and not also on the governor as required by that rule. Chuuk also moves to dismiss the case against it because the plaintiffs lack standing to sue; because Chuuk is not a real party in interest; and because the six-year statute of limitations bars the plaintiffs' claims against it.

Chuuk has waived any right to move for insufficiency of the service of process since it did not raise that defense either before or in its answer to the plaintiffs' original complaint. The filing of an answer not asserting the Rule 12(b)(5) defense of insufficient service constitutes a waiver of that defense. FSM Civ. R. 12(h)(1).

Chuuk also moves for dismissal on statute of limitations grounds. Under Chuuk State Law No. 5-01-39, § 11, actions for breach of contract (or breach of a lease) must be commenced within six years of the date the right to sue accrues.

When the allegations of the plaintiff's own complaint demonstrate that certain of its claims are subject to the defense of statute of limitations, the court may dismiss those claims on the statute of limitations, even though it is generally an affirmative defense. Aunu v. Chuuk, 18 FSM R. 48, 50-51 (Chk. 2011); Mobil Oil Micronesia, Inc. v. Pohnpei Port Auth., 13 FSM R. 223, 228 (Pon. 2005).

The amended complaint's claims against the defendant State of Chuuk are for lease payments allegedly due in 1997, 1998, and 1999. The complaint in this case was filed May 5, 2021.

III.

NOW THEREFORE IT IS HEREBY ORDERED that this matter is dismissed without prejudice for claims against defendant Chuuk Public Utilities Corporation and dismissed with prejudice for all claims against the State of Chuuk that accrued before May 5, 2015.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. SHOTA ISHIKAWA (Captain of the fishing vessel), TAKASHI KAWAMURA (Master of the fishing vessel), SARAJI KASUAN (Cook), and TAIYO MICRONESIA CORPORATION (Owner),TAIYO TOFOL, a Purse Seine fishing vessel, together with her fishing gear, furniture, appurtenances, stores and cargo, including catch, Defendants.	)	CIVIL ACTION NO. 2021-018

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Dennis L. Belcourt
Associate Justice

FSM v. Ishikawa
23 FSM R. 459 (Pon. 2021)

Hearing: August 26, 2021
Submitted: September 13, 2021
Decided: December 9, 2021

APPEARANCES:

For the Plaintiff: Josephine Leben James, Esq.
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* * * *

HEADNOTES

Civil Procedure – Dismissal – Before Responsive Pleading

A court evaluates a Rule 12(b)(6) motion to dismiss only on whether a plaintiff's claim has been adequately stated in the complaint, and does not resolve the case's facts or merits. A court's review is limited to the complaint's contents and the court must assume the facts alleged therein are true and view them in the light most favorable to the plaintiff. Dismissal can only be granted if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. FSM v. Ishikawa, 23 FSM R. 459, 467 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Summary Judgment – Procedure

When both the plaintiff and the defendants have submitted matters outside the complaint (and no answer having been filed), the court can accept such matters for consideration and elect to treat the defendants' Rule 12(b)(6) motion to dismiss as a motion for summary judgment. FSM v. Ishikawa, 23 FSM R. 459, 467 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Summary Judgment – Procedure

When a party in support of or in opposition to a Rule 12(b)(6) motion to dismiss submits matters outside of the pleadings, a court has complete discretion to exclude those matters from consideration or to accept those matters and treat the motion as one for summary judgment. FSM v. Ishikawa, 23 FSM R. 459, 467 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

The standard for granting a summary judgment motion is whether the pleadings, depositions, answers to interrogatories, and admissions on file, taken together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden is on the movant. FSM v. Ishikawa, 23 FSM R. 459, 467 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds; Civil Procedure – Summary Judgment – Procedure

In reviewing a summary judgment motion, the court must view the facts, and any inferences deduced therefrom, in the light most favorable to the party opposing summary judgment. Before summary judgment can be granted, it must be clear what the truth is, and any doubt as to the existence of a genuine issue of

material fact will be resolved against the movant. FSM v. Ishikawa, 23 FSM R. 459, 467 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds; Civil Procedure – Summary Judgment – Procedure

The order of burdens in a summary judgment motion is that the party moving for summary judgment has the initial burden of showing that there are no triable issues of fact. Once the movant has done this, the burden shifts to the non-moving party. It is not enough for the non-moving party to simply disagree with the movant and attempt to show, through affidavits or otherwise, that there is a triable issue. The opposing party must show that there is enough evidence supporting his position to justify a decision upholding his claim by a reasonable trier of fact. If the evidence, affidavits, and pleadings present a sufficient disagreement to require submission to a fact finder, then the motion must be denied, but if the evidence is so one-sided that one party must prevail as a matter of law, then the motion must be granted. FSM v. Ishikawa, 23 FSM R. 459, 467-68 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds; Civil Procedure – Summary Judgment – Procedure

A movant for summary judgment needs to prove its prima facie factual case as to why it is entitled to judgment as a matter of law. To defeat a summary judgment motion when the movant has proven a prima facie case, the opponent needs to establish, at least, that a genuine issue of material and triable fact exists, i.e., that a factual element of movant's prima facie case is in genuine dispute. FSM v. Ishikawa, 23 FSM R. 459, 468 (Pon. 2021).

Civil Procedure – Affidavits; Civil Procedure – Summary Judgment – Procedure

Supporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit must be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. FSM v. Ishikawa, 23 FSM R. 459, 468 (Pon. 2021).

Civil Procedure – Affidavits; Civil Procedure – Summary Judgment – Procedure; Evidence – Authentication

When the authenticity of a document submitted to support a summary judgment motion is in dispute, an affidavit purporting to authenticate the document must be made by a person having personal knowledge of that document, and even a duplicate so authenticated may not suffice. FSM v. Ishikawa, 23 FSM R. 459, 468 (Pon. 2021).

Civil Procedure – Summary Judgment – Procedure; Evidence – Authentication

When the defendants moving for summary judgment have offered documents that are not authenticated by affidavits made on an affiant's personal knowledge in compliance with Rule 56(e), the court may find it appropriate that evidence noncompliant with Rule 56(e) may be considered if no objection is made. FSM v. Ishikawa, 23 FSM R. 459, 468 (Pon. 2021).

