

**FEDERATED STATES OF MICRONESIA  
SUPREME COURT TRIAL DIVISION**

Cite as People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151 (Yap 2007)

**THE PEOPLE OF THE MUNICIPALITY OF WELOY, YAP  
STATE, by and through CHIEF JOHN PONG, CHIEF  
ZACHARY GAMOW, and CHIEF JOSEPH LUSON,  
Plaintiffs,**

**vs.**

**THE M/V CEC ACE, its engines, masts, bowsprit, boats,  
anchors, chains, cable, tackle, rigging, apparel, furniture  
and all other necessaries thereunto appertaining;  
In Rem Defendant,**

**K-S DIFKO, ACE SONDERLANDSGAD, CAPTAIN  
DURSUN ALI ALEMDARROGLU, MARIANA EXPRESS  
LINES, CLIPPER DENMARK, and MOLIVA SHIPPING INC.,  
In Personam Defendants.**

CIVIL ACTION NO. 2006-3004

**ORDER CONCERNING CLASS CERTIFICATION**

Dennis K. Yamase  
Associate Justice

Decided: June 29, 2007

**APPEARANCES:**

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## HEADNOTES

### **Civil Procedure - Class Actions**

Since each class must have a class representative of its own and must be represented by someone who claims the same injuries as the absent class members, and since a class cannot be certified if the same person is the representative of two different classes, the court will consider certifying only one class when all three named plaintiffs are alleged to represent the same class. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 156 (Yap 2007).

### **Civil Procedure - Class Actions**

The plaintiffs bear the burden of showing that all the requirements for a class action have been met. Under Rule 23, all class actions must satisfy all four prerequisites in subsection (a) - numerosity, commonality, typicality, and adequacy of representation - and any one of the three subsections in subsection (b). The failure to meet any one of the prerequisites precludes class certification. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 156-57 (Yap 2007).

### **[15 FSM Intrm 158]**

### **Civil Procedure - Class Actions**

A subsection (b)(3) class action can be maintained only if the court finds that the class members' common questions of law or fact predominate and that a class action is superior to other methods of adjudication. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 157 (Yap 2007).

### **Custom and Tradition - Yap; Marine Resources**

Under Yap traditional rights and ownership of natural resources and marine areas inside the Yap fringing reef - the rights to use and exploit, to the exclusion of all others, the marine resources of particular areas of the submerged lands inside the fringing reef around Yap - stem from a concept called a *tabinaw*. A *tabinaw* entails rights, duties and obligations for its members, and includes families and households. But a *tabinaw* is more than a concept. A *tabinaw* includes an estate in identifiable land and specific areas within the Yap fringing reef within which a *tabinaw* member can exploit the marine resources. A *tabinaw* member can only exploit marine resources in the marine area that appertains to his *tabinaw*. Each village includes a number of *tabinaw*. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 157 (Yap 2007).

### **Civil Procedure - Class Actions**

If the trial court decides that the class suggested or described in the complaint does not

meet the minimum standards of definiteness, the court has the discretion to limit or redefine the class in an appropriate manner to bring the action within Rule 23. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 157, 161 (Yap 2007).

#### **Civil Procedure - Class Actions; Marine Resources**

Since a *tabinaw* member can only exploit marine resources in the marine area that appertains to his *tabinaw*, the court can and will redefine the class to include only those residents whose *tabinaw* membership gives them exclusive exploitation or use rights in the affected reef area, regardless of whether the state is the ultimate owner of the reef. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 157 (Yap 2007).

#### **Civil Procedure - Class Actions**

A class action may be maintained only if the class is so numerous that joinder of all members is impracticable. Practicability of joinder depends on the size of the class, ease of identifying members and determining their addresses, facility of making service on members joined and their geographic dispersion. There are no arbitrary rules regarding the size of classes. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 157-58 (Yap 2007).

#### **Civil Procedure - Class Actions**

Mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1). People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 158 (Yap 2007).

#### **Civil Procedure - Class Actions**

Although 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).

**[15 FSM Intrm 159]**

#### **Civil Procedure - Class Actions**

An allegation that the named plaintiffs are the three highest chiefs in Weloy is sufficient to allege that they are Weloy residents. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 158 (Yap 2007).

