as set forth above, the issue sounding in an alleged lack of subject matter jurisdiction was never raised at that time. Furthermore, no "extraordinary circumstances" have been depicted by the Ehsas. In contradistinction, prejudice which would invariably inure to the bank, in light of its justified reliance on the finality of the relevant December 28, 2007 Default Judgment, along with the March 7, 2008 Order.

B. *Estoppel*

As previously noted, the Ehsas remained mute, concerning a purported lack of subject matter jurisdiction, not only when they filed a Motion to Set Aside the Default Judgment on January 18, 2008, but for a period of time encompassing four plus years, after the corresponding March 7, 2008 Order was entered (ultimately filing a Motion to Vacate on April 11, 2012). During this interval, FSMDB instituted enforcement proceedings and an Order in Aid of Judgment was issued on December 19, 2011.

As also set forth above, the Promisor on the underlying loan: PFS, filed for Bankruptcy (presumably to stave off seizure of collateral which had been pledged as security – the Sea Breeze Hotel). Accordingly, the claims of the bank against PFS (of which the Ehsas were Incorporators, Directors, Officers and shareholders) were transferred and continued in the Bankruptcy Case: In re Pacific Foods & Services, Inc., Bankr. No. PB 001-2009. The Bankruptcy reorganization plan called for the PFS to make monthly payments toward the outstanding debt to FSMDB, in the amount of $4,281.61, which it has dutifully remitted since August of 2010.

In sum, the aforementioned actions of PFS, coupled with inertia on the part of the Ehsas, in terms of broaching their perceived absence of subject matter jurisdiction, reflect an acknowledgment of finality and *a fortiori*, the propriety of same, in terms of the trial Court's December 28, 2007 Default Judgment, along with the March 7, 2008 Order denying their Motion to Set Aside. FSMDB intimates, that such behavior on the part of PFS, as well as the Ehsas, upon which the bank relied, should preclude such an untimely challenge to subject matter jurisdiction.

Carlos Etscheit Soap Co. v. Epina, 8 FSM R. 155 (Pon. 1997), recognized that estoppel constitutes a doctrine which may be only be invoked by parties who themselves have acted properly concerning the subject matter of the litigation. *Id.* at 163. Furthermore, Enengeitaw Clan v. Shirai, 10 FSM R. 309 (Chk. S. Ct. Tr. 2011), referenced the applicable definition, as it appears in BLACK'S LAW DICTIONARY: "'The doctrine by which a person may be precluded by his act or conduct or silence, when it is his duty to speak.'" *Id.* at 311.

Albeit within the context of patent infringement, the seminal case of Aspex Eyewear Inc. v. Clariti Eyewear, Inc., 605 F.3d 1305 (Fed. Cir. 2010) is instructive. Under the facts of that case, eyeglass frame maker Aspex sued competitor Clariti for patent infringement. Aspex waited three years, without responding to a request that it list the infringement patent claims, before asserting its patent in litigation. During this time frame, Clariti expanded its marketing and sales of the product. The Federal Court found that Aspex had misled Clariti, to believe it would not enforce its patent and thus estopped Aspex from proceeding with the lawsuit.

The lack of protest voiced by the Ehsas, over an elongated period of time, during which enforcement actions were undertaken by the bank in the wake of an Order in Aid of Judgment, parallels the dormant behavior of Aspex. As part and parcel of collection efforts, the prevailing party will proceed to enforce a Judgment via, among other thing, dispatching requests to the debtors to disclose their respective financial statements, containing existing assets and liabilities. There is no indication

in the Record, that the Ehsas ever articulated any reasonable facsimile of a protestation to the bank's collection efforts. In addition to the absence of any objection to a purported lack of subject matter jurisdiction by the Ehsas during this interval, PFS filed for Bankruptcy (implicitly recognizing the authority of the trial Court's Rulings).

Having capitulated to the propriety of the Default Judgment and finality embodied within the concomitant March 7, 2008 Order denying their Motion to Set Aside, the Ehsas' behavior belies any indication that the trial Court's jurisdiction was perceived to have been improperly usurped. Equally important, is that FSMDB relied upon such tenor, by commencing efforts to enforce the Judgment is issue.

