

FILED

JUN 20 2016

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Def. ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IROIJ MICHAEL KABUA,
INDIVIDUALLY, AND FOR AND ON
BEHALF OF TRADITIONAL
LANDOWNERS JESSE RIKETA, SEARS
KOBENEY, NELSON BOLKEIM,
RILLONG LEMARI, SEAGULL JAMES,
MORRISON JR. JAMES, FAPIEN BELLU,
CENTILLA BELLU, HARRINGTON
DRIBO, HENCY CALEP, ROSITA
CAPELLE, KEJJO BIEN, CARD SUBILLIE,
JULIET KILMA, BARKAJ BULELE,
TORWA KAJIMWE, JOMA MAIE and JOMI
MAIE

Plaintiffs,

vs.

M/VMELL SPRINGWOOD, in rem, its
engines, masts; bowsprits, boats, anchors,
chains, cables, rigging, apparel, furniture, And
all necessaries thereto pertaining,

In Rem

MV TAMMO SHIPPING COMPANY
LIMITED, CAPTAIN MYRTA GRZEGORZ,
PACIFIC SHIPPING, INC. and MARIANA
EXPRESS LINES PTE. LTD.,

In Personam

Defendants.

CIVIL ACTION NO. 2015-200

ORDER

TO: Phillip A. Okney, counsel for Plaintiffs
Daniel J. Berman, counsel for Plaintiffs
Melvin C. Narruhn, counsel for Plaintiffs
Dennis Reeder, counsel for Defendant Mariana Express Lines Ptd., Ltd.
Arsima A. Muller, counsel for Defendants MV Tammo Shipping Company and M/V
MELL Springwood

ORDER RELATING TO VARIOUS PENDING MOTIONS

Plaintiffs Michael Kabua, Jesse Riketa, Sears Kobeney, Nelson Bolkeim, Rillong Lemari, Seagull James, Morrison Jr. James, Fapien Bellu, Centilla Bellu, Harrington Dribo, Hency Calep, Rosita Capelle, Kejjo Bien, Card Subille, Juliet Kilma, Barkaj Bulele, Torwa Kajimwe, Joma Maie, and Jomi Maie ("Plaintiffs") filed the present suit in relation to the grounding of the M/V TAMMO (the "Vessel") in the lagoon waters in Kwajalein Atoll on May 8, 2015.

There are several pending motions in this case, including the following: (1) *In Personam* Defendant Mariana Express Lines Pte. Ltd.'s Rule 12(b)(5) and 12(b)(1) Motion to Dismiss for Insufficient Service of Process and Lack of Subject Matter Jurisdiction; (2) Plaintiffs' Motion for Entry of Default Against Defendants Owner MV Tammo Shipping Company Limited and Captain Myrta Grzegorz; (3) Plaintiffs' Second Motion for Entry of Default Against Defendant Owner MV Tammo Shipping Company Limited; and (4) Defendants MV Tammo Shipping Company and M/V MELL Springwood's Motion to Dismiss Complaint *In Rem* and *In Personam*.

On May 5, 2016, the various motions came up for hearing. Phillip Okney, Esq., and Daniel Berman, Esq., appeared on behalf of Plaintiffs. Arsima Muller, Esq., appeared on behalf of Defendants MV Tammo Shipping Company and M/V MELL Springwood ("Tammo Defendants"). Dennis Reeder, Esq., appeared on behalf of Defendant Mariana Express Lines Pte. Ltd. ("Defendant MELL"). Defendant Pacific Shipping, Inc. ("Defendant Pacific Shipping") and Defendant Captain Myrta Grzegorz ("Defendant Grzegorz") did not appear.

The Court, having carefully considered the parties' motions and memoranda, the exhibits attached thereto, the files and records herein, and the arguments of counsel, orders, adjudges and decrees as follows:

i. Although Plaintiffs did not properly effect service on Defendant MELL pursuant to the Judiciary Act, Title 27 Chapter 2, and the Marshall Islands Rules of Civil Procedure ("MIRCP") Rule 4(f), the Court nevertheless accepts Plaintiffs' service on Defendant MELL by Registered Mail, return receipt requested. Therefore, dismissal of claims against Defendant MELL for insufficient service is denied.

ii. Plaintiffs' attempts to personally serve the Tammo Defendants and Defendant Grzegorz at Defendant Pacific Shipping's office in Majuro were not proper under the Judiciary Act and MIRCP Rule 4(f). Therefore, entry of default based on such attempts is denied.

iii. Plaintiffs have relinquished their request for entry of default against the Tammo Defendants based on personal service in Germany. Therefore, entry of default based on such service is denied.

iv. The purported delegation of authority from the Marshall Islands Environmental Protection Agency ("EPA") to Plaintiffs was not proper as EPA does not have the right to bring a lawsuit for civil damages on its own. In addition, Plaintiffs have not shown that they have an interest in the reef that was damaged by the Vessel's grounding. Instead, 9 MIRC § 103 makes clear that the Government of the Republic of the Marshall Islands ("RMI") owns the reef. Therefore, Plaintiffs have no standing to bring the present action and dismissal for lack of subject matter jurisdiction is granted.

v. Because Plaintiffs have not shown an interest in the reef, damage to the reef cannot be the basis for their legal claims. In addition, since the delegation from EPA was improper, Plaintiffs cannot bring a derivative action for damages on behalf of EPA. Therefore, the Complaint fails to state a claim upon which relief can be granted, and dismissal is granted.

vi. Since the Vessel has not been arrested and is not in the RMI, the *in rem* claim cannot be maintained. Therefore, dismissal of the *in rem* claim is granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

On October 21, 2015, Plaintiffs filed their Complaint *In Rem* and *In Personam* ("Complaint"). Plaintiffs filed the Complaint "on behalf of themselves and as representatives of all others similarly situated." Compl., p. 1-2.