#### **Civil Procedure - Class Actions**

To satisfy the typicality prerequisite, a class representative must be a member of the class and must possess the same interest and suffer the same injury as the class members. This prerequisite is inherent in the real party in interest requirement prescribed by Rule 17(a). People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

### **Civil Procedure - Class Actions**

A disparity in the amount of damages claimed by the class representative and other class members will not defeat certification. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

### **Civil Procedure - Class Actions**

If a named plaintiff is a member of, or chief of any of the one or more *tabinaw* that may claim the allegedly affected reef, that named plaintiff is an adequate class representative and his claims are typical of the class claims, but each named plaintiff must qualify as a class representative on his own merits and does not automatically qualify because another named plaintiff has. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 & n.3 (Yap 2007).

### **Civil Procedure - Class Actions**

Being a recognized community leader does not prevent a person from being an adequate class representative. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

### **Civil Procedure - Class Actions**

If the chiefs named as plaintiffs are not qualified, some other chief(s) who can satisfy the typicality and adequacy requirement may need to appear as class representative(s). People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

### **Civil Procedure - Class Actions**

Trial is too late for the plaintiffs to prove that the named plaintiffs' ability to be class representatives. Class certification should take place much earlier in the process than that. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

### **Civil Procedure - Class Actions**

The prerequisite that the named plaintiff will fairly and adequately protect the interests of the class is met when the representative shares, without conflict, the interests of the unnamed class members and the court is assured that the representative will vigorously prosecute the rights of the class through qualified counsel. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007).

### **Civil Procedure - Class Actions**

Since the court may make a class certification order conditional, the court will conditionally find that the named plaintiffs are adequate class representatives with typical claims, subject to the submission of later satisfactory evidence for each named plaintiff or to name new class representative(s). People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 159 (Yap 2007)

[15 FSM Intrm 160]

### **Civil Procedure - Class Actions**

For a case to proceed under Rule 23(b)(3), the court must find that the questions in common to the class predominate over those affecting only individual class members. In determining whether the predominance standard is met, courts focus on the issue of liability. If the liability issue is common to the class, common questions are held to predominate over individual ones. But if there is present a likelihood that significant questions not only of damages but of liability and defenses to liability will arise affecting only individual members of the class in different ways, class action treatment is inappropriate. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 160 (Yap 2007).

### **Civil Procedure - Class Actions; Torts - Infliction of Emotional Distress**

Common issues of law and fact do not predominate for an infliction of emotional distress claim because this cause of action involves personal injury. A claim for infliction of emotional distress cannot be sustained without evidence of physical injury to the plaintiff or of a foreseeable physical manifestation or physical illness resulting from the plaintiffs' mental and emotional distress. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 160 (Yap 2007).

### **Civil Procedure - Class Actions; Torts - Causation**

Causation and damages can appropriately be proven on a class basis when the basis for each person's claim is the same. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 160 (Yap 2007).

### **Civil Procedure - Class Actions; Torts - Infliction of Emotional Distress**

When the complaint does not allege that the class as a whole suffered a common physical injury, any compensable emotional distress must be each individual's physical manifestation or illness. Since the basis of each person's claim, and of the defendants' liability for that claim, is different for each class member and evidence of this necessary element for liability on an emotional distress claim would thus be highly individualized and unique to each class member and could only be proven on an individual basis, class certification of infliction of emotional distress claims would not be appropriate. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 160 (Yap 2007).

### **Civil Procedure - Class Actions; Torts - Infliction of Emotional Distress**

When each person's individual infliction of emotional distress claim would require a separate mini-trial, no class can be certified for this cause of action and any claims for the personal injury of infliction of emotional distress will have to proceed on an individual basis. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 160 (Yap 2007).

### **Civil Procedure - Class Actions; Civil Procedure - Pleadings - Amendment; Torts - Infliction of Emotional Distress**

If the court is persuaded that no definable class is present, it may have the class

allegations stricken and allow the action to proceed on an individual basis. Thus when no definable class is present for the infliction of emotional distress cause of action, the court will order that the complaint be amended to eliminate allegations that the named plaintiffs represent absent persons for any infliction of emotional distress claims and the named plaintiffs may proceed on their individual infliction of emotional distress claims, if they so choose. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 160-61 (Yap 2007).

### **[15 FSM Intrm 161]**

#### **Civil Procedure - Class Actions**

Since Rule 23 is to be liberally construed so that in doubtful cases, a court should decide in favor of a class action, the court can conditionally certify a class subject to the plaintiffs providing further information about the potential size of the plaintiff class (numerosity) who claim rights in the area of the reef affected by the alleged grounding and on whether the named plaintiffs are adequate class representatives with typical claims or to name new class representative(s). People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 161 (Yap 2007).