Marine Resources – Regulation of; Statutes of Limitations

As 24 F.S.M.C. 701(3) applies to criminal informations as well as civil actions for fishery violations, the rule of construction applicable to criminal statutes of limitations should govern. Although statutes of limitation on criminal prosecutions must be accorded a rational meaning in harmony with the law's obvious intent and purpose, such statutes must be liberally construed in the accused's favor, and exceptions from the benefits of such statutes must be construed narrowly or strictly against the government. This rule of strict construction does not justify an unreasonable interpretation – one contrary to the law's intent. FSM v. Ishikawa, 23 FSM R. 459, 469 (Pon. 2021).

Marine Resources – Regulation of; Statutes of Limitations – Accrual of Action

The decision to file a complaint or an information can only be made upon discovery of a violation. Thus, a rational meaning of section 701(3) in harmony with the law's obvious intent and purpose would be that Congress did not want to have the clock start running on suits until the facts constituting the marine

resources violation were discovered by the person who is responsible for making a decision to file a civil complaint on the violation. FSM v. Ishikawa, 23 FSM R. 459, 469 (Pon. 2021).

Agency

FSM law follows general agency law in imputing knowledge held by an agent to its principal. FSM v. Ishikawa, 23 FSM R. 459, 469 (Pon. 2021).

Agency

The general rule of imputation of knowledge from agent to principal rests upon a legal fiction and a presumption. The fiction is that when the agent acts within the scope of the agency relationship, there is an identity of interest between principal and agent. The presumption is that the agent will perform his duty and communicate to his principal the facts that the agent acquires while acting in the scope of the agency relationship. Thus, under the rule of imputation the principal is chargeable with the knowledge the agent has acquired, whether the agent communicates it or not. FSM v. Ishikawa, 23 FSM R. 459, 469-70 (Pon. 2021).

Agency

An agency relationship is based upon one person's consent that another shall act on his behalf and be subject to his control. It does not necessarily matter whether the principal in an agency relationship selects or pays the agent for its services. FSM v. Ishikawa, 23 FSM R. 459, 470 (Pon. 2021).

Agency

The existence of an agency relationship is not negated merely because the agent is named by someone other than the principal. FSM v. Ishikawa, 23 FSM R. 459, 470 (Pon. 2021).

Agency; Common Law

The common law rules of agency, as expressed in the restatements of the law approved by the American Law Institute, are rules of decision in the FSM Supreme Court in the absence of applicable written or customary law. Under those rules, an agent need not be an employee of the principal, or be compensated by the principal. An express or implied agreement that the agent would act on the principal's behalf suffices. FSM v. Ishikawa, 23 FSM R. 459, 470 (Pon. 2021).

Agency; Statutes of Limitations – Accrual of Action

For imputation of knowledge purposes, the scope of agency need not extend to authority to bind the principal but may be as limited as the duty to give the principal information. The agent must have a duty to reveal the information which he has, and the imputation of information must allow for a lapse of such time as is reasonable for its communication. FSM v. Ishikawa, 23 FSM R. 459, 470 (Pon. 2021).

Marine Resources – Regulation of

An "authorized observer" is any person authorized in writing by the National Oceanic Resources Management Authority to act as an observer on fishing vessels for the purposes of the Marine Resources Act. Vessel operators are required to accept the Authority's authorized observers. Authorized observers, in accordance with any access agreement or fisheries management agreement, will exercise their duties beyond the FSM fishery waters and on the high seas and in waters under another nation's jurisdiction. FSM v. Ishikawa, 23 FSM R. 459, 471 (Pon. 2021).

Marine Resources – Regulation of; Marine Resources – Regulation of – Fishing Permits

Vessels with a valid permit and their crew must allow and assist any authorized observer to have full access to any place where fish taken are unloaded or transshipped; to remove reasonable samples for scientific purposes and to gather any information relating to fisheries in the fishery waters and to perform the authorized observer's scientific, compliance monitoring, as required. FSM v. Ishikawa, 23 FSM R. 459, 471 (Pon. 2021).

Agency; Marine Resources – Regulation of

An authorized observer is an agent of the National Oceanic Resources Management Authority and has the duty to communicate observed violations to the Authority, and a delay in the authorized observer's information in reaching the Authority or the Department of Justice is not due to the lack of an agency relationship between the authorized observer and the Authority. FSM v. Ishikawa, 23 FSM R. 459, 471-72 (Pon. 2021).

Marine Resources – Regulation of

The Department of Justice has the primary responsibility for fisheries enforcement, but is also required to collaborate with the National Oceanic Resources Management Authority in the monitoring and control of all fishing operations within the fishery waters, with both agencies having a duty to share information as to the exclusive economic zone, the territorial sea, and internal waters with each other. FSM v. Ishikawa, 23 FSM R. 459, 472 (Pon. 2021).

Marine Resources – Regulation of

The Department of Justice's role in fisheries enforcement is not limited to the FSM's fishery waters but extends beyond to include enforcement with respect to FSM flagged vessels on the high seas and other waters. The National Oceanic Resources Management Authority and the Department of Justice have a concurrent role regarding FSM-flagged vessel activities beyond FSM fishery waters. FSM v. Ishikawa, 23 FSM R. 459, 473 (Pon. 2021).

Agency; Marine Resources – Regulation of – Acts Violating; Statutes of Limitations – Accrual of Action

The interrelationship between the National Oceanic Resources Management Authority and the Department of Justice under the Marine Resources Act creates duties on the Authority's part to transmit information about fishery violations to the Department. Since the Authority, in its concurrent enforcement role with respect to FSM-flagged vessels, has a reason and duty to transmit information on fishery violations to the Department, the Authority's knowledge of the fishery violations is imputed to the Department for purposes of determining when discovery took place under the statute of limitations. FSM v. Ishikawa, 23 FSM R. 459, 473 (Pon. 2021).

Agency; Marine Resources – Regulation of; Statutes of Limitations – Accrual of Action

Information in an agent's hands is not immediately imputed to the principal, but requires that the principal be deemed to have such knowledge after the lapse of such time as is reasonable for its communication. Two weeks after an authorized observer has arrived on shore and reported his fishery violations information to the National Oceanic Resources Management Authority is a reasonable time for its communication to the Department of Justice and thus for knowledge of it to be imputed to the Department. FSM v. Ishikawa, 23 FSM R. 459, 473-74 (Pon. 2021).