In the Complaint, Plaintiffs allege that on May 8, 2015, the Vessel grounded and collided with the bottom of the reef in Kwajalein Atoll; or caused and permitted contact to occur. Compl., ¶ 21. The tides ultimately floated the Vessel free on May 12, 2015. *Id.*

With respect to their interest in the case, Plaintiffs allege that they constitute the three levels of land ownership and represent all persons having an interest in the land and natural resources at issue in this case. Compl., ¶ 11. They assert that they are the owners of the land adjacent to the grounding site and of the natural resources damaged by the Vessel. *Id.* In addition, referencing Article X, sections 1(1) and (2) of the RMI Constitution, Plaintiffs assert that the Iroj, Alap, and Senior Dri-Jerbal are, by right and obligation within traditional law and practice, and otherwise, authorized to act to protect and pursue damages for injury to such natural resources, on behalf of themselves and in representation of all persons damaged through injury to such natural resources. *Id.* As such, Plaintiffs seek certification of this case as a class action under MIRCP 23(a) and (b)(3), on behalf of themselves and all others situated. Compl., ¶

28.

Plaintiffs have specified five causes of action in this case: (1) Maritime Negligence; (2) Unseaworthiness; (3) Trespass; (4) Nuisance - Public and Private; and (5) EPA Derivation Action Right.

Plaintiffs personally served the Complaint and Summons on Defendant MELL, the Tammo Defendants, Defendant Grzegorz, and Defendant Pacific Shipping at Defendant Pacific Shipping's office in Majuro on October 22, 2015. *See* Return of Service dated October 22, 2015. On October 28, 2015, Plaintiffs again personally served an Amended Summons and Complaint to the defendants at Defendant Pacific Shipping's office in Majuro. *See* Return of Service dated October 28, 2015.

On November 11, 2015, Defendant MELL filed its Rule 12(b)(5) and 12(b)(1) Motion to Dismiss for Insufficient Service of Process and Lack of Subject Matter Jurisdiction ("MELL Motion to Dismiss"). On November 13, 2015, Defendant MELL filed an Errata to Rule 12(b)(5) and 12(b)(1) Motion to Dismiss for Insufficient Service of Process and Lack of Subject Matter Jurisdiction. Attached to this Errata is the Agency Agreement between Defendant MELL and Defendant Pacific Shipping ("Agency Agreement").

Plaintiffs filed their Opposition Memorandum to Defendant Mariana Express' Motion to Dismiss for Insufficient Service of Process and Lack of Subject Matter Jurisdiction on December 30, 2015. Attached as Exhibit 3 to the Plaintiffs' Opposition is a Receipt for Registered Mail, purporting to show that Plaintiffs made service on Defendant MELL at its Singapore offices by Registered Mail, return receipt requested, on November 27, 2015.¹ On December 31, 2015,

¹ The Court notes that Plaintiffs did not file the return receipt confirming that the documents were received in Singapore. Plaintiffs asserted at the hearing that they did not, and could not, obtain such a receipt. During recess, the Court requested that Plaintiffs check to see if such a receipt was available from the USPS website. Plaintiffs submitted a USPS print-out confirming that such a receipt was not available. *See* Plaintiffs' Exhibit 8.

Plaintiffs filed an Errata to their Opposition Memorandum, in which they attached as an exhibit the Declaration of Moriana Phillip, EPA's General Manager, and an Environmental Protection Authority Amended Delegation of Authority dated December 3, 2015, signed by EPA's General Manager and Chairman of the Board ("Amended Delegation"). The Amended Delegation purports to delegate "all powers, duties and functions of the Authority (subject to limitations as provided by law) to the landowners of Kwajalein Atoll for enforcement purposes against violators/owners of that certain fishing vessel that ran aground on Kwajalein Atoll on or about 8th through 12th of May 2015." Ex. 5 of Plaintiffs' Opposition to MELL's Motion to Dismiss. Attached as Exhibit A to the Amended Delegation is a letter signed by Plaintiff Kabua and EPA's Acting General Manager on August 12, 2015, in which the Acting General Manager purports to authorize Plaintiff Kabua to pursue any environmental claims related to the Vessel's grounding, including the right to sue. Ex. A to Ex. 5 of Plaintiffs' Opposition to MELL's Motion to Dismiss.

On January 6, 2016, Defendant MELL filed its Reply to Opposition Memorandum to Defendant Mariana Express' Motion to Dismiss for Insufficient Service of Process and Lack of Subject Matter Jurisdiction.

On January 26, 2016, Plaintiffs filed a Motion for Entry of Default Against Defendant Pacific Shipping, Inc.

On January 29, 2016, Plaintiffs filed a Motion for Entry of Default Against Defendants Owner MV Tammo Shipping Company Limited and Captain Myrta Grzegorz. The motion was based on Plaintiffs' service on the Tammo Defendants and Defendant Grzegorz at Defendant Pacific Shipping's office on October 22, 2015 and October 28, 2015. Also on January 29, 2016, Plaintiffs filed a Motion for Leave to Conduct Jurisdictional Discovery and Schedule Conference.

On February 29, 2016, Plaintiffs filed a Second Motion for Entry of Default Against Defendant Owner MV Tammo Shipping Company Limited. Attached to this motion was an Affidavit of Counsel Re: Service of Process on Defendant MV Tammo Shipping Company Limited. In the affidavit, counsel asserts that Defendant MV Tammo Shipping Company Limited was personally served in Germany on February 3, 2016. *See* Berman Decl. dated Feb. 29, 2016.

Three days later, on March 2, 2016, the Tammo Defendants filed their Motion to Dismiss Complaint *In Rem* and *In Personam* ("Tammo Motion to Dismiss").