#### **Civil Procedure - Class Actions**

When a class has been conditionally certified, plaintiffs' counsel shall prepare and have approved as to form by defendants' counsel a notice defining membership in the class, stating that it has been certified as plaintiffs in this action, identifying this action and the court it is in, and advising each member that the court will exclude the member from the class if the member so requests by a specified date; the judgment, whether favorable or not, will include all members who do not request exclusion; and any member who does not request exclusion may, if the member desires, enter an appearance through counsel. The notice shall also include that if any person suffered physical injury or illness because of emotional distress caused by the defendants that person must pursue his or her claim individually and must enter their own appearance. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 161 (Yap 2007).

#### **Civil Procedure - Class Actions**

The best notice to the class practicable under the circumstances must include at a minimum, but not be limited to, notice by frequent, periodic announcements on the state radio station over a period of two weeks, publication in at least two issues of the local newspaper, the posting of copies in the village meeting place in each and every village in the municipality, and the posting of copies in all public places, such as the courthouse, the post office, and the library, and other places where public notices may be posted. People of Weloy ex rel. Pong v. M/V CEC Ace, 15 FSM Intrm. 151, 161 (Yap 2007).

#### **Attorney's Fees; Torts - Damages**

An attorney's fees award under a private attorney general theory can only be made, if at all, at the litigation's conclusion. People of Weloy ex rel. Pong v. M/V CEC Ace, 15

FSM Intrm. 151, 161-62 (Yap 2007).

\* \* \* \*

[15 FSM Intrm 162]

## COURT'S OPINION

**DENNIS K. YAMASE, Associate Justice:**

On March 15, 2007, the court issued a scheduling order that, among other things, required the parties to file and serve no later than April 24, 2007, their views on whether this suit may be maintained as a class action or actions with fourteen days given for the opposing parties' responses. On March 28, 2007, the plaintiffs filed their Motion for Class Certification. On April 11, 2007, the court approved and entered the parties' stipulation that, among other things, set the time to respond to the March 28, 2007 motion to April 30, 2007 and set May 24, 2007 as a deadline for the defendants to file their "position statement" on whether this action could be maintained as a class action, with the plaintiffs given fourteen days to respond.

The defendants filed their response and opposition to the class certification motion on April 13, 2007. The plaintiffs filed their reply on April 27, 2007. No defendants' "position statement" was filed in May. The matter is now therefore before the court.

### I. Plaintiffs' Position

The plaintiffs' verified complaint alleges that, on November 23, 2005, the M/V *Cec Ace* crashed into and damaged a 392 square meter section of the Colonia Harbor Reef where the plaintiffs own the rights to utilize the marine resources. The named plaintiffs, Chiefs John Pong, Zachary Gamow, and Joseph Luson, seek to maintain this action as a class action and allege six causes of action upon which they assert the defendants are liable: 1) maritime negligence, 2) infliction of serious emotional distress, 3) unseaworthiness of the vessel, 4) trespass, 5) nuisance (public and private), and 6) punitive damages.

The plaintiffs' motion asks that the court certify two classes of plaintiffs: 1) all residents of Weloy who (a) are unable to use the natural resources appertaining to Weloy following the November 23, 2005 alleged incident, and (b) by tradition own in common with other residents the natural resources affected by the grounding, including the water column, fish and other sea life, and other affected natural resources; and 2) all residents and members of the unincorporated Municipality of Weloy. The plaintiffs, in their reply, limit their certification motion to only the first class and ask for an award of attorney's fees and costs based on, in their view, the defendants' unnecessary opposition to certification in light of the case precedent of previous class certifications in Yap.

Since each class must have a class representative of its own and must be represented by someone who claims the same injuries as the absent class members, a class cannot be certified if the same person is the representative of two different classes. People of Weloy ex rel. Pong v. M/V Micronesia Heritage, 12 FSM Intrm. 613, 617 (Yap 2004); People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 200 (Yap 2003) (when all the named plaintiffs are members of one class they cannot be class representatives of a second class; certification of the second class must be denied). Since all three named plaintiffs are alleged to represent the same class, the court will consider certifying only the first class.