Marine Resources – Regulation of; Statutes of Limitations – Tolling

The statute of limitation for fishery violations unambiguously excludes any statutory tolling for the two-year statutory limitation period for filing any information or complaint with respect to any fishery violations. FSM v. Ishikawa, 23 FSM R. 459, 474 (Pon. 2021).

Statutes – Construction

The phrase "notwithstanding any other provision of law," is a very comprehensive phrase, which signals a broad application overriding all other code sections unless it is specifically modified by use of a term applying to only to a particular code section or phrase. FSM v. Ishikawa, 23 FSM R. 459, 474 (Pon. 2021).

Marine Resources – Regulation of; Statutes of Limitations – Accrual of Action; Statutes of Limitations – Tolling

As a matter of law, when the statute of limitations for fishery violations began running by virtue of the authorized observer's observing the violations, it also began running against the defendants outside the FSM

without any tolling due to their absence. FSM v. Ishikawa, 23 FSM R. 459, 474 (Pon. 2021).

Marine Resources – Regulation of; Statutes of Limitations – Accrual of Action

A June 16, 2021 complaint is time-barred by a two-year statute of limitation when an authorized observer's knowledge of a March 16, 2019 violation is imputed to the National Oceanic Resources Management Authority and in turn to the Department of Justice under principles of agency law as set forth in the restatement of the law, after a reasonable time for communication of less than 28 days and when tolling under 6 F.S.M.C. 808 is inapplicable. FSM v. Ishikawa, 23 FSM R. 459, 475 (Pon. 2021).

Civil Procedure – Frivolous Actions; Civil Procedure – Sanctions – Rule 11

A time-barred complaint is neither frivolous nor vexatious when it raises issues of law not previously addressed in the FSM. FSM v. Ishikawa, 23 FSM R. 459, 475 (Pon. 2021).

Civil Procedure – Motions – Rule 6(d) Certification; Civil Procedure – Sanctions – Rule 11

A Rule 11 motion's failure to contain a Rule 6(d) certification that the movant has made a reasonable effort to obtain the opposing party's agreement or acquiescence and that no such agreement has been forthcoming can be a basis for denying the motion outright, without prejudice. FSM v. Ishikawa, 23 FSM R. 459, 475 (Pon. 2021).

* * * *

COURT'S OPINION

DENNIS L. BELCOURT, Associate Justice:

This matter is before this Court on Defendants'[1] 12(b)(6) Motion to Dismiss the Verified Complaint, which motion was filed on June 25, 2021. As matters outside the pleadings were submitted on this motion and not excluded by the Court, the motion is treated as one for summary judgment pursuant to FSM Civil Rule 12(b). Finding on the material undisputed facts that the Complaint was filed more than two years after the FSM's discovery of the violations at issue in the Complaint occurred, summary judgment is granted in favor of Defendants. Defendants' motion for attorneys' fees or sanctions is denied.

I. SUMMARY OF PROCEEDINGS RELATED TO MOTION

The Verified Complaint (the Complaint) alleges certain violations of the Marine Resources Act of 2002, as amended (the MRA) which is codified at subtitle I of title 24 of the Code of the Federated States of Micronesia. The alleged violations concern shark-finning and disposal of waste by crew of the Taiyo Tofol, a vessel flagged in the FSM. The alleged violations occurred while the vessel was in Papua New Guinea's EEZ.

Causes of Actions Alleged in the Complaint

The Complaint alleges five causes of action are roughly summarized as follows: (1) violation of section 4.5 of the access agreement insofar as it incorporates Conservation and Management Measures related to retention or release of silky sharks; (2) violation of section 4.5 of the access agreement insofar as it incorporates Conservation and Management Measures related to discharging garbage, including food waste; (3) violation of section 913(2) prohibiting removal of shark fins on board fishing vessels, retention, transshipment, or landing of sharks or shark fins; (4) violation of section 913(4)(a) relating to failure to release properly and unnecessary harm during the release process of a shark; and (5) violation of section

[1] All named Defendants–Shota Ishikawa (the Captain), Takashi Kawamura (the master), Saraji Kasuan (the cook), Taiyo Micronesia Corporation (the owner), and Taiyo Tofol (the vessel)–were named as movants herein.

918 by contamination of the exclusive economic zone (EEZ)[2] by the discharge of non-biodegradable trash or debris.

Motion to Dismiss and Opposition

Defendants' motion seeks dismissal of the Complaint because the Complaint was filed more than two years after Plaintiff allegedly discovered the Defendants' violations. Section 701(3) of the MRA prescribes that "any information or complaint with respect to any violation of this subtitle must be filed within two years of the discovery of the violation." Defendants further contended that the two-year period for filing the Complaint is jurisdictional.

On July 5, 2021, Plaintiff filed an opposition to Defendants' Motion to Dismiss, contending that there are questions of fact as to when discovery occurred, putting forward March 19, 2021, when the National Oceanic Resources Management Authority ("NORMA") advised the FSM Department of Justice ("DOJ") of the violations, as a discovery date. Plaintiff further contended that the two year period in section 701(3) was tolled by absence of Defendants Ishikawa (the Captain), Kawamura (the Master), and Kasuan (the Chef) from the jurisdiction, who were in Japan. 6 F.S.M.C. 808. Plaintiff took issue with the characterization of the statutory period in section 701(3) as jurisdictional.

On July 12, 2021, TMC filed a Reply to Plaintiff's Opposition to Motion to Dismiss, arguing that the FSM discovered the violations when they were witnessed by Mr. Tabu, whose knowledge TMC contends must be imputed to Plaintiff. Based on the prefatory language in section 701(3) ("[n]othwithstanding any provision of any other law of the Federated States of Micronesia,"), TMC contests Plaintiff's interpretation that tolling provisions outside of that section are applicable and raises the additional argument that the doctrine of laches should apply based on delay prejudicial to TMC. TMC also requested sanctions under FSM Civil Rule 11, as a vexatious litigant or on other grounds.

On July 30, 2021, Defendant Taiyo Micronesia Corporation ("TMC") filed a supplemental brief, in which it further stated that the authorized observer for the FSM on board the vessel was an agent whose knowledge of the violations at issue, having been appointed pursuant to section 102(7) of title 24 of the Code of the Federated States of Micronesia, and pursuant to the Federated States of Micronesia Arrangement (FSMA), which was entered into by the countries that had entered into the Parties to the Nauru Agreement (PNA),[3] establishing the PNA Observer Agency (POA). TMC further noted that the Court lacked *in rem* jurisdiction over the vessel, which was never seized and in fact had been sold, and that the Complaint failed to state a claim upon which relief may be based, because (1) the events occurred outside of FSM waters, i.e., in the Papua New Guinea EEZ; and (2) the standards allegedly violated post-date the violations.