On March 21, 2016, the Tammo Defendants filed a Memorandum in Opposition to Plaintiffs' Second Motion for Entry of Default Against Defendant Owner MV Tammo Shipping Company Limited.

On April 6, 2016, Plaintiffs filed an Opposition to Defendants MV Tammo Shipping Company and MV MELL Springwood's Motion to Dismiss Complaint *In Rem* and *In Personam* for Failure to State a Claim. In addition to the exhibits previously presented by Plaintiffs, Plaintiffs also attached as exhibits to their Opposition attorney Phillip Okney's correspondence with Attorney General Nathan Brechtefeld relating to the grounding of the Vessel and Plaintiffs' claims.

On April 19, 2016, the Tammo Defendants filed their Reply in Support of Motion to Dismiss.

Plaintiffs did not reply to the Tammo Defendants' Memorandum in Opposition to Plaintiffs' Second Motion for Entry of Default Against Defendant Owner MV Tammo Shipping Company Limited.

The Court deems waived any arguments not raised in the above-referenced papers or at

the May 5, 2016 hearing.

II. DEFENDANT MELL'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE

In their Complaint, Plaintiffs assert that the Court has jurisdiction over Defendant MELL pursuant to 27 MIRC §§ 251(1)(a) and (c). 27 MIRC § 251(1)(a) gives the Court civil jurisdiction over any person, corporation or legal entity who "transacts business within the territorial limits of the Republic." 27 MIRC § 251(1)(c), on the other hand, gives the Court civil jurisdiction over any person, corporation or legal entity who "operates a vessel or aircraft within the territorial waters or airspace of the Republic." In this case, Defendant MELL was the charterer of the Vessel at the time of the grounding. Compl., ¶ 18. In addition, Defendant MELL operates an ocean cargo business in the RMI by way of an agency arrangement with Defendant Pacific Shipping. MELL Mot. to Dismiss at 2. These activities are sufficient to give the Court civil jurisdiction over Defendant MELL in this case.

Having found that it has jurisdiction over Defendant MELL, the Court must now consider the means by which service can be properly effected on Defendant MELL. As noted in the Complaint, Defendant MELL is a citizen of the foreign country of Singapore. Compl., ¶ 18.

The means to serve those outside of the Republic are outlined in the Judiciary Act, 27 MIRC Division 2. Specifically, 27 MIRC § 252 states:

- (1) Service of process may be made upon any person subject to the jurisdiction of a court of the Republic under this Division by personally serving the process on him outside the territorial limits of the Republic.
- (2) Service shall be made, in the same manner as service is made within the territorial limits of the Republic, by an officer or person authorized to service process in the jurisdiction where service is made.
- (3) An affidavit of service shall be filed with the court issuing the process, stating the time, manner and place of service.
- (4) Service under this Section has the same force and effect as service

within the territorial limits of the Republic.

In addition, 27 MIRC § 255 states:

Nothing in this Division limits or affects the right to serve process in any other manner provided by law or by the Rules of Court, or allowed by order the court concerned.

MIRCP Rule (4) then lists various methods for effecting service outside of the Republic:

(1) by an internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculative to give notice:

(A) as prescribed by the foreign country's laws for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

In this case, Plaintiffs attempted to effect service on Defendant MELL on three separate occasions: by personal service to Defendant Pacific Shipping's office in Majuro on October 22, 2015 and October 28, 2015; and by Registered Mail to Defendant MELL's offices in Singapore on November 27, 2015. Plaintiffs maintain that their personal service on Defendant MELL at Defendant Pacific Shipping's office was proper because Defendant Pacific Shipping was acting

as agent for service of process for Defendant MELL. In support of this argument, Plaintiffs point to Sections 3.2.18 and 6 of the Agency Agreement. However, nowhere in these provisions or anywhere else in the Agency Agreement does Defendant MELL appoint Defendant Pacific Shipping as its agent for the purpose of service of process. For Plaintiffs' argument to make sense, the Court would have to read into the Agency Agreement words that are simply not there. Therefore, the Court finds that Defendant Pacific Shipping is not the agent of Defendant MELL for the purpose of service of process, and Plaintiffs' attempts to personally serve Defendant MELL at Defendant Pacific Shipping's offices in Majuro were improper.

The Court next reviews Plaintiffs' attempt to serve Defendant MELL at its offices in Singapore through Registered Mail, return receipt requested. Because Defendant MELL is outside the Republic, service on Defendant MELL is governed by 27 MIRC § 252. Under that provision, Plaintiffs were required to personally serve Defendant MELL, which they did not. Under 27 MIRC § 255, Plaintiffs could have also utilized the Court Rules relating to service of someone outside the Republic. These are outlined in MIRCP Rule 4(f). Plaintiffs failed to do so. Finally, under 27 MIRC § 255, Plaintiffs also could have requested a Court Order allowing them to serve Defendant MELL through Registered Mail, return receipt requested. Such requests for substitute service by mail, usually certified mail, return receipt requested, are commonly granted. However, Plaintiffs did not seek such a Court Order. For these reasons, the Court finds that Plaintiffs' attempt to serve Defendant MELL at its offices in Singapore through Registered Mail, return receipt requested, without a Court Order allowing service by such means, was improper under 27 MIRC Division 2 and MIRCP Rule 4(f).

Although the Court finds that the service was improper, it also finds that it would be a waste of this Court and the parties' time and resources to dismiss the Complaint without

prejudice on this basis, only to then have Plaintiffs request a Court Order to serve Defendant MELL in this manner. Therefore, the Court accepts Plaintiffs service on Defendant MELL at its offices in Singapore through Registered Mail, returned receipt requested.