## II. Class Certification Requirements

### [15 FSM Intrm 163]

The plaintiffs bear the burden of showing that all the requirements for a class action have been met. People of Rull, 12 FSM Intrm. at 196. Under Rule 23, all class actions must satisfy all four prerequisites in subsection (a) - numerosity, commonality, typicality, and adequacy of representation - and any one of the three subsections in subsection (b). The failure to meet any one of these prerequisites precludes class certification. A subsection (b)(3) class action, as the plaintiffs seek here, can be maintained only if the court finds that the class members' common questions of law or fact predominate and that a class action is superior to other methods of adjudication. People of Rull, 12 FSM Intrm. at 196; Saret v. Chuuk, 10 FSM Intrm. 320, 321 (Chk. 2001); Lavides v. Weilbacher, 7 FSM Intrm. 591, 593 (Pon. 1996).

The defendants assert that the class as defined by the plaintiffs cannot be certified because, in their view, Weloy Municipality residents do not own the submerged lands or marine resources in common; because the plaintiffs have not shown that the class is too large for practical joinder; because the named plaintiffs have not shown they can adequately represent the class since they failed to allege that they are members of the *tabinaw* or *tabinaws* that own or control the resources of that portion of the reef; and because common questions of law and fact do not predominate since, in their view, the question that will predominate is whether the defendants owe damages to individuals under private ownership rights, and, if so, to whom and how much.

## III. Analysis

### A. *Definiteness*

The defendants contend that the class cannot be certified because the plaintiffs do not own the reef, the State of Yap does. The defendants further contend that even if private persons have some ownership interest in the reef its marine resources, it is not vested in Weloy residents but in *tabinaw* whose members have exclusive rights to exploit the marine resources in the marine areas that appertain to the *tabinaw*.



The court has previously held that:

Under Yap traditional rights and ownership of natural resources and marine areas inside the Yap fringing reef - the rights to use and exploit, to the exclusion of all others, the marine resources of particular areas of the submerged lands inside the fringing reef around Yap - stem from a concept called a *tabinaw*. A *tabinaw* entails rights, duties and obligations for its members, and includes families and households. But a *tabinaw* is more than a concept. A *tabinaw* includes an estate in identifiable land and specific areas within the Yap fringing reef within which a *tabinaw* member can exploit the marine resources. . . . A *tabinaw* member can only exploit marine resources in the marine area that appertains to his *tabinaw*. Each village includes a number of *tabinaw*.

People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 415 (Yap 2006).

The defendants' objections are an assertion that a plaintiff class of all Weloy residents is not sufficiently definite. The court agrees. But if the trial court decides that the class suggested or described in the complaint does not meet the minimum standards of definiteness, the court has the discretion to limit or redefine the class in an appropriate manner to bring the action within Rule 23. People of Weloy, 12 FSM Intrm. at 618. Therefore the court can and will redefine the class to include only those residents whose *tabinaw* membership gives them exclusive exploitation or use rights in the affected reef area, regardless of whether the state is the ultimate owner of the reef.

#### **[15 FSM Intrm 164]**

##### *B. Numerosity*

The defendants also assert that the plaintiffs have not shown that the suggested class is too large for practical joinder. A class action may be maintained only if the class is so numerous that joinder of all members is impracticable. Practicability of joinder depends on the size of the class, ease of identifying members and determining their addresses, facility of making service on members joined and their geographic dispersion. There are no arbitrary rules regarding the size of classes. Saret, 10 FSM Intrm. at 322; Lavides, 7 FSM Intrm. at 593-94.

The plaintiffs assert that there are about 1,197 residents of Weloy. This is not that helpful since it is apparent that the class of Weloy residents with an interest in the damaged area of the reef must be less than all residents. The plaintiffs attach to their reply a copy of an Amended Affidavit of Chief Pong, dated July 7, 2004, which asserts that the number of Weloy residents affected by the grounding of the M/V *Micronesia Heritage* was about 500. That affidavit was originally filed in Civil Action No. 2004-3000 and concerned the

M/V *Micronesian Heritage* running aground on Fiteenguch Reef on June 21, 2003, while navigating in Colonia Harbor. No separate affidavits were filed in this case to support this certification motion although the complaint itself was verified by all three named plaintiffs.