On August 9, 2021, Plaintiff filed an opposition to TMC's supplement, largely reiterating its previously stated arguments sets forth in its opposition to the motion to dismiss, and responding to Defendant's new arguments as follows: (1) *in rem* jurisdiction applies to proceeds of the sale and would be effected by service of the summons on TMC; (2) earlier versions of the violated standards were in effect when the violations occurred and were infringed by Defendants' conduct; (3) although violations occurred outside of FSM waters, the same rules of conduct applied because the vessel was an FSM-flagged vessel. Attached as an exhibit "A" to the opposition was an email chain that included Justino Helgen, a Senior Fisheries Compliance Officer with NORMA, in which he explains that the notification program currently in place was not in place until April 2019, 2-3 months after the violations. According to Mr. Helgen, since May 2019, there is in place "a system

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[2] Per 24 F.S.M.C. 102(23), the EEZ is defined by reference to title 18, which concerns the EEZ of the Federated States of Micronesia.

[3] PNA members are the FSM, the Marshall Islands, Kiribati, Palau, Papua New Guinea, Solomon Islands, and Tuvalu. Ex. B-7

that quickly notifies any PNA members of such allegations on their flag vessel."

On August 16, 2021, TMC filed a surreply to Plaintiff's opposition to its supplement, further restating its imputation argument. Addressing Plaintiff's Exhibit A, TMC argues that this Court should disregard that Exhibit as "outside the pleadings"–as on a motion to dismiss, it is within the Court's discretion to disregard documents outside the pleading. TMC further argues that the exhibit is immaterial on the issue of when discovery occurred, the relevant event being the authorized observer's discovery.

On August 23, 2021, Plaintiff filed an opposition to TMC's surreply, in which it continued to dispute the relevance of Mr. Tabu's knowledge, stating that NORMA may be an agent for purposes of imputation, noting it was notified of the violation on April 20, 2020. If that date was when the 2 year period started to run, the June 16, 2021 Complaint was timely.

Hearing; Brief on Agency

On motion of TMC, a hearing was held on Defendants' Motion to Dismiss on August 26, 2021. As an outgrowth of that hearing, this Court ordered the parties to brief on the issue of Mr. Davis Tabu's agency and imputation of what he observed to the FSM Government, inviting them to submit affidavits on material facts.

On September 6, 2021, Plaintiff and Defendant TMC filed initial briefs specifically addressing the issue of Mr. Tabu as agent. In its initial brief on agency, TMC argued that Mr. Tabu was in an agency relationship with the FSM based on his contract with POA, through its contractor MRAG. TMC included exhibits relating to the trips on which the violations occurred, such as the trip data reports, information relating to debriefing from one of the trip(s) in question, affidavits of witnesses, and an excerpt from testimony in another case, involving Taiyo Chuuk, another purse seining vessel, relating to the observer process.[4]

Plaintiff's initial brief on agency argues that Mr. Tabu, who it acknowledges was the authorized observer, was not an agent of the FSM because (1) he was not an agent as defined in section 102 of the MRA, which defines a person appointed or designated by the foreign fishing company; (2) he was not allowed to be an "authorized officer" of the FSM and therefore must be without authority to take enforcement action under the MRA, 24 F.S.M.C. 606(3);[5] and (3) in addition to being an employee of Marshall Islands Marine Resources Authority ("MIMRA"), was compensated by a third party, MRAG Asia Pacific Pty Ltd, which was contracted to administer the POA program for Regional Access Licensees.[6]

Filed on September 13, 2021, TMC's brief in response to Plaintiff's brief on agency, TMC contends that Mr. Tabu and the FSM Government had an agent-principal relationship, the elements of which are a relationship of trust wherein the agent has manifested consent to the principal that he shall act on the principal's behalf and subject to his control, and the principal has consented thereto. TMC asserts that consent to said relationship was manifested in the TMC Access agreement, pursuant to MRA section 102(7), and through Mr. Tabu's accepting an appointment as observer.

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[4] The exhibits, B-1 through B-13 comprised over two hundred pages. For voluminous filings, Bates-stamping (individually numbering the pages with a Bates-stamp or using the Bates-stamp function on a copy machine) is recommended.

[5] The language in 24 F.S.M.C. 606(3) relied on by Plaintiff was repealed by section 12 of Public Law No. 19-169 effective April 18, 2017.

[6] *See* Ex. B-10.

Also filed on September 13, 2021, Plaintiff's response to TMC's initial brief on agency reiterated its arguments as set forth in its brief dated September 6, 2021.

II. LEGAL STANDARD FOR RULING ON MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Defendants brought the motion to dismiss under Rule 12(b)(6) of the FSM Rules of Civil Procedure, for failure of the Complaint to state a claim upon which relief may be granted. A court evaluates a Rule 12(b)(6) motion to dismiss only on whether a plaintiff's claim has been adequately stated in the complaint, and does not resolve the facts or merits of the case. A court's review is limited to the complaint's contents and the court must assume the facts alleged therein are true and view them in the light most favorable to the plaintiff. Dismissal can only be granted if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. Latte Motors, Inc. v. Hainrick, 7 FSM R. 190, 192 (Pon. 1995).

With regard to the subject motion, both Plaintiff and Defendants submitted matters outside the Complaint (no answer having been filed), and the Court, accepting such matters for consideration, elects to treat the motion as a motion for summary judgment. *See* FSM Civil Rule 12(b), which in part provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

When a party in support of or in opposition to a Rule 12(b)(6) motion to dismiss submits matters outside of the pleadings, a court has complete discretion to exclude those matters from consideration or to accept those matters and treat the motion as one for summary judgment. Arthur v. Pohnpei, 16 FSM R. 581, 593 (Pon. 2009).

The standard for granting a motion for summary judgment is whether

> "the pleadings, depositions, answers to interrogatories, and admissions on file, taken together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FSM Civ. R. 56(c). *See also* Bank of Guam v. Island Hardware, Inc., 2 FSM R. 281, 284 (Pon. 1986). Moreover, the burden is on the movant, and the Court, in reviewing a motion for summary judgment, must view the facts, and any inferences deduced therefrom, in the light most favorable to the party opposing the summary judgment. Id. Of course, before summary judgment will be granted it must be clear what the truth is, Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962), and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant.