In addition, based on 27 MIRC Division 2 and MIRC Rule 4(f), the Court also finds that the personal service at Defendant Pacific Shipping's Majuro office was only effective as to Defendant Pacific Shipping. Therefore, the attempts to personally serve Defendant Grzegorz and the Tammo Defendants at Defendant Pacific Shipping's office are ineffective.

III. PLAINTIFFS' MOTIONS FOR ENTRY OF DEFAULT

Having found that the personal service at Defendant Pacific Shipping's Majuro office was only effective as to Defendant Pacific Shipping, the Court denies Plaintiffs' Motion for Entry of Default Against Defendants Owner MV Tammo Shipping Company Limited and Captain Myrta Grzegorz filed January 29, 2016, which was based on the attempted service at Defendant Pacific Shipping's office.

With respect to Plaintiffs' Second Motion for Entry of Default Against Defendant Owner MV Tammo Shipping Company Limited filed February 29, 2016, the Court notes that Plaintiffs did not file a Reply to the Tammo Defendants Memorandum in Opposition. In addition, at the hearing on this matter, Plaintiffs' counsel stated that Plaintiffs were no longer pursuing this issue. Therefore, Plaintiffs' Second Motion for Entry of Default Against Defendant Owner MV Tammo Shipping Company Limited is moot, and therefore denied.

IV. DEFENDANT MELL'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A. STANDARD FOR DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

MIRC Rule 12(b)(1) allows dismissal for lack of subject-matter jurisdiction. MIRC

Rule 12(b)(1) mirrors Rule 12(b)(1) of the United States Federal Rules of Civil Procedure ("FRCP"). Therefore, the RMI courts can look to United States cases for interpretation and application of such rule. *See Kap v. Trust Territory*, 4 TTR 336, 338 (Tr. Div. Truk 1969); *Kabua v. Kabua*, 1 MILR (Rev.) 96 (1998). The concept of standing is an integral part of "the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Hagan v. United States*, 2002 WL 338882, at *4 (E.D. Pa. 2002) (citing *Simon v. Eastern KY Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). A motion to dismiss for want of standing implicates the court's subject matter jurisdiction and is therefore appropriately brought under Rule 12(b)(1). *See id.* (citing *Miller v. Hygrade Food Prods. Corp.*, 89 F.Supp.2d 643, 646 (E.D. Pa. 2000)).

The doctrine of standing requires (1) that a plaintiff must have suffered an injury-in-fact; (2) that there must be a causal connection between the injury and the conduct complained of; and (3) that it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). In other words, standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being the real party in interest entitled to bring the claim.

The requirement for a real party in interest is set out in MIRCPC Rule 17 as follows:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the Republic. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or

substitution of, the real party in interest; and such ratification, joinder, substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.

When deciding a motion to dismiss for lack of subject matter jurisdiction, the reviewing court presumes all factual allegations to be true and all reasonable inferences from those allegations are construed in favor of the non-moving party. *See Cooperman v. R.G. Barry Corp.*, 775 F. Supp. 1211 (Dist. Minn. 1991).

B. ANALYSIS

Defendant MELL claims that Plaintiffs are not the real party in interest for two reasons: (1) the Environmental Protection Agency Act, Title 35 Chapter 1 ("EPA Act"), does not authorize EPA to delegate the right to sue for damages to private individuals; and (2) Plaintiffs have no interest in the marine areas below the ordinary high water mark.

1. Plaintiffs' Interest Pursuant to Delegation from EPA.

At the time that the lawsuit commenced on October 21, 2015, the only delegation from EPA to Plaintiffs was the letter signed by Plaintiff Kabua and EPA's Acting General Manager on August 12, 2015, in which the Acting General Manager purports to authorize Plaintiff Kabua to pursue any environmental claims related to the Vessel's grounding, including the right to sue. *See Ex. A to Ex. 3 of Plaintiffs' Opposition to MELL's Motion to Dismiss.* Subsequently, on December 3, 2015, after the Complaint was filed, the EPA General Manager and Board Chairman signed the Amended EPA Delegation, purporting to give Plaintiffs authority to proceed with the present suit. *See Ex. 3 of Plaintiffs' Opposition to MELL's Motion to Dismiss.*

In their Complaint, Plaintiffs claim that they have been delegated the authority to bring this suit pursuant to 35 MIRC § 109. That provision states:

(1) The Authority may, by written instrument, delegate any of its powers and functions to any person or body of persons, except the power to make

by-laws under Section 113 of this Chapter and regulations under Section 121 of this Chapter.

35 MIRC § 109(1). EPA's powers are then specified in 35 MIRC § 121.

Here, Plaintiffs point to 35 MIRC § 121(3)(i), which states that the EPA can "detect, prosecute or *cause the prosecution* of, any offenses committed *in contravention* of the provisions of [the EPA Act] and the regulations made under [the EPA Act]." 35 MIRC § 121(3)(i) (emphases added). Plaintiffs also point to 35 MIRC § 121(3)(d), which allows the EPA to obtain advice and services of any person; § 121(3)(e), which allows the EPA to make contracts and other instruments for the supply of goods and services; and § 121(3)(h), which allows the EPA to accept assistance in services from any sources. *See* Plaintiffs' Opp. to MELL's Mot. to Dismiss at 11. Plaintiffs' reliance on these provisions is misguided. The only question for this Court is whether the EPA could, under the EPA Act, properly delegate the authority to ***bring a civil action for damages***. None of the provisions cited by Plaintiffs answer this in the affirmative. 35 MIRC §§ 121(3)(d), (e) and (h) relate to EPA's ability to obtain goods and services. This is not at issue in this case. In addition, 35 MIRC § 121(3)(i) refers to the prosecution of offenses committed in violation of the EPA Act and its regulations. However, the Complaint does not allege any such violations. Even if it did, 35 MIRC § 157 states that the EPA can only fix civil penalties for such violations. The present case is one seeking damages. Under 35 MIRC § 158, the Attorney General is the proper person to petition the Court for a judgment awarding damages relating to violations of the EPA Act. This is further confirmed by the language in 35 MIRC § 118, which states:

The Attorney-General ***shall*** provide legal assistance and representation to the [EPA] in any suit or prosecution brought by or against the [EPA] or against any member, officer, servant or agent of the Authority, and shall advise the Authority on matters of law whenever thereto requested.