In light of the Ehsas' default on the subject obligation, coupled with the bank's actions to enforce the Judgment, to which the Judgment debtors never balked over a span of four plus years, an acquiescence to the trial Court's Rulings was depicted. In other words, during this prolonged time frame there was never even a hint that subject matter jurisdiction was an unsettling issue for the Ehsas. As such, the venerable legal concept of equitable estoppel applies, since the Ehsas refrained from acting in apposite to such implied recognition of the Judgment in issue and the bank relied on that conduct or more appropriately, lack thereof.

Bottom line: the aggregate effect of both *res judicata* and equitable estoppel hardly bodes well for the Ehsas, in terms of their belated challenge. Despite the aforementioned failings in this regard, neither the doctrine of *res judicata*, nor equitable estoppel, was addressed by trial Court and an Appellate Court should be reluctant to substitute its Judgment for that of the trial Judge. Barrett v. Chuuk, 16 FSM R. 229, 232 (App. 2009). Accordingly, we will proceed to address the remaining issues in the appeal before us.

C. *The Authority of Congress to Create the Development Bank*

At the outset, we must address the issue of standing on the part of the Ehsas to raise the subject issue of whether Congress possesses the authority to enact legislation (i.e. FSM Pub. L. No. 8-47, whereby the corporate structure of FSMDB was reorganized), under its powers to regulate banking and interstate commerce, as set forth in Article IX, § 2(g). This pivotal threshold issue of standing, must be broached prior to reaching the merits of a case, since a particular party's ability to bring an action constitutes a potentially dispositive determination, as far as subject matter jurisdiction. FSM v. Udot Municipality, 12 FSM R. 29, 40 (App. 2003). Although, the standing requirement is not expressly delineated within the FSM Constitution, it is implied as an antecedent to the "case or dispute" requirement found in Article XI, § 6 and should be interpreted, so as to implement the objectives of that requirement. Sipos v. Crabtree, 13 FSM R. 355, 362 (Pon. 2005).

Whether a party has standing is a question of law reviewed *de novo* on appeal. *Id.* Since standing cannot be waived, an Appellate Court is obliged to conduct an independent inquiry, with respect to the parties' standing to challenge national laws, even though the parties have not raised and the trial Court not ruled, on the issue of standing. *See* Animal Legal Defense Fund, Inc. v. Espy, 29 F.3d 720 (D.C. Cir. 1994); 16 AM. JUR. 2D *Constitutional Law* § 131 (1998).

Two factors are central to the determination of whether a party has standing. Initially, a party must allege a sufficient stake in the outcome of the controversy and must have suffered some threatened or actual injury resulting from the allegedly illegal action or erroneous Court Ruling. Furthermore, the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable Decision. Udot, 12 FSM R. at 40. While not constitutionally based, three additional rules need to be applied before the question of standing can be resolved. First,

generalized grievances shared by substantially the whole population do not normally warrant standing. Second, even when an injury sufficient to satisfy the constitutional requirement is alleged, the party must generally assert its own legal rights and interests and cannot rest its claim to relief on the legal rights and interests of third parties. Third, the interests which the party is seeking to protect, must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Id.*

The Ehsas framed the present issue, that Congress lacks constitutional authority to create/establish FSMDB, as an attack on the FSM Supreme Court's subject matter jurisdiction. Their argument is as follows: if Congress lacked the authority under the Constitution to establish FSMDB, then the Act creating this bank is void *ab initio*. In other words, FSMDB lacked standing to appear before the FSM Supreme Court to apply for the Default Judgment is was granted on December 28, 2007. As an aside, by extrapolation, all Judgments for or against FSMDB, since its inception (1994), would also be void for lack of subject matter jurisdiction.

The Ehsas however, neglect to cite any authority in support of their averment, that the FSM Supreme Court lacks subject matter jurisdiction over a nationally chartered corporation, which was purportedly established in excess of Congressional authority. In short, the Ehsas are essentially asking us to refrain from exercising jurisdiction over FSMDB, by virtue of their affirmation, that it is acting *ultra vires, to wit*: engaging in development banking, despite it not having been properly authorized to do so.

The Achilles' heel of this argument lies in the fact, that the particularized injury suffered by the Ehsas would not be redressed by a coveted Ruling which found FSM Pub. L. No. 8-47 was an unconstitutional enactment of Congress, since this is a generalized injury: one shared by a substantial number of individuals. Stated somewhat differently, the Ehsas have arguably sustained two types of injury as a result of the enactment of FSM Pub. L. No. 8-47. First, the Ehsas are Judgment debtors to FSMDB and as such, they suffer a concrete particularized injury. In addition, they have conceivably sustained injury, given the actions of Congress, in terms of allegedly exceeding its constitutional authority.