Berman v. Santos, 7 FSM R. 231, 235 (Pon. 1995).

The order of burdens in a motion for summary judgment is as follows:

> [T]he moving party has the initial burden of showing, through the pleadings, depositions, etc., that there are no triable issues of fact.
>
> Once the moving party has done this, however, the burden shifts to the non-moving party. It is not enough for the non-moving party to simply disagree with the moving party and attempt to show, through affidavits or otherwise, that there is a triable issue. The party opposed to the motion "must show that there is enough evidence supporting his position to

justify a decision upholding his claim by a reasonable trier of fact."

. . . .

. . . If the evidence, affidavits, and pleadings present a sufficient disagreement to require submission to a fact finder, then the motion should be denied. If, however, the evidence is so one-sided that one party must prevail as a matter of law, then the motion should be granted.

Alik v. Kosrae Hotel Corp., 5 FSM R. 294, 295-96 (Kos. 1992) (emphasis in original) (citations omitted).

In summary, a movant for summary judgment needs to prove its prima facie factual case as to why it is entitled to judgment as a matter of law; to defeat a motion for summary judgment where the movant has proven a prima facie case, the opponent needs to establish, at least, that a genuine issue of material/triable fact exists, i.e., that a factual element of movant's prima facie case is in genuine dispute.

Manner of Proof of Facts in Summary Judgment

FSM Rule of Civil Procedure 56(e) requires that

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Where authenticity of a document submitted in support of a motion for summary judgment is in dispute, an affidavit purporting to authenticate the document must be made by a person having personal knowledge of that document, and even a duplicate so authenticated may not suffice. Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (III), 7 FSM R. 453, 455 (Pon. 1996).

In briefing the subject motion, Defendants have offered documents that are not authenticated by affidavits made on the personal knowledge of affiants in compliance with Rule 56(e). This Court finds it appropriate that evidence noncompliant with Rule 56(e) may be considered on motion for summary judgment if no objection is made. United States v. Dibble, 429 F.2d 598, 602 (9th Cir. 1970) (concurring opinion); Brown v. Ohio Cas. Ins. Co., 409 N.E.2d 253, 256 (Ohio Ct. App. 1978); United States ex rel. Austin v. Western Elec. Co., 337 F.2d 568, 574-75 (9th Cir. 1964).

III. DISCUSSION

Issue: When Did Discovery Occur?

The alleged violations occurred and were observed on board the Taiyo Tofol by an "authorized observer," Mr. Davis Tabu, who was assigned to the vessel for the trip. According to the Complaint, the violations occurred on two days, January 23, 2019 and February 19, 2019.[7] Compl. ¶¶ 36, 40. According to Plaintiff, in its brief filed in support of this matter, NORMA, established by the MRA, was advised of the violations on April 7, 2020, and NORMA referred the alleged violations to the DOJ on March 19, 2021, and the Complaint was filed on June 16, 2021. Assuming no tolling of the statute of limitations, whether the

[7] Trip records show that the second incident actually occurred on February 4, 2019 (19/02/04). Ex. B-2, SC/FFA Regional Observer Vessel Trip Monitoring Summary, signed by Davis Tabu, dated February 15, 2019.

Complaint in this case is barred by the limitations period in section 701(3) depends on which of the above events–(1) observation of the violations by the authorized observer, (2) notice to the Authority of the violations, or (3) referral by the Authority of the violations to the DOJ–constitutes discovery starting the two year period contained in that section.

Plaintiff contends that it discovered the violations when NORMA forwarded the violations to DOJ. Analyzing the issue using this event as the discovery under 701(3), the filing of the Complaint as was done herein was less than two years after discovery and therefore would be timely under section 701(3).

On the other hand, Defendants contend that observation of the violation by the authorized observer is the operative event, on the basis that his observation constitutes discovery by the FSM. If this is the event of first discovery by the FSM, the Complaint would be untimely (absent any tolling–see below) as the Complaint was filed more than two years after the observer saw the violations, i.e., after January 23, 2021, for the first violation, and after February 4, 2021 for the second violation.

Whose Discovery Is the Trigger?

Section 701(3) is in the passive voice, not specifying whose discovery would trigger commencement of the two-year limitations period. As 24 F.S.M.C. 701(3) applies to criminal informations, the rule of construction applicable to criminal statutes of limitations should govern:

> Although statutes of limitation on criminal prosecutions must be accorded a rational meaning in harmony with the obvious intent and purpose of the law, such statutes must be liberally construed in favor of the accused, and exceptions from the benefits of such statutes must be construed narrowly or strictly against the government. But the rule of strict construction does not justify an unreasonable interpretation – one contrary to the law's intent.

FSM v. Nifon, 14 FSM R. 309, 313 (Chk. 2006).

Only upon discovery of a violation can the decision to file a complaint or information be made. As such, "a rational meaning [of section 701(3)] in harmony with the obvious intent and purpose of the law" would be that Congress did not want to have the clock start running on suits until the facts constituting the violation were discovered by the person who is responsible for making a decision to file a civil complaint on an MRA violation.

DOJ and Imputation of Agent's Knowledge

DOJ has primary authority to enforce the MRA. 24 F.S.M.C. 601. There is no dispute in this matter that DOJ's knowledge of the violations constitutes "discovery" under section 701(3). Given the timelines discussed above, the critical issue herein is whether (and if so, when) knowledge of the authorized observer imputes to DOJ.

This Court has held that FSM law follows general agency law in imputing knowledge held by an agent to its principal. FSM v. Katzutoku Maru, 15 FSM R. 400, 404 (Pon. 2007) (owner of fishing vessel charged with knowledge of local agent of lack of license). The basis in agency law for imputation of knowledge of the principal to the agent has been stated as follows:

> The general rule of imputation of knowledge from agent to principal rests upon a legal fiction and a presumption. The fiction is that when the agent acts within the scope of the agency relationship, there is an identity of interest between principal and agent. The presumption is that the agent will perform his duty and communicate to his principal the facts that the agent acquires while acting in the scope of the agency relationship. Thus, under the rule of imputation the principal is chargeable with the knowledge the agent has acquired,

whether the agent communicates it or not.