In this case, the M/V *Cec Ace* is alleged to have crashed into and damaged a 392 square meter section of reef while navigating in Colonia Harbor. It is unknown whether the portion of the reef allegedly struck in this case is exactly the same as in the *Micronesian Heritage* case or is nearby, but either way, the court, for lack of better evidence, can infer that a roughly similar number of Weloy residents may be involved in this case. Since "mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1)," 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1762, at 164 (2d ed. 1986),<sup>i</sup> the court will therefore conditionally find that the numerosity prerequisite has been met, subject to later evidence that either confirms that or negates that.

### C. Typicality and Adequacy

The defendants also contend that the plaintiffs cannot satisfy the typicality and adequacy prerequisites because the three named plaintiffs have not alleged that they are residents of Weloy and are either members of the *tabinaw*(s) allegedly affected by the M/V *Cec Ace*'s navigation on November 23, 2005 or that they have a cognizable claim to ownership of the part of the reef where the M/V *Cec Ace* allegedly grounded or to the marine resources located there.

The plaintiffs assert that there is no question that the chiefs are residents of Weloy and are representatives of the people of Weloy. They assert that trial may be held for proof of this. They also rely on Chief Pong's July 7, 2004 affidavit and the class certification in the other People of Weloy cases, Civil Actions No. 2004-3000 and 2004-3001, where the same chiefs served as class representatives.<sup>ii</sup>

An allegation that the named plaintiffs are the three highest chiefs in Weloy is sufficient to allege that they are Weloy residents.

### [15 FSM Intrm 165]

To satisfy the typicality prerequisite, a class representative must be a member of the class and must possess the same interest and suffer the same injury as the class members. People of Rull, 12 FSM Intrm. at 199. "This prerequisite is inherent in the real party in interest requirement prescribed by Rule 17(a)." 7A Wright, Miller & Kane, *supra*, § 1761, at 132-33; *see also* Mays v. Scranton City Police Dep't, 87 F.R.D. 310, 314 (M.D. Pa. 1979); Booth v. Prince George's County, 66 F.R.D. 466, 471 (D. Md. 1975). But a disparity in the amount of damages claimed by the class representative and other class members will not defeat certification. 7A Wright, Miller & Kane, *supra*, § 1764, at 236-

41.

If a named plaintiff (Chiefs Pong, Gamow, and Luson) is a member of, or chief of any of the one or more *tabinaw* that may claim the allegedly affected reef, that named plaintiff is an adequate class representative and his claims are typical of the class claims.iii Being a recognized community leader does not prevent a person from being an adequate class representative. *See, e.g., In re Antibiotic Antitrust Actions*, 333 F. Supp. 267, 268 (S.D.N.Y. 1971) (state attorneys general are natural class representatives of class of government entities with the states); *McDaniel v. Board of Pub. Instruction*, 39 F. Supp. 638, 641 (N.D. Fla. 1941) (school principal could be class representative of teachers since all are members of same profession whose qualifications are prescribed by the school board); *Purcell v. Summers*, 34 F. Supp. 421, 428 (E.D.S.C. 1940) (Methodist church bishops can adequately represent class of all Methodist church members). If the named plaintiffs are not qualified, some other chief(s) who can satisfy the typicality and adequacy requirement may need to appear as class representative(s).

The plaintiffs' pleadings and the above-mentioned affidavit assert the ability of the three named chiefs to represent Weloy Municipality as a whole in ecosystem damage claims. If the plaintiff class included all Weloy residents, the named plaintiffs' ability to be class representatives would be unquestioned. However, in this case, it is only part of Weloy Municipality that can claim their reef and marine resources were affected by the M/V *Cec Ace*.

The plaintiffs contend that they can prove at trial the named plaintiffs' ability to be class representatives. Trial is too late. Class certification should take place much earlier in the process than that. FSM Civ. R. 23(c)(1) (certification must take place "[a]s soon as practicable after the commencement of an action brought as a class action"). The court should make its class determination before turning to the case's merits. *Haas v. Pittsburgh Nat'l Bank*, 60 F.R.D. 604, 612 (W.D. Pa. 1973). The prerequisite that the named plaintiff will fairly and adequately protect the interests of the class is met when the representative shares, without conflict, the interests of the unnamed class members and the court is assured that the representative will vigorously prosecute the rights of the class through qualified counsel. *Kaminski v. Shawmut Credit Union*, 416 F. Supp. 1119, 1123 (D. Mass. 1976).