With respect to the first salvo endured by the Ehsas, as a result of the Congressional enactment of FSM Pub. L. No. 8-47, they now owe money to the institution created by that Act. While such an injury is concrete and particularized enough to support standing, the Ehsas have been remiss, as far as demonstrating how a favorable Decision would redress this injury. In other words, even if the Ehsas were to prevail on their claim that the enactment of FSM Pub. L. No. 8-47 was unconstitutional, it is highly doubtful that their monetary obligation would simply disappear. Rather, the FSMDB would be either reconstituted as a private bank (as argued by the Ehsas) or the bank could be ordered to cease operations, wind up its affairs and the Court would oversee the process of its dissolution. In the latter scenario, the assets of FSMDB would be sold to third parties and the equity generated by the sale disbursed to shareholders. Bottom line: the Ehsas' debt would hardly vanish, since either the newly configured bank or the aforementioned third party would inherit the subject Default Judgment.

Furthermore, as noted above, the contention that the establishment of FSMDB exceeded the authority of Congress, is a generalized injury, affecting a significant number of people. Generalized grievances shared by the public at large, do not confer standing on specific individuals. An interest in having the government conform to the limitations imposed by the Constitution, without more, is clearly a shared interest and therefore, the alleged failure on the part of the Government represents a generalized grievance.

In contrast, where the claim at issue, is that Congress exceeded its authority when it established FSMDB, the parties with standing could conceivably include those with a particularized injury caused

by an action of FSMDB, capable of being redressed by its dissolution. Such parties might include private commercial banks which are exposed to keen competition in the lending market as a result of FSMDB's creation or business owners that compete with similar entities who have been on the receiving end of loans from FSMDB. *See* Aisek v. Foreign Inv. Bd., 2 FSM R. 95, 100 (Pon. 1985) (finding that dive operators in competition with a cruise ship which received a foreign investment permit have standing to contest the legality of the issuance of the permit).

The trial Court held that "FSM Public Law No. 8-47 is not unconstitutional because it was a valid exercise of [Congressional] power to regulate banking and to regulate interstate commerce, FSM Const. art. IX, § 2(g) and because development banking is a power of national character beyond the power of a state to control or provide and so is a national power, FSM Const. art. VIII, § 1." FSM Dev. Bank v. Ehsa, 18 FSM R. 608, 619 (Pon. 2013). FSMDB accurately notes the Ehsas failed to address two of the aforementioned grounds relied upon by the trial Court in concluding, that FSM Pub. L. No. 8-47 was a valid exercise of Congressional power under the Constitution. Specifically, the Ehsas refrain from disputing the trial Court's holding, that Congress is imbued with the power to enact FSM Pub. L. No. 8-47, under its exclusive enumerated power to regulate banking, as well as foreign and interstate commerce under Article IX, Section 2(g), nor do they contest that FSM Pub. L. No. 8-47 is constitutional, by virtue of Article VIII, Section 1, based upon development banking constituting a power of national character beyond the scope of a state to control or provide.

By failing to contest the aforementioned two conclusions articulated by the trial Court, the Ehsas have essentially capitulated, that these grounds provided Congress valid authority to enact FSM Pub. L. No. 8-47. *See* Beck v. Washington, 369 U.S. 541, 553, 82 S. Ct. 955, 962, 8 L. Ed. 2d 98, 109 (1962) (an Appellant who fails to argue a constitutional contention in his or her brief, merely setting it forth in a lone sentence, is deemed to have abandoned or waived such contention).

Since the Ehsas do not dispute that Congress had the authority to enact FSM Pub. L. No. 8-47, their appeal of the trial Court's Ruling on this point is merely tantamount to a request for an Advisory Opinion, regarding whether the enumerated powers of Congress to regulate banking and interstate commerce, is by itself, sufficient to support the constitutionality of FSM Pub. L. No. 8-47. It is well established, that an Appellate Court does not sit to render decisions on abstract legal propositions or issue Advisory Opinions. Fritz v. National Elections Dir., 11 FSM R. 442, 444 (App. 2003). Accordingly, the instant challenge to the trial Court Ruling, that FSM Pub. L. No. 8-47 is deemed a constitutional enactment of Congress, can be summarily discounted and the trial Court's Decision within this context will not be disturbed.