(Emphasis added). In this case, since Plaintiffs are claiming that they are bringing the claim on behalf of EPA (*see* Compl. ¶¶ 51-55), only the Attorney General could have brought the present claim. The delegation of authority from EPA to Plaintiffs is, therefore, improper and Plaintiffs have no standing to bring a derivative action for civil damages on behalf of the EPA. Dismissal of any claims based on such derivative right is thus proper.

The Court also finds that the Complaint does not allege claims by or on behalf of the EPA, and it does not list EPA as a plaintiff. However, if the delegation of authority was proper, as Plaintiffs contend, the proper party in interest under MIRC Rule 17 would be EPA, not Plaintiffs. Thus, even if the delegation of authority was proper, the Complaint would be in contravention of MIRC Rule 17 and dismissal would still be appropriate.

2. Plaintiffs' Interest in the Marine Areas Below Ordinary High Water Mark

Section 103 of Title 9, MIRC, provides:

§103. Rights in areas below high watermark.

(1) That portion of the law established during the Japanese administration of the area which is now the Republic, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of the Republic, with the following exceptions:

(a) Such rights in fish weirs or traps (including both types erected in shallow water and those sunk in deep water) and such rights to erect, maintain and control the use of these weirs or traps as were recognized by local customary law at the time the Japanese administration abolished them, are hereby reestablished; provided, that no weirs or traps or other obstruction shall be erected in such locations as to interfere with established routes of water travel or those routes which may hereafter be established.

(b) The right of the owner of abutting land to claim ownership of all materials, coconuts, or other small objects deposited on the shore or beach by action of the water or falling from trees located on the abutting land, and such fishing rights on, and in waters over reefs where the general depth of water does not exceed four feet at mean low water as were recognized by local customary law at the time the Japanese administration abolished them, are hereby reestablished where such rights are not in

conflict with the inherent rights of the government as the owner of all marine areas below the ordinary high watermark; provided however, that this Section shall not be construed to apply to any vessel wrecked or stranded on any part of the reefs or shores of the Republic.

(c) The owner of land abutting the ocean or lagoon shall have the right to fill in, erect, construct and maintain piers, buildings, or other construction on or over the water or reef abutting his land and shall have the ownership and control of such construction; provided, that said owner first obtains written permission of the Chief Secretary before beginning such construction.

(d) Each of the rights described in Paragraphs (a), (b) and (c) of this Subsection (1) are hereby granted to the person or group of persons who held the right at the time it was abolished by the Japanese administration, or to his or their successor or successors in interest. The extent of each right shall be governed by the local customary law in effect at the time it was abolished.

(e) Nothing in the foregoing Paragraphs of this Subsection (1) shall withdraw or disturb the traditional and customary right of the individual land owner, clan, family or municipality to control the use of, or material in, marine areas below the ordinary high watermark, subject only to, and limited by, the inherent rights of the Government of the Marshall Islands as the owner of such marine areas. The foregoing Paragraphs of this Subsection (1) shall create no right in the general public to misuse, abuse, destroy or carry away mangrove trees or the land abutting the ocean or lagoon, or to commit any act causing damage to such mangrove trees or abutting land.

The RMI Supreme Court has confirmed that 9 MIRC § 103 means what is says, *i.e.*, "all marine areas below the ordinary high watermark belong to the government," and not to any private person or a group of private persons. *See Zedkaia and Toring v. Marshalls Energy Company, Inc.*, S. Ct. Civil No. 2012-001, at 5 (2015).

At the hearing on this matter, Plaintiffs stated that they did not dispute the Supreme Court's decision in *Zedkaia*, and conceded that they do not have any ownership rights in the submerged lands. Instead, Plaintiffs maintain that they have standing to bring this action based on their rights as Iroj, Alap, and Senior Dri-Jerbal. Plaintiffs claim that as Iroj, Alap, and Senior Dri-Jerbal, they are by right and obligation within traditional law and customary practice,

and otherwise, authorized to act to protect and pursue damages for injury to natural resources, on behalf of themselves and in representation of all persons damages through injury to such natural resources. *See* Compl., ¶ 11. In support of their argument, Plaintiffs point to the RMI Constitution, Article X, sections 1(1) and (2).

Article X, sections 1(1) and (2) of the RMI Constitution state:

(1) Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter in any part of the Republic of the Marshall Islands, including, where applicable, the rights and obligations of the Iroijlaplap, Iroiherik, Alap and Dri Jerbal.

(2) Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Republic, it shall not be lawful or competent for any person having any right in any land in the Republic, under the customary law or any traditional practice to make any alienation or disposition of that, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroiherik where necessary, Alap and the Senior Dri Jerbal of such land, who shall be deemed to represent all persons having an interest in that land.

These provisions, however, relate to the landowner's rights with respect to those lands in which he has an ownership interest. Section 1(1) references customary law and traditional practice concerning land tenure and issues related to land tenure. Section 1(2), on the other hand, relates to the alienation or disposition of land. There is nothing in these provisions that would suggest that the landowners have a duty with respect to those lands that clearly belong to the RMI Government.