Martin Marietta Corp. v. Gould, Inc., 70 F.3d 768, 773 (4th Cir. 1995) (citations omitted).

As discussed above, at issue herein is whether Mr. Tabu, the FSM's authorized observer aboard the Taiyo Tofol, was an agent such that his knowledge of the violations are imputed to DOJ.

Agency Relationship Between Authorized Observer and NORMA/DOJ

Plaintiff states that "[i]f anyone is authorized" as an agent of DOJ, "it would be NORMA,"[8] although it doesn't go so far as to conclude that the notification to NORMA, occurring on April 7, 2020, is the date on which DOJ's discovery occurred. It also concedes that Mr. Tabu was an authorized observer, but disputes that he is an agent of NORMA such that his knowledge is imputed to NORMA and (indirectly) DOJ. In contrast, Defendants claim that Mr. Tabu, as an authorized observer, was an agent such that his knowledge is imputed to DOJ.

Law of Agency

"An agency relationship is based upon consent by one person that another shall act in his behalf and be subject to his control." Bank of the FSM v. O'Sonis, 8 FSM R. 67, 69 (Chk. 1997). According to O'Sonis, it does not necessarily matter whether the principal in an agency relationship selects or pays the agent for its services.

For example, in O'Sonis, borrowers were sued by the Bank of the FSM when their employer, the State of Chuuk, failed to remit their loan payments to the Bank under the borrowers' allotment arrangement with Chuuk. When the borrowers asserted they should not be held liable for Chuuk's failure to make payments, the Court found that the borrowers and the State of Chuuk were in a principal-agency relationship by virtue of the allotment arrangement. As a consequence, the borrowers were held to be Chuuk's principals and therefore liable to third parties for Chuuk's failure to remit, and Chuuk was not held to be Bank of the FSM's agent, even though the Bank required the allotment arrangement of the State before it would extend the loan. As stated by this Court, "'[t]he existence of an agency relationship is not negated merely because the recipient of the authority [the agent] is named by someone other than the creator [the principal] of the authority." *Id.* at 69.

This Court has applied the common law rules of agency, "as expressed in the restatements of the law approved by the American Law Institute," which are rules of decision in this Court in the absence of applicable written or customary law.[9] Under those rules, it has been held that an agent need not be an employee of the principal, or be compensated by the principal. Malloy v. Fong, 232 P.2d 241, 251 (Cal. 1951) ("An agency relationship may be informally created. No particular words are necessary, nor need there be consideration. All that is required is conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction.") An express or implied agreement that the agent would act on behalf of the principal suffices.

Further the scope of agency for imputation purposes need not extend to authority to bind the principal but may be as limited as the "duty to give the principal information." RESTATEMENT (SECOND) OF AGENCY § 272 (1958). "The agent must have a duty to reveal the information which he has. It is not enough that the agent has a duty in relation to the subject matter." *Id.* § 275 cmt. c. Imputation of information must allow, however, for a "lapse of such time as is reasonable for its communication." *Id.* § 278.

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[8] Pl.'s Reply to TMC's Surreply to the Gov't's Opp'n to the Supp. at 4.

[9] 1 F.S.M.C. 203; Iriarte v. Individual Assurance Co., 18 FSM R. 340 (App. 2012).

Is an Authorized Observer an Agent of NORMA For Imputation Purposes?

"Authorized observer" is defined in the MRA as "any person authorized in writing by the Authority to act as an observer on fishing vessels for the purposes of [the MRA], including any observer authorized pursuant to the provisions of an access agreement or a fisheries management agreement." 24 F.S.M.C. 102(7). NORMA determines fees and charges related to authorized observers and their placement. 24 F.S.M.C. 113(2). As part of access agreements, vessel operators are required to accept the Authority's (NORMA's) authorized observers, provide any authorized observer, while on board the vessel, at no expense, with officer level accommodations, food and medical facilities, and meet the full travel costs to and from the vessel, salary, and full insurance coverage of the observer. 24 F.S.M.C. 404. Section 606 of the MRA was amended by Public Law No. 19-169 to provide that "[a]uthorized observers appointed under [the MRA] shall exercise their duties beyond the fishery waters in accordance with any access agreement or fisheries management agreement," and that NORMA "may promulgate regulations that provide, inter alia, for . . . observer duties on the high seas and in waters under the jurisdiction of another nation."

Under section 607 of the MRA, it is provided that "[t]he operator and each member of the crew of such vessel shall allow and assist any authorized observer to: . . . board such vessel for scientific, compliance monitoring and other functions, at such time and place as the Executive Director [of NORMA] may require." Further "[a]ny operator of any vessel with a valid permit issued under this subtitle, shall allow and assist any authorized observer to have full access to any place where fish taken in the fishery waters is unloaded or transshipped; to remove reasonable samples for scientific purposes and to gather any information relating to fisheries in the fishery waters."

Figuring prominently among the foregoing provisions of the MRA is the role of the authorized observer in performing "scientific, *compliance monitoring* and other functions, at such time and place as the Executive Director may require." (emphasis added). While the MRA requires compliance monitoring, it does not by its terms require the observers to report on violations of fishing license agreements or FSM law, and it appears NORMA has not yet adopted regulations implementing the MRA.

Although not set forth in statute or regulation, NORMA requires its authorized observers to report to NORMA on compliance monitoring, as shown elsewhere. For example, in its annual report, NORMA states that "[o]bservers on fishing vessels are our eyes on a boat, which document and verify fish catch, and ensure that licensed vessels operate within the law in FSM waters."[10] It is further shown by other documentation of the observers' job duties. Observers are debriefed at the end of the trips, and summary reports (SPC/FFA Regional Observer Vessel Trip Monitoring Summary Form Gen-3) are turned in. Ex. B-2. NORMA relies on the P[arties to the Nauru Agreement] Observer Agency to run the observer program and debrief the authorized observers, for provision to the "home party," i.e., the FSM. Exs. B-5, B-8, and B-12 (aff. of Patrick Jack). The SPC/FFA Regional Observer Vessel Trip Monitoring Summary Form Gen-3 that Mr. Tabu filled out for trip 26-17, dated February 15, 2019, includes a prominently placed instruction that "[t]his form must be filled in by the observer for every trip." On that form, the observer is required to check "yes" or "no" boxes as to specified occurrences on the trip. On Mr. Tabu's form there appear check marks in the "yes" column for "species of special interest" including "protected sharks" both "landed" and "interacted," and in the "pollution" category, for "dispos[al] of any metals, plastics, chemicals or old fishing gear." On subsequent pages of the form, Mr. Tabu described the very violations at issue in the Complaint, with no less specificity than is found in the Complaint.