D. *Original and Exclusive Jurisdiction under Article XI, Section 6(a) of the FSM Constitution*

1. *"National Government"*

The Ehsas contend the trial Court erred in holding, that the FSM Supreme Court possessed original and exclusive jurisdiction over the instant matter, under Article XI, Section 6(a) of the FSM Constitution, which provides: "The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases and in cases where the national government is a party[,] except where land is at issue."

The Court below found, that Article XI, Section 6(a) of the Constitution was an appropriate basis for jurisdiction in the case before us, since 1) an instrumentality of the National Government is equivalent to the "National Government" for the purposes of Section 6(a) and 2) FSMDB is an instrumentality of the National Government.

The Ehsas urge us to adopt a narrow interpretation of the term "national government" in Section 6(a), by limiting the jurisdiction of the FSM Supreme Court to cases in which one of the three branches of government is a party. In support of this proposition, the Ehsas cite to the specific nomenclature utilized by the framers in Article XII, Section 3(b), which sets forth: "The Public Auditor shall inspect and audit accounts in every branch, department, agency or statutory authority of the national government and in other public entities or nonprofit organizations receiving public funds from the national government. . . ."

The Ehsas essentially maintain that the contrast between the wording of the constitutional provisions depicted in Articles XI and XII, by employing divergent terminology, *to wit*: in Article XI – "national government" and within Article XII – "every branch, department, agency or a statutory authority . . . of the national government . . . " was intended to connote divergent meanings. The strict construction coveted by the Ehsas would lead to the conclusion that, if viewed in tandem, the two relevant Articles are inconsistent. In other words, "national government," as referenced in Article XI, Section 6(a), is not necessarily synonymous with "every branch, department, agency or a statutory authority . . . of the national government . . ." as delineated within Article XII, Section 3(b).

In contradistinction, FSMDB posits a less rigid interpretation, as the framers intended the FSM Supreme Court to oversee cases involving national issues. J. of Micro. Con. Con. SCREP No. 49. 876, 878. The bank further proposes, that Article XII, § 3(b) be read to expound upon the definition of "national government," to subsume "every branch, department, agency or a statutory authority. . ." thereof.

The trial Court rejected the strict interpretation of Article XI, Section 6(a) espoused by the Ehsas, finding that such a constrained reading would render the FSM Supreme Court's exclusive jurisdiction ephemeral. We agree with this assessment, as the specific language in Article XII, Section 3(b) merely signifies those entities which come within the penumbra of duties/responsibilities incumbent upon the Office of the Public Auditor. This is further evidenced by the use of the phrase "every branch . . . of the national government," the use of which would be redundant, if Article XII actually endeavored to distinguish and/or limit the term "national government," as it appears in Article XI.

The delineation of such entities in Article XII does not imply, that in juxtaposition they are mutually exclusive, as far as the "national government," rather these classifications elucidate what could be included therein and cannot be seen to differentiate, much less restrict, the term "national government," as employed in Article XI. In choosing to utilize the disjunctive (by inserting commas) and specifically making mention of "every branch," it is readily apparent the framers were listing a series of entities that would come within the ambit of the duties/responsibilities charged to the Office of the Public Auditor.

2. *"Instrumentality Thereof"*

The Ehsas propose a literal reading of "national government" within Article XI, Section 6(a), so as to exclude instrumentalities of the national government. This tautological assertion, *to wit*: that the bank is not tantamount to the national government, therefore it cannot be considered an instrumentality thereof, would require a wholesale abandonment of long-standing precedent in the FSM. Similar entities, established via enactment(s) of Congress, have been found to constitute instrumentalities of the national government. These decisions include: Berman v. College of Micronesia-FSM, 15 FSM R. 582, 596 (App. 2008) (the College of Micronesia); Arthur v. Pohnpei, 16 FSM R. 581, 590 (Pon. 2009) (the Federated Development Authority and Investment Development Fund) and FSM Telecomm. Corp. v. Deparment of Treasury, 9 FSM R. 380, 385 (Pon. 2000) (the FSM Telecom Corp). "Stare decisis is the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions

when the same points of law arise again in litigation. Nakamura v. Chuuk, 15 FSM R. 146, 149-50 (Chk. S. Ct. App. 2007) (citing BLACK'S LAW DICTIONARY 1414 (7th ed. 1999)).