Since the court may make a class certification order conditional, FSM Civ. R. 23(c)(1); *cf. People of Weloy*, 12 FSM Intrm. at 618 (if an order defining and certifying a class action later proves inadequate, the order may be altered or amended before the decision on the merits), the court will therefore conditionally find that the named plaintiffs are adequate class representatives with typical claims, subject to the submission of later evidence. The plaintiffs shall have until August 15, 2007, to submit satisfactory evidence for each named plaintiff or to name new class representative(s). *Cf. Rothman v. Gould*, 52 F.R.D. 494, 496, 501 (S.D.N.Y. 1971) (if class representative unqualified, instead of dismissal of class claims, notice will be given to class to allow other class members to

come forward who may be ready and able to carry on the litigation); *see also* Lowenschuss v. Bluhdorn, 78 F.R.D. 675, 678 (S.D.N.Y. 1978) (disqualified class representative has duty to seek substitute representative and must give notice to class).

#### **[15 FSM Intrm 166]**

##### *D. Commonality and Predominance*

For a case to proceed under Rule 23(b)(3), the court must find that the questions in common to the class predominate over those affecting only individual class members. "In determining whether the predominance standard is met, courts focus on the issue of liability. If the liability issue is common to the class, common questions are held to predominate over individual ones." Zapata v. IBP, Inc., 167 F.R.D. 147, 165 (D. Kan. 1996) (citations omitted). But "if there is present a likelihood that significant questions not only of damages but of liability and defenses to liability will arise affecting only individual members of the class in different ways, class action treatment is inappropriate." In re Transit Co. Tire Antitrust Litig., 67 F.R.D. 59, 72 (W.D. Mo. 1975).

The plaintiffs' first, third, fourth, fifth, and sixth causes of action all involve economic damages allegedly caused by the M/V *Cec Ace* running aground on Colonia Harbor Reef on November 23, 2005. The common questions of law or fact include: did the M/V *Cec Ace* strike the reef on November 23, 2005?; what damage was caused?; what effect did that have on the marine ecosystem and use of marine resources in Weloy?; are the defendants liable for these damages?; and, how to measure those damages. Thus, these five causes of action all involve common questions of law and fact and those questions predominate.

##### *E. Infliction of Emotional Distress*

However, for the plaintiffs' second cause of action - infliction of emotional distress - common issues of law and fact do not predominate. This cause of action involves personal injury. A claim for infliction of emotional distress cannot be sustained without evidence of physical injury to the plaintiff or of a foreseeable physical manifestation or physical illness resulting from the plaintiffs' mental and emotional distress. People of Rull, 14 FSM Intrm. at 419; Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004); Tomy v. Walter, 12 FSM Intrm. 266, 272 (Chk. S. Ct. Tr. 2003); Hauk v. Board of Dirs., 11 FSM Intrm. 236, 241 (Chk. S. Ct. Tr. 2002); Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998); Eram v. Masaichy, 7 FSM Intrm. 223, 227 (Chk. S. Ct. Tr. 1995). The defendants' actions or omissions must be the proximate cause of the plaintiff's physical injury or of his or her foreseeable physical manifestation or physical illness.

Causation and damages can appropriately be proven on a class basis when the basis for each resident's claim is the same. People of Rull, 14 FSM Intrm. at 417. Since the complaint does not allege that the class as a whole suffered a common physical injury,

any compensable emotional distress must be each individual's physical manifestation or illness. The basis of each resident's claim, and of the defendants' liability for that claim, is different for each class member. Evidence of this necessary element for liability on an emotional distress claim would thus be highly individualized and unique to each class member and could only be proven on an individual basis.

**[15 FSM Intrm 167]**

Therefore class certification of infliction of emotional distress claims would not be appropriate. In re Tri-State Crematory Litig., 215 F.R.D. 660, 698 (N.D. Ga. 2003). Each person's individual claim would require a separate mini-trial. Thus no class can be certified for this cause of action. Any claims for the personal injury of infliction of emotional distress will have to proceed on an individual basis. "[I]f the court is persuaded that no definable class is present, it may have the class allegations stricken and allow the action to proceed on an individual basis." 7A Wright, Miller & Kane, *supra*, § 1760, at 131. No definable class is present for the infliction of emotional distress cause of action. The court therefore orders that the complaint be amended to eliminate allegations that the named plaintiffs represent absent persons for any infliction of emotional distress claims. FSM Civ. R. 23(d)(4). The named plaintiffs may proceed on their individual infliction of emotional distress claims, if they so choose.