At the hearing in this matter, Plaintiffs asserted that their concerns are encompassed within the "any related matter" language in Article X, section 1(1). However, the land at issue in this case is submerged lands that are approximately two miles from dry land on Ebeye. For Plaintiffs' reading of the RMI Constitution to be sensible, the Court would have to broaden the

definition of "land" to include submerged lands, which would be clearly inconsistent with 9 MIRC § 103 and the Supreme Court's ruling in *Zedkaia*. The Court rejects Plaintiffs' interpretation.

Plaintiffs also cited to Article II, sections 5(5) and (9) of the RMI Constitution. Article II, section 5 relates to just compensation when land rights are taken. Again, though, these provisions relate to the landowner's rights with respect to those lands in which he has an ownership interest. Since Plaintiffs concede that they have no ownership interest in the submerged lands, Article II, section 5 does not give them a basis for standing.

In their Opposition to MELL's Motion to Dismiss, Plaintiffs assert that they "hold rights to fish weirs, traps (both types erected in shallow water and sunk in deep water, objects on the beach by action of the water, fishing rights in shallow water (not to exceed four feet at mean low water), and piers, buildings and other construction over or on the reef by customary law." Pl. Opp to MELL's Mot. to Dismiss at 14. In support of this argument, Plaintiffs cite to paragraphs 11 and 20 through 27 of the Complaint. However, the Court, having reviewed these paragraphs, finds that Plaintiffs have not alleged any facts to show that they own any of these things, and they have not alleged any facts to show that any of these things were damaged. Instead, the only allegation in the Complaint relates to damage to the reef and coral. The Supreme Court's ruling in *Zedkaia* has made it clear that a submerged reef belongs to the RMI Government. Plaintiffs have no standing to bring a claim relating to damage to RMI property. Therefore, Plaintiffs have no standing to maintain the present suit and dismissal for lack of subject matter jurisdiction is proper.

V. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. STANDARD FOR DISMISSAL FOR FAILURE TO STATE A CLAIM

MIRCP Rule 12(b)(6) allows for dismissal for failure to state a claim upon which relief can be granted. MIRCP Rule 12(b)(6) mirrors FRCP Rule 12(b)(6). Thus, as noted above, the Court can look to United States cases for interpretation and application of such rule. *See Kap*, 4 TTR at 338.

On a Rule 12(b)(6) motion, "[a] complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory." *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1216 (D. Haw. 2002) (citations omitted), *aff'd*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). Although the Court must take all well-pleaded factual allegations contained in a complaint as true when considering a Rule 12(b)(6) motion, it "need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1462 (C.D. Cal. 1996) (citing *Western Miller Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert denied*, 454 U.S. 1031 (1981)).

The complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" and must "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (internal quotations omitted).²

²² The Court rejects the plaintiffs' cite to *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), as authority for the legal standard that dismissal under Rule 12(b)(6) is only appropriate "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The United States Supreme Court abrogated *Conley* in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,563 (2007). The United States Supreme Court clarified that to satisfy Rule 8 and survive a motion to dismiss under Rule 12, "a complaint must contain *sufficient factual matter*, accepted as true, to state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added, internal quotation marks omitted); *see also Twombly*, 550 U.S. at 555,562-63 ("[A] plaintiffs obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a *formulaic recitation of the*

elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.") (emphasis added, internal citations omitted). The U.S. Supreme Court has made clear that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not satisfy Rule 8's requirements. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

B. ANALYSIS

The Tammo Defendants' Motion to Dismiss asserts that the existing Complaint before the Court must be dismissed because it lacks a cognizable legal theory based on the facts alleged. As previously discussed, the Complaint fails to allege injury to any property that Plaintiffs own. Therefore, all of Plaintiffs' claims are barred, as a matter of law, by the doctrine of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). *Robins Dry Dock* does not allow recovery in tort of "pure economic loss" to persons whose property has not been physically damaged. See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985) (no tort action could be maintained to recover damages for negligently caused, purely financial harm arising out of fuel oil spill from one ship into harbor which prevented a different ship from docking at nearby berth, requiring it to discharge cargo at another pier at significant cost); *State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (1985) (shipping interests, marina and boat rental operators, wholesale and retail seafood enterprises seafood restaurants, tackle and bait shops, and recreational fishermen could not recover damages for economic losses arising out of a chemical spill which interrupted fishing, shrimping and related activities). The rule precluding recovery of "pure economic loss" in tort is a part of general maritime law of the United States which has been adopted in the RMI by 47 MIRC § 113.

Moreover, because Plaintiffs concede that they do not own the reef that was allegedly injured, and have failed to allege injury to any property they do own, the Complaint fails to state a claim upon which relief can be granted even aside from the "pure economic loss" doctrine. This is clear when the allegations of each of the counts alleged in the Complaint are examined.

Plaintiffs' First Cause of Action is for Maritime Negligence. "The elements of a maritime negligence cause of action are essentially the same as land-based negligence under the common

law, free of 'inappropriate common law concepts.'" Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 5-2 (4th ed. 2004) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959)). The traditional elements of negligence are duty, breach, causation, and damage. *See, e.g., Uncle Ben's International Division of Uncle Ben's Inc. v. Hapag-Lloyd A.G.*, 855 F.2d 215, 216 (5th Cir. 1988), citing Prosser and Keeton on Torts, 5th ed. 1984 at 164-65. In this case, Plaintiffs allege that they are "persons that have sustained and are continuing to sustain damage resulting from the reef and coral damage caused by the Vessel on May 8, 2015, following the negligent grounding on the inner reef." Compl., ¶ 35.