FSM Development Bank v. Estate of Nanpei, 2 FSM R. 217 (Pon. 1986), found FSMDB to be an instrumentality and therefore, part of the national government, for purposes of the exclusive jurisdiction afforded the FSM Supreme Court, under Article XI, Section 6(a). Although the Nanpei Court fell short of establishing a bright-line rule, in terms of when an entity can be considered on a par and therefore, synonymous with the national government, it did hypothesize "that an entity created by national statute may or may not be a part of the national government [for purposes of Article XI, Section 6(a)], depending on its role and characteristics." 2 FSM R. at 219. The Nanpei Court, *id.* at 219-20, opined:

> Activities and organizations created and controlled by the national government should remain subject to the constitutional provision [i.e. article XI, § 6(a)], regardless of the name given to the agency or other details of form. Conversely, organizations merely authorized or licensed by the national government but which operate for a private purpose, with little if any governmental involvement or control, should not be treated as part of the national government.

The trial Court referenced several characteristics which, considered *in toto*, support its holding that FSMDB remains an instrumentality of the national government. The bank was created and is supported by the national government. It is imbued with solely a public purpose, 30 F.S.M.C. 128, and although reorganized, pursuant to FSM Pub. L. No. 8-47, it is still governed by the aforementioned special Act, as opposed to the general banking statutes under Title 29. The bank, even in its reconstituted form, continues to be owned almost exclusively by the national government; as it controls 98.7% of the issued shares, while the States of Kosrae and Chuuk possess the remaining shares. FSMDB is exempt from taxes (with the exception of import taxes), assessments on its property or operations; lending further credence to its non-profit status – for the benefit of the public at large. Additionally, since its inception in 1994, with the exception of one year, the bank has been on the receiving end of annual infusions of capital from the national government; usually pursuant to appropriations contained within the FSM national government fiscal year budgets.

In terms of the control over the FSMDB, the national government, as majority shareholder, elects all members of the Board of Directors, absent the President, who is an ex-officio member of the Board and chosen by the other Directors. 30 F.S.M.C. 114(1). Annual reports are also dispatched to the national government, albeit in its capacity as a shareholder. 30 F.S.M.C. 134. The aforementioned tax-exempt status, which is contingent upon its prohibition on dividends being issued, is subject to the review of Congress. Finally, although the bank operates independently (from a fiscal perspective), the national government irrefutably wields a considerable amount of influence over the decision-making process of FSMDB, given the former's status as majority shareholder, coupled with the fact Congress can certainly amend the statute which created the restructured bank and/or institute some new measure reflecting a national policy preference.[3]

In sum, FSMDB was formed by the national government to undertake a public purpose and is subject to the control of its creator, at the discretion of the latter. Consequently, we agree with the Trial Court's finding, that the reconfigured FSMDB constitutes an instrumentality of the national government and therefore, comes within the ambit of the constitutional provision set forth in Article XI, Section 6(a); to be accorded the status equivalent to that of the national government. FSM Dev.

[3] Bills have been introduced to amend Title 30 in various manners, however none have been successful to date.

Bank v. Ifraim, 10 FSM R. 1, 4 (Chk. 2001).

E. *Concurrent Original Jurisdiction pursuant to Article XI, Section 6(b). Diversity.*

Aside from the jurisdiction properly afforded the FSM Supreme Court, under Article XI, Section 6(a), the trial Court found that, in the alternative, Section 6(b) provided safe harbor. It is noteworthy, that the Ehsas did not challenge this finding and therefore ostensibly concede to the determination of the lower Court. However, as noted above, a party may not waive subject matter jurisdiction, Bualuay v. Rano, 11 FSM R. 139, 145 (App. 2002); thereby warranting this alternate analysis of its existence.

The FSM Supreme Court is endowed with concurrent original jurisdiction, pursuant to Article XI, Section 6(b), which provides:

> The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes between a state and citizen of another state, between citizens of different states and between a state or a citizen thereof and a foreign state, citizen or subject.

The trial Court opined, that assuming *arguendo*, FSMDB is not the functional equivalent of the national government or an instrumentality thereof, since the bank is a corporation, of which 1.3% of the respective shares are owned by the States of Kosrae and Chuuk, it would constitute an entity with diverse citizenship (as the Ehsas are both citizens of Pohnpei). In Luzama v. Ponape Enterprises Co., 7 FSM R. 40 (App. 1995), we found that the language in Article XI, Section 6(b) was borrowed from the United States Constitution and therefore, U.S. Supreme Court cases which spoke to the breadth or limits of diversity jurisdiction were an appropriate source of guidance. Accordingly, Luzama held, that a corporation's citizenship, for diversity purposes, is the citizenship of its shareholders and only minimal diversity need exist. *Id.* at 45-48.