That Mr. Tabu was an agent of NORMA for purposes of communicating observed violations to NORMA is borne out by the record. Having returned to Pohnpei, he was debriefed for trip 26-17 on February

[10] NORMA-Annual-Report-2017-2019-FINAL.pdf at 36, Ex. B-9.

16, 2019.[11] NORMA's Senior Fisheries Compliance Officer conducted an "internal investigation" on the two violations reported by Mr. Tabu and recommended to NORMA's Assistant Director of Fisheries Compliance Division, Justino Helgen, by letter dated February 2, 2021, that the matters be referred to DOJ "to pursue their own investigation and take action as a flag state responsibility on our flag vessel." Ex. B-8.

That the Complaint was generated from information found in a form filled out by an authorized observer acting as such, which form required him to provide information related to the compliance issues in this case (landing of species of special interest and disposal of plastics), supports proof of his agency for purposes of imputing his knowledge to NORMA. As NORMA's eyes on the vessel, Mr. Tabu was required to provide information that would be used to identify compliance or noncompliance with the law or Conservation or Management Measures. He did so. The FSM (DOJ and NORMA) acted on that information, by NORMA forwarding it to DOJ and then DOJ bringing it to court.

Delays Do Not Create an Issue of Fact as to Observer Agency

Exhibit A attached to Plaintiff's Opposition to TMC's Supplement in Support of its 12(b)(6) Motion to Dismiss the Verified Complaint is comprised of emails from NORMA's Mr. Helgen and MRAG's David Byrom to the effect that a couple of months after Trip 26-17, MRAG, which assists and provides PNA members (such as the FSM) with notifications of alleged infringements on flag vessels, changed its method for notification from flagging the allegations on Western and Central Pacific Fisheries Commission's (WCPFC's) case-file system to a new infringement notification system, by email to FSM and other PNA member countries.

Exhibit A serves to explain that the failure of Mr. Tabu's information to reach NORMA (or DOJ) in a prompt manner was due to the notification system in place prior to May 2019. It does not show that the delay was due to the lack of an agency relationship between Mr. Tabu and NORMA. In fact, the correspondence between Mr. Helgen and Mr. Byrom clearly establishes that a part of the observer program's purpose and duty was to communicate alleged infringements to the FSM and other PNA member countries. The duty to transmit information did not change in May 2019–only the rapidity of transmission.

NORMA's Knowledge Imputed to DOJ

Mr. Tabu's information was formally received by NORMA on April 20, 2020, Pl.'s Reply Br. (Aug. 23, 2021), but not forwarded by NORMA to DOJ until March 19, 2021. Pl.'s Opp'n to Defs.' 12(b)(6) Mot. to Dismiss the Verified Compl. at 3. Even if Mr. Tabu's information is imputed to NORMA, whether there is imputation from NORMA to DOJ, which, under section 601 of the MRA, is responsible for prosecuting violations of the MRA, is ultimately critical to when "discovery" under MRA section 701(3) occurred.

A relationship between NORMA and DOJ giving rise to imputation exists. As noted above, Plaintiff accepts that there is an agency relationship between NORMA and DOJ, although it does not go so far as to conclude that what is known to NORMA should be imputed to DOJ.

The relationship between DOJ and NORMA is set forth in the law. Section 601 confers on DOJ primary responsibility for fisheries enforcement.[12] It also requires its "collaboration with" NORMA "in the monitoring and control of all fishing operations within the fishery waters," conferring upon NORMA and DOJ a duty to share information as to "the exclusive economic zone, the territorial sea, and internal waters."

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[11] Ex. B-2 (Purse Seine Evaluation Form).

[12] DOJ's role as law enforcement and litigation arm of the FSM National Government in general is provided by Executive Order No. 1, at 18-19 (as amended Apr. 2018).

Under section 601, DOJ's role in fisheries enforcement is not limited to the FSM's fishery waters but extends beyond to include enforcement with respect to FSM flagged vessels on the high seas and other waters, e.g., PNG's EEZ. For example, authorized officers, who are appointed by the Secretary of DOJ, 24 F.S.M.C. 602, have the authority to exercise powers under the MRA as authorized by access agreements, fisheries management agreements or conservation and management measures implemented by a regional fisheries management organization or arrangement. 24 F.S.M.C. 603(11).

NORMA and DOJ have a concurrent role regarding flagged vessel activities beyond FSM fishery waters. The Executive Director of NORMA has issued regulations pursuant to MRA section 204[13] and has regulatory authority over flagged vessels pursuant to sections 303 and 603(11)(3). NORMA's Mr. Helgen's letter dated February 2, 2021 articulates the relationship between DOJ and NORMA with respect to flag states, recommending a referral of the alleged violations to DOJ "to pursue their own investigation and take action as a flag state responsibility on our flag vessel." Ex. B-8.

This Court finds that the interrelationship between NORMA and DOJ under the MRA creates duties on the part of NORMA to transmit information about violations by FSM flagged vessels to DOJ.

Imputation of knowledge between personnel in different government agencies thus far does not appear to have been directly addressed by this Court. However, there seems to be no logical reason imputing knowledge between persons whose relationship within a government (or private) agency meets the test of principal and agent, but not doing so between separate agencies acting as principal and agent. Indeed, other jurisdictions that have addressed the matter have applied agency principles to impute knowledge between agencies. In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 796 (E.D.N.Y. 1984) (applying agency principles, stating "the knowledge of employees of one agency may be imputed to those of another if there is some relationship between the agencies–either some reason for the agency without knowledge to seek the information or a reason for the knowledgeable agency to transmit the information."). NORMA, in its concurrent enforcement role with respect to FSM flagged vessels, had a reason and duty to transmit information on the violations to DOJ, and, indeed, did so. This Court finds that NORMA's knowledge of the MRA violations is imputed to DOJ for purposes of determining when discovery took place under section 701(3).

Lapse of a Reasonable Time For Communication

As noted above, the RESTATEMENT (SECOND) OF AGENCY § 278 does not deem information in the hands of the agent to be immediately imputed to the principal, but requires that the principal be deemed to have such knowledge after the "lapse of such time as is reasonable for its communication."