Plaintiffs' Second Cause of Action is for Unseaworthiness. Elements of a cause of action for unseaworthiness are an unseaworthy condition of the vessel, *i.e.*, the vessel is not "reasonably fit for [its] intended use," causation, and injury. *See, e.g., Johnson v. Offshore Express*, 845 F.2d 1347 (5th Cir. 1988). Here, the Second Cause of Action does not contain independent allegations as to the damages incurred but simply incorporates the relevant allegations of the First Cause of Action. Compl., ¶¶ 40-42.

The First and Second Causes of Action allege injury to the reef. However, it is undisputed that the submerged reef where the Vessel grounded is located two miles from dry land on Ebeye. Plaintiffs have conceded that the reef belongs to the RMI Government pursuant to 9 MIRC § 103. Since Plaintiffs concede that they do not own the reef, damage to the reef cannot be the basis for their legal claims. Moreover, Plaintiffs do not allege that any rights they have as the owners of the adjacent dry land two miles away have been affected by the grounding. In this regard, 9 MIRC § 103(1) specifies the residual customary rights in "the areas below high watermark," *i.e.*, submerged lands, by the owners of the adjacent dry land. None of these rights are invoked by the Complaint as pleaded. Specifically, Plaintiffs do not allege any damage to:

fish weirs or traps, *see* 9 MIRC § 103(1)(a); any materials, coconuts, or other small objects deposited on the shore or beach by action of the water or falling from trees located on the abutting land, and such fishing rights on, and in waters over reefs where the general depth of water does not exceed four feet at mean low water, *see* 9 MIRC § 103(1)(b) (the depth of the water at the grounding site is at least nine feet); any structures built over the water or on filled land, *see* 9 MIRC § 103(1)(c); or mangrove trees, *see* 9 MIRC § 103(1)(e). Moreover, Plaintiffs do not allege that they have filed a written notice of any legal interest in the submerged lands with the land office, as required by 9 MIRC §103(2). Therefore, Plaintiffs have not alleged any set of facts that would sustain their First and Second Causes of Action.

Plaintiffs' Third Cause of Action is for Trespass, and their Fourth Cause of Action is for Public and Private Nuisance. Trespass and private nuisance are claims by exclusive possessors of the land for interference with their exclusive possession or enjoyment of the land. *See, e.g., Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219 (Mich. App. 1999) ("[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it."); *Zimmerman v. Carmack*, 739 N.Y.S.2d 430, 431 (N.Y.App.Div. 2002) ("The essence of trespass is the invasion of a person's interest in the exclusive possession of land."); *Town of Superior, Mont. v. Asarco, Inc.*, 874 F.Supp.2d 937 (D. Mont. 2004) ("A private nuisance is a tort against land and the plaintiff's actions must always be founded upon his interest in the land.") (citing Restatement (Second) of Torts §§ 821B, 821D).

In their Complaint, Plaintiffs allege that "the injury to the reef interfered with the exclusive right of ownership and possession of natural resources belonging to the people of Ebeye and/or members of the Plaintiff class," *see* Compl. ¶ 45; "Plaintiffs ... are entitled to undisturbed use and enjoyment of natural resources of Ebeye," *Id.*, ¶ 48. These allegations do

not invoke any rights that Plaintiffs, as the owners of dry land, have in the reef under 9 MIRC §103(1). Nothing in 9 MIRC § 103(1) gives Plaintiffs, as landowners in Ebeye, the exclusive right to possess the reef—the natural resource at issue. Without such exclusive right, Plaintiffs' allegation of Trespass and Private Nuisance cannot be legally sustained.

Moreover, in order to state a claim for public nuisance, Plaintiffs would have to allege a "special interest" in the reef different in kind from the interest of any other member of the public. "Where the nuisance alleged is not also a private nuisance as to a private individual, [*i.e.*] where there is no allegation of an interference with a known property right, he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540, 1549–50, 87 Cal.Rptr.3d 602 (Cal.App. 2009). Plaintiffs have not alleged that they have any such interest, or that it has been violated. To the contrary, Plaintiffs allege that they had "the public right to use and enjoy the natural resources free from annoyance and interference." Compl., ¶ 48. However, under 9 MIRC § 103, the RMI Government owns the reef for the benefit of all citizens of the RMI, not just the Plaintiffs, as it is made clear by the narrow definition of residual rights reserved for the adjacent dry land owners in 9 MIRC § 103(1). Thus, Plaintiffs' allegation of Public Nuisance also fails.

Plaintiffs' Fifth Cause of Action ("Damages: EPA Derivation Action Right"), alleges "substantial and permanent damage to the environment more specifically identified as the marine resources in and around Ebeye and Kwajalein atoll" as a claim owned by the RMI Government and "delegated" to the Plaintiffs "under 35 MIRC §151." Compl., ¶¶ 53-55. This allegation is defective on its face, because 35 MIRC § 151 allows "any other person" to maintain actions only "for declaratory or equitable relief." In contrast, this action is a tort action for money damages.

At the time that the lawsuit commenced on October 21, 2015, the only delegation from EPA to Plaintiffs was the letter signed by Plaintiff Kabua and EPA's Acting General Manager on August 12, 2015, in which the Acting General Manager purports to authorize Plaintiff Kabua to pursue any environmental claims related to the Vessel's grounding, including the right to sue. *See* Ex. A to Ex. 3 of Plaintiffs' Opposition to MELL's Mot. to Dismiss. Subsequently, on December 3, 2015, after the Complaint was filed, the EPA General Manager and Board Chairman signed the Amended Delegation, purporting to give Plaintiffs authority to proceed with the present suit. While 35 MIRC § 109 generally allows the EPA to delegate its powers and functions, as outlined above, the October 21, 2015 letter and the Amended Delegation attempt to delegate rights that the EPA does not have.