Bottom line: the FSM Supreme Court, in the alternative (since the existence of jurisdiction can only be exclusive or non-exclusive/concurrent), possesses concurrent jurisdiction under Article XI, Section 6(b), based on the diversity of citizenship, *to wit*: that of FSMDB being comprised, in part, by its Kosrae and Chuuk shareholders and the Pohnpeian citizenship of the Ehsas. As such, we affirm the trial Court's holding in this regard.

F. *"Arising Under"*

While the trial Court did not broach the potential for jurisdiction under Article XI, Section 6(b), as a "case arising under this Constitution [or] national law," the case before us is subject to *de novo* review and a Reviewing Court is empowered to affirm a lower Court's Decision on grounds other than those utilized by the latter. Akinga v. Heirs of Mike, 15 FSM R. 391, 399 (App. 2007). Furthermore, as this case epitomizes an issue capable of repetition, yet evading review, we find it fertile ground to address this alternate source of subject matter jurisdiction available to the FSM Supreme Court.

FSMDB avers, that jurisdiction is vested, as per Article XI, Section 6(b), in light of the fact that the bank is a creation of Congress, hence any case in which it is a party constitutes a case arising under national law. In short, Article XI, Section 6(b) grants the national Courts concurrent original jurisdiction in cases arising under national law and these forums include the trial division of the FSM Supreme Court and any other national Courts which might be established by statute, but not state Courts. Gilmete v. Carlos Etscheit Soap Co., 13 FSM R. 145, 147 (App. 2005).

Neimes v. Maeda Construction Co., 1 FSM R. 47 (Truk 1981) represents the precursor, in terms

of broaching the availability of "arising under" jurisdiction. Neimes acknowledged that a deprivation of property claim triggered Article XI, Section 6(b) jurisdiction, since there was a substantive due process allegation, however the Court proceeded to employ an analysis which was akin to that employed under 28 U.S.C.A. §1331 (i.e. whether the cause of action, on its face, demonstrated it was predicated upon national law or the Constitution). As such the Neimes Court fell short of finding a constitutional question, *ipso facto* would implicate Article XI, Section 6(b) "arising under" jurisdiction.

Subsequent trial division cases have found the scope of this "arising under" jurisdiction reposed within the FSM Supreme Court was limited to those matters, in which the following four factors exist: 1) a national law issue is an essential element of the cause of action; 2) the issue of national law is disclosed upon the face of the Complaint; 3) the issue of law is not inferred from a defense which is asserted and 4) the issue of law is a substantial one. See Enlet v. Bruton, 10 FSM R. 36 (Chk. 2001); David v. San Nicolas, 8 FSM R. 597 (Pon. 1998); Ponape Chamber of Commerce v. Nett Mun. Gov't, 1 FSM R. 389 (Pon. 1984).[4] These cases however, essentially limited the FSM Supreme Court's constitutional grant of jurisdiction to the narrow confines depicted within the federal question statute in the United States, 28 U.S.C.A. § 1331, *vis a vis* relying on a more expansive basis for jurisdiction authorized by the Constitution.[5]

The limited interpretation of Article XI, Section 6(b), as espoused by Neimes and its progeny, is not required by the constitutional history, which reflects the intent of the framers that "arising under" jurisdiction extend to "cases involving the enforcement of a right protected or created by the national constitution, national law or treaty and cases involving the construction or interpretation of the national constitution, national law or treaty." SCREP No. 49, II J. of Micro. Con. Con. 876, 879. *See* Ponape Chamber of Commerce, 1 FSM R. at 393.

As set forth in Nanpei, "Moreover, this Court's exclusive jurisdiction over cases in which the national government is a party is not paralleled in the United States." *Id.* at 219 n.1. "Such differences 'presumably reflect a conscious effort by the framers to select a road other than that paved by the United States Constitution.'" Nanpei, 2 FSM R. at 219 n.1 (quoting Tammow v. FSM, 2 FSM R. 53, 59 (App. 1985)). In light of the self-executing grants of jurisdiction embodied within the FSM Constitution (i.e. that are not contingent upon an Act of Congress), the United States Decisions which address the underlying Congressional intent, as set forth in 28 U.S.C.A. § 1331, provide little guidance, in terms of our analysis of the Article XI, Section 6(b) language: "arising under," against the backdrop of a constitutional provision.