*F. Class as Defined*

If the court decides that the class suggested or described in the complaint does not meet the minimum standards of definiteness, the trial court has the discretion to limit or redefine the class in an appropriate manner to bring the action within Rule 23. People of Weloy, 12 FSM Intrm. at 618. Thus the class will be certified as follows: those residents of Weloy Municipality who by tradition own in common with other residents the rights to use or exploit the natural resources affected by the alleged grounding of the M/V *Cec Ace* on a portion of the Colonia Harbor Reef on November 23, 2005.

*G. Certification is Conditional*

Since "Rule 23 is to be liberally construed so that in doubtful cases, a court should decide in favor of a class action," People of Weloy, 12 FSM Intrm. at 618, a class is therefore conditionally certified in this case. As stated above, this class certification is conditional upon the plaintiffs providing further information about the potential size of the plaintiff class (numerosity) who claim rights in the area of the reef affected by the alleged grounding and on whether the named plaintiffs are adequate class representatives with typical claims or to name new class representative(s). The plaintiffs shall have until August 15, 2007, to make these submissions.

**IV. Required Notice to Plaintiff Class**

A class having been conditionally certified, plaintiffs' counsel shall prepare and have approved as to form by defendants' counsel a notice, in both Yapese and English, defining membership in the class, stating that it has been certified as plaintiffs in this action, identifying this action and the court it is in, and advising "each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." FSM Civ. R. 23(c)(2). The notice shall also include that if any person suffered physical injury or illness because of emotional distress caused by the defendants that person must pursue his or her claim individually and must enter their own appearance.

The plaintiffs shall submit to the court, no later than July 30, 2007, the proposed notice and a proposed order requiring "the best notice practicable under the circumstances." *Id.* This order must include at a minimum, but not be limited to, notice by frequent, periodic announcements on radio station V6AI over a period of two weeks, publication in at least two issues of the Yap Networker (YNN), the posting of copies in the village meeting place in each and every village in Weloy municipality, and the posting of copies in all public places in Yap, such as the courthouse, the post office, and the library, and other places where public notices may be posted. Counsel may include additional methods of notice designed to effect Rule 23(c)(2).

## **V. Attorney's Fees Motion**

### **[15 FSM Intrm 168]**

Lastly, the plaintiffs ask for an order granting them their attorney's fees and costs, under the private attorney general doctrine, for the defendants' "unnecessary" opposition to the plaintiffs' class certification motion in the light of prior Yap grounding cases. This appears to be, although it is not denominated as such, a Rule 11 motion for sanctions, to which the defendants have not responded. In light of the court's ruling in this order, no Rule 11 sanctions can possibly be granted. The plaintiffs' request for their fees and costs on their reply is denied. An attorney's fees award under a private attorney general theory can only be made, if at all, at the litigation's conclusion.

## **VI. Conclusion**

The plaintiff class is conditionally certified for all causes of action except the infliction of emotional distress claims. The plaintiffs have until August 15, 2007, to provide further information about the potential size of the plaintiff class who claim rights in the area of the reef affected by the alleged grounding and on whether the named plaintiffs are adequate class representatives with typical claims or to name new class representative(s). The conditional class certification does not include the infliction of emotional distress claims, and the class allegations for those claims must be stricken and amended pleadings

filed since those claims can only proceed on an individual basis. Plaintiffs' counsel shall, by July 30, 2007, prepare a class notice in English and Yapese to be approved as to form by the defendants. The plaintiffs' request to be awarded their fees and costs for their reply to the defendants' opposition to certification is denied.

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**Footnotes:**

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i. Although 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 an FSM civil procedure rule which is identical or similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the rule. *See, e.g.*, *Primo v. Pohnpei Transp. Auth.*, 9 FSM Intrm. 407, 413 n.3 (App. 2000); *Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440, 444 (App. 1994). FSM Civil Procedure Rule 23 is similar to U.S. Federal Rule of Civil Procedure 23. The court has not previously considered certain aspects of Rule 23.

ii. They also rely on a chapter 6 of a treatise authored by Lingenfelter which they state is attached to their reply. It is not, so therefore it was not considered.

iii. Each named plaintiff must qualify as a class representative on his own merits and does not automatically qualify because another named plaintiff has.