35 MIRC § 118 provides that the Attorney General "shall" provide representation to the EPA in "any suit or prosecution brought by or against the Authority." The word "shall" indicates this provision is mandatory. If the EPA attempted to enforce any fine or penalty assessed against Defendant Tammo in this Court, or if Defendant Tammo sought review of any such penalty in this Court, 35 MIRC § 118 requires that in any such proceeding the EPA must be represented by the Attorney General, not by private Plaintiffs.

Moreover, 35 MIRC § 158 provides:

§158. Damages.

(1) Where a person violates any provision of this Chapter, the Attorney-General may petition the High Court for a judgment awarding damages.

The EPA does not have the right to seek civil damages from Defendant Tammo for injury to the reef unless such injury constitutes a violation of the EPA Act or its regulations. 35 MIRC §158 makes clear that the Attorney General, not the EPA, is entitled to seek civil damages (as opposed to civil penalties) from Defendant Tammo on behalf of the RMI for injury to the reef, even if such action is based on an alleged violation of the EPA Act or its regulations. Either

way, the EPA cannot delegate to Plaintiffs the right to prosecute an action against Tammo for civil damages on behalf of the RMI, because the EPA does not have such a right to begin with. Therefore, EPA's attempted delegation was improper, and Plaintiffs' Fifth Cause of Action cannot be legally sustained.

Because none of the Causes of Action alleged in the Complaint can be legally sustained based on the facts as alleged in the Complaint, dismissal for failure to state a claim upon which relief can be granted is proper.

VI. MOTION TO DISMISS *IN REM* CLAIM

It is elementary that "admiralty practice ... requires a vessel's arrest in order to maintain an *in rem* action against it." *Dluhos v. Floating and Abandoned Vessel*, 162 F.3d 63, 68 (2d Cir. 1998). "Before a court may exercise jurisdiction over a vessel, the vessel must be arrested within the court's territorial jurisdiction." *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 74 (8th Cir. 1988). "Jurisdiction over the *res* is obtained by arrest under process of the court. In absence of an arrest, no decree *in rem* can be rendered against the *res*." *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 384 (9th Cir.1983).

In their Motion to Dismiss, the Tammo Defendants seek dismissal of the *in rem* claim without prejudice as an alternative relief. In their Opposition to the Tammo Motion to Dismiss, Plaintiffs did not address this issue. At the hearing in this matter, Plaintiffs' counsel stated that Plaintiffs were not contesting this issue as the Vessel had not been arrested. Therefore, the Court grants the Tammo Defendants' motion to dismiss the *in rem* claim without prejudice.

VII. DECISION

With respect to Defendant MELL's MIRCP Rule 12(b)(5) motion to dismiss the Complaint for insufficient service, the Court finds that Plaintiffs did not properly effect service

on Defendant MELL by personally serving the Complaint and Summons at Defendant Pacific Shipping's office in Majuro since the Agency Agreement does not authorize Defendant Pacific Shipping to accept service of process on behalf of Defendant MELL. In addition, the Court finds that Plaintiffs did not properly serve Defendant MELL by serving them through Registered Mail, return receipt requested without a Court Order approving such method of service.

Notwithstanding the improper service, the Court accepts Plaintiffs' service on Defendant MELL through Registered Mail, return receipt requested, as it would be a waste of time and resources to require them to re-do the service. Therefore, Defendant MELL's motion to dismiss the Complaint for insufficient service is DENIED.

With respect to Plaintiffs' motion for entry of default against Defendant Grzegorz, the Court finds that Plaintiffs did not properly effect service on Defendant Grzegorz by personally serving the Complaint and Summons at Defendant Pacific Shipping's office in Majuro. Therefore, Plaintiffs' motion for entry of default against Defendant Grzegorz is DENIED.

With respect to Plaintiffs' motion for entry of default against the Tammo Defendants, the Court finds that that Plaintiffs relinquished this claim. Therefore, Plaintiffs' motion for entry of default against the Tammo Defendants is DENIED.

With respect to Defendant MELL's MIRCP Rule 12(b)(1) motion to dismiss the Complaint for lack of subject matter jurisdiction, the Court finds that the purported delegation of authority from EPA to Plaintiffs was not proper because the EPA Act does not provide EPA with authority to bring a lawsuit for civil damages. The EPA cannot, therefore, delegate authority that it does not have. In addition, Plaintiffs have not shown that they have an interest in the reef that was damaged by the Vessel's grounding. Instead, 9 MIRC § 103 makes clear that it is the RMI Government that owns the reef. Therefore, Plaintiffs have no standing to bring the present action

and dismissal for lack of subject matter jurisdiction is granted. Defendant MELL's motion to dismiss the Complaint for lack of subject matter jurisdiction is GRANTED.

With respect to the Tammo Defendants' MIRCP Rule 12(b)(6) motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, the Court finds that Plaintiffs have not alleged sufficient facts to show that they have a legally cognizable interest in the reef that was damaged. Thus, damage to the reef cannot be the basis for their legal claims, and the first four causes of action cannot be legally sustained. In addition, since the delegation from EPA was improper, Plaintiffs cannot bring a derivative action for damages on behalf of EPA. For this reason, the fifth cause of action also fails. Therefore, the Complaint fails to state a claim upon which relief can be granted, and the Tammo Defendants' motion to dismiss is GRANTED.

With respect to the Tammo Defendant's motion to dismiss the *in rem* claim, the Court finds that Plaintiffs have relinquished this claim. Therefore, the motion to dismiss the *in rem* claim is GRANTED.

The Court further finds that Plaintiffs' failure to state a claim upon which relief can be granted affects the entire Complaint, and requires that the entire Complaint be dismissed with prejudice.

VIII. ORDER

Based upon the above, the Court hereby orders that this case is dismissed with prejudice, with each party to bear its own costs and expenses.

Entered: June 20, 2016.



Carl B. Ingram
Chief Justice, High Court