Having arrived on shore on February 15, 2019, *see* Ex. B-1, Mr. Tabu wrote up his vessel trip monitoring summary on February 15, 2019, *see* Ex. B-2, was debriefed on February 16, 2019, *id.*, and the information on the violations was transmitted to NORMA on April 20, 2020, one year and two months later. By the time DOJ was in receipt of information on the violations, on March 19, 2021, two years and one month had passed since Mr. Tabu was debriefed on the violations. Plaintiff filed its Complaint three months later, on June 16, 2021, two years and four months after the violations were observed. *Id.*

Mr. Tabu prepared his report recounting the violations while he was at the port in Pohnpei on February 15, 2019 and was debriefed on February 16, 2019. "[S]uch time as is reasonable for its communication," from the port in Pohnpei to Palikir, Pohnpei could not account for more than two weeks of the two-year period. Even adding two weeks for transmission from NORMA's office to DOJ, Mr. Tabu's knowledge would

[13] National Oceanic Resource Mgt. Admin. Penalties Regs., filed with FSM Office of the Registrar of Corporations (Sept. 18, 2018). *See* http://fsmlaw.org/fsm/regulations/NORMA%20Administrative%20Penalties%20Regulations.pdf.

be imputed to DOJ on March 16, 2019.[14] Thus, unless there is tolling, DOJ had until the 16th of March 2021 to file the subject lawsuit (unless there is tolling).

Tolling of Statute for Defendants Absent from the FSM

Even if the two-year period in section 701(3) has run for vessel owner TMC, based on its having an agent in the FSM, Plaintiff contends that it has not run against the three of the defendants–the captain, the master and the pilot–because they have been absent from the FSM. The Defendants' response is that, in light of the clear language of 701(3), the tolling provision found relied upon by Plaintiff, 6 F.S.M.C. 808, does not apply to proceedings governed by 701(3). Section 808 of title 6 provides as follows:

> If at the time a cause of action shall accrue against any person he shall be out of the Trust Territory, such action may be commenced within the times limited in this chapter after he comes into the Trust Territory. If, after a cause of action shall have accrued against a person he shall depart from and reside out of the Trust Territory, the time of his absence shall be excluded in determining the time limited for commencement of the action.

By its terms, Section 808 applies to toll limitations periods set forth in chapter 8 of title 6. The question is whether it applies to violations of the Marine Resources Act, subtitle I of title 24. This Court agrees that section 701(3) unambiguously excludes any statutory tolling. It states: "Notwithstanding any provision of any other law of the Federated States of Micronesia, any information or complaint with respect to any violation of this subtitle must be filed within two years of the discovery of the violation."

One court has viewed the phrase "notwithstanding any other provision of law," as "a very comprehensive phrase," which "signals a broad application overriding all other code sections unless it is specifically modified by use of a term applying to only to a particular code section or phrase." Stone Street Capital, LLC v. California State Lottery Comm'n, 80 Cal. Rptr. 3d 326, 335 n.6 (Cal. Ct. App. 2008) (citations omitted).

Under its plain meaning, nothing in section 701(3) or section 808 makes this override inapplicable to section 808. In fact, section 808, in referring to "times limited in this chapter," by its terms only tolls limitation periods prescribed in chapter 8 of title 6. Thus, Congress, in placing the limitations period for violations of the MRA in title 24, not in chapter 8 of title 6, exempted violations of the MRA from the tolling provisions of section 808.

Therefore, as a matter of law, when the statute of limitations in 701(3) began running as to TMC, by virtue of Mr. Tabu's observing the violations, it also began running against the three defendants outside the FSM, i.e., the captain, the master and the pilot, without any tolling due to their absence.

Plaintiff's Complaint is Time-Barred

Plaintiff had two years from discovery of the violations at issue in this lawsuit within which to bring the Complaint herein. It is undisputed that the authorized observer engaged on behalf of NORMA learned of those violations when they occurred, in January and February of 2019.

There is no factual dispute concerning the relationship between the authorized observer–the dispute is whether the relationship legally amounted to a principal-agent relationship. This Court finds that it had such a relationship.

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[14] Estimates are conservative, based on communication by mail, which in a worst-case scenario, could take two weeks for in-state mail, under circumstances where the mail is sent to Guam for sorting.

Based on the undisputed facts and the law, this Court determines that the authorized observer's knowledge of the violation is imputed to NORMA and in turn DOJ under principles of agency law as set forth in the restatement of the law, after a reasonable time for communication. This Court concludes that a reasonable length of time for communication of the report on the violations from the authorized observer's debriefing (at the port in Pohnpei) to DOJ (in Palikir) was less than 28 days. Imputing to DOJ knowledge of the violation on March 16, 2019, and finding tolling under 6 F.S.M.C. 808 to be inapplicable, this Court determines the Complaint herein, filed on June 16, 2021, to be time-barred.

REQUEST FOR SANCTIONS

In its Reply Brief and reiterated in later filings, TMC requested an award of sanctions or attorneys' fees, on the basis that the Complaint was frivolous or vexatious. The request is denied on two grounds. First, while the Complaint is time-barred, the Court finds it neither frivolous nor vexatious, as it raises issues of law not previously addressed in the FSM. Second, in making this motion to dismiss, Defendants failed to comply with FSM Rule of Civil Procedure 6(d), which requires in part that "[a]ll motions shall contain certification by the movant that a reasonable effort has been made to obtain the agreement or acquiescence of the opposing party and that no such agreement has been forthcoming." Defendants' failure to do so could have been a basis for denying its motion without prejudice, outright. Calvary Baptist Church v. Pohnpei Bd. of Land Trustees, 9 FSM R. 238, 239 (Pon. 1999). Instead, it is a basis for denying this request.

CONCLUSION

Summary judgment is hereby granted in favor of Defendants on the basis of the statute of limitations.

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FSM SUPREME COURT TRIAL DIVISION

NORLEEN OLIVER and MARK DEORIO, Petitioners, vs. PRESIDENT DAVID W. PANUELO and the FSM GOVERNMENT, Respondents.	)	CIVIL ACTION NO. 2021-020

ORDER GRANTING WRIT OF MANDAMUS

Larry Wentworth
Associate Justice

Decided: December 21, 2021

APPEARANCE:

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