Notwithstanding, the watershed case of Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824), is instructive, as it addressed whether Congress could constitutionally confer federal jurisdiction over all cases in which a Congressionally created bank was a party. Not only did the United States Supreme Court find, that since there was a federal ingredient within the cause of action federal jurisdiction was proper, but "the mere potentiality of a federal ingredient is sufficient."

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[4] Subsequent Decisions in FSM Dev. Bank v. Ifraim, 10 FSM R. 1, 4 (Chk. 2001); Mailo v. Chuuk, 12 FSM R. 597, 600 (Chk. 2004) and Etscheit v. McVey, 13 FSM R. 477, 479 (Pon. 2005) reaffirmed that national law defenses would not suffice, as far as implicating jurisdiction, via "arising under."

[5] It is especially noteworthy, that jurisdictional grants of power to the national Courts in Article XI, Section 6 of the FSM Constitution "appear to be self-executing grants of jurisdiction, calling for no action by Congress. In contrast, most jurisdictional provisions in Article III of the United States Constitution are not self-executing. Thus, determinations of jurisdiction of the United States Courts are typically based on statutory construction rather than, as here, interpretation of the Constitution." Nanpei, 2 FSM R. at 219 n.1.

Id. at 823-24, 6 L. Ed. at 224.

Subsequent United States Supreme Court Decisions have followed the lead of Osborn; reflecting a broad interpretation of this Constitutional authorization of federal question jurisdiction. In Bell v. Hood, 327 U.S. 678, 683, 66 S. Ct. 773, 776, 90 L. Ed. 939, 942, 13 A.L.R.2d 383, 388 (1946), the Court found arising under jurisdiction was proper, even though the Complaint was not directly grounded on violations of rights alleged stemming from the Fourth and Fifth Amendments. The Bell Court held the alleged violations of the Constitution were not immaterial, but formed the sole basis of relief sought. Furthermore, in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) an implied cause of action was determined to have existed for an individual whose sacrosanct Fourth Amendment right to be free from unreasonable search and seizures had been violated by federal agents. Despite the lack of a federal statute authorizing such a suit, the United States Supreme Court found arising under jurisdiction was triggered, given the implication of a constitutional provision.

Finally, as the United States Supreme Court stated in American National Red Cross v. S.G., 505 U.S. 247, 112 S. Ct. 2465, 120 L. Ed. 2d 201(1992): "[The] holding [in this case] leaves the jurisdiction of the federal courts well within Article III's ["arising under" jurisdictional] limits." *Id.* at 264, 112 S. Ct. at 2475, 120 L. Ed. 2d at 217. "We have consistently reaffirmed the breadth of [the Osborn] holding. We would be loath to repudiate such a longstanding and settled rule." *Id.* at 264-65, 112 S. Ct. at 2476, 120 L. Ed. 2d at 217 (citations omitted).

In Gully v. First National Bank in Meridian, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936) Justice Cardozo aptly noted:

> How and when a case "arises under the Constitution or laws of the United States" has been much considered in the books. . . . The right or immunity [within the cause of action] must be such, that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

Id. at 112, 57 S. Ct. at 97, 81 L. Ed. at 72.

The issues raised by the Ehsas necessitate construction of the Constitution, in terms of the jurisdictional powers vested in this forum. We find, that arising under jurisdiction enables the FSM Supreme Court to explicate the meaning of these jurisdictional grants under our Constitution and thereby ensure an appropriate level of uniformity in the applicability thereof. Accordingly, Article XI, Section 6(b) "arising under" jurisdiction poses, yet another alternative, which could be invoked to properly validate subject matter jurisdiction.

V. Conclusion

We concur with the holding of the trial Court, *to wit*: that FSMDB is an instrumentality of the national government and therefore the FSM Supreme Court has jurisdiction under Section 6(a) of Article XI. In the alternative (once again, because exclusive and concurrent jurisdiction cannot be simultaneously present), concurrent jurisdiction properly exists, pursuant to Section 6(b), given the diverse citizenship of the parties. Finally, concurrent subject matter jurisdiction could also be implicated here, consonant with the "arising under" constitutional provision, as set forth in Article XI, Section 6(b); thereby yielding another option.

Accordingly, the Decision of the FSM Supreme Court Trial Division, Denying Relief From Judgment, is hereby AFFIRMED.

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