SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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Application of Stephen J. Saft, Lynn Grossman and
Alfred LaRosa, Executors of the Estate of File No. 339363

THOMAS ELMEZZI, Dec. No. 470

Deceased,

For an Order to Discover Property Withheld.

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This is a proceeding pursuant to SCPA 2103 to deliver property. The petitioners are Stephen Saft, Lynn Grossman and Alfred Larosa, co-executors of the estate of Thomas Elmezzi. The respondent is Enrique Molina. Mr. Molina has moved to dismiss this proceeding on the grounds, inter alia, that this court lacks personal jurisdiction and for forum non conveniens.

The decedent, Thomas Elmezzi, was an employee of Pepsico Corporation for over thirty-five years. He died on October 3, 2005. He was survived by his spouse, Jeanne Elmezzi, who died three days after the decedent. The decedent's will was admitted to probate by this court on January 26, 2006. The will provides for a pour over of the decedent's assets into the Thomas Elmezzi Revocable Trust. The trust, in turn, provides for payments of specific bequests with the remainder to the Thomas and Jeanne Elmezzi Private Foundation.

The petitioners allege that Mr. Molina possesses property that belongs to the estate. Specifically, the petitioners allege that the decedent and Mr. Molina had a "lifetime business association and friendship" and that the decedent owned stock or equity interest in the following companies: Bebidas Purificadas de Acapulco, S.A.; Immuebles para la Industria, S.A.; Embotelladora el Sol and REVAMSA; E.M.S.A. Embotelladora Metropolitana, S.A, and its subsidiaries; BEPURA; Grupo Azul; Troika; Industria Refrescos, S.A.; and REFRISA, all of

which are Mexican corporations. In support of these claims, the petitioners attach copies of eight letters sent to the decedent from Mr. Molina covering the time period of 1971 through 1981. The letters set forth the following terms:

1. "This will confirm that I hold on your behalf and that you are the beneficial owner of ten percent (10%) of the Bebidas Purificadas de Acapulco, S.A. de C.V. and also Immuebles para la Industria, S.A. shares which holds the Pepsi-Cola Franchise in Acapulco" (letter dated January 15, 1971).

2. "This will confirm that I hold on your behalf and that you are the beneficial owner of five percent (5%) of EMSA and all of the present subsidiaries and others in the future. E.M.S.A. Embotelladora Metropolitano, S.A. and the subsidiaries owns the Mexico City Pepsi-Cola and Morelos Franchises. Seven-Up in Mexico City and the Garci Crespo Group" (letter dated October 1, 1984).

3. "By means of this letter I confirm to you that you are the owner of 15% of the 100% shares of Embotelladora el Sol and REVAMSA which owns 7UP and Manzanita Sol Plant in Mexico City, which you have fully paid. Those shares are issued in my name and deposited in" (letter dated September 13, 1989).

4. "By means of this letter I confirm that you are the owner of 15% of the 100% shares of BEPURA which owns the plant of Pepsi in Acapulco Gro., which you have fully paid. Those shares are issued in my name and deposited in" (letter dated September 13, 1989).

5. "By means of this letter I confirm to you that you are the owner of 15% of the 100% shares of Grupo Azul which owns the Garci-Crespo plant in Tehuacan, Pue., which you have fully paid. Those shares are issued in my name and are deposited in" (letter dated September 13, 1989).

6. "By means of this letter I confirm that you are the owner of 15% of the 100% shares of the Holding Company Troika which owns the Pepsi plants in Mexico City, which you have fully paid. Those shares were issued in my name and are deposited in" (letter dated September 13, 1989).

7. "By means of this letter I confirm to you that you are the owner

of 15% of the shares of Industria de Refrescos, S.A., which owns the Pepsi plant in Cuernavaca, Mor., which you have fully paid. Those shares were issued in my name and are deposited in" (letter dated September 13, 1989).

8. "By means of this letter I confirm to you that you are the owner of 15% of the 100% shares of REFRISA which owns the plant of Pepsi in Iguala, Gro, which you have fully paid. Those shares were issued in my name and are deposited in" (letter dated September 13, 1989).

Seven of the letters were allegedly signed by the respondent and witnessed by Fernando Molina and Jose Luis Bustos.

The petitioners further allege that "in addition to the Mexican Pepsi Bottling Plants, at all times up to and including the day of death of the Decedent, Decedent owned an equity interest held by Molina as Nominee in Pepsi-Gemex, S.A. de C.V., a New York Stock Exchange Company, which through a series of transactions acquired the stock of the Mexican Bottling Plants." Petitioners allege that the Mexican Bottling Plants were merged into a holding company named Troika which subsequently merged into a corporation which became Pepsi-Gemex, S.A. de C. V. and that the decedent's equity interest in Troika transferred to the Pepsi-Gemex shares. In 2002, the Pepsi Bottling Company made a cash tender offer of $1.2 billion to acquire Pepsi-Gemex shares. The petitioners allege that the respondent's share of the proceeds of that sale amounted to approximately $480 million and that through the respondent, as nominee, the decedent owned 6% of Pepsi Gemex which amounts to approximately $72 million. The petitioner, Stephen Saft, alleges in his affidavit in opposition to respondent's motion that the decedent "often stated that he was owed a significant amount of the proceeds" or 15% of "whatever Molina owned."

A transaction statement under Section 13(e) of the Securities and Exchange Act is attached as an exhibit. The decedent is listed as a director of Pepsi-Gemex as a "Private Investor in Intercontinental Food Consultants."

The petitioners assert that the court has jurisdiction over this matter because of the following: the decedent and respondent met in New York on numerous occasions to discuss transactions involving the bottling companies; that discussions took place in New York between the decedent and respondent regarding financial transactions which included personal delivery of monetary payments; and that the decedent, through a New York Corporation - International Food Consultants, Inc. ("IFC") entered into a consulting agreement with Consorcio Industrial Escorpion, S.A. ("CAZE"), a Mexican company controlled by the respondent, in which the companies agreed that IFC shall act as advisor to CAZE "in regard to its sugar operations and its operations of soft drink bottling plants in matters of technology, engineering, finances and sales". The agreement is to be governed by the laws of the State of New York and any disagreement is to be settled by arbitration.

In response to the petition, Mr. Molina filed a motion to dismiss. In his affidavit in support of the motion, Mr. Molina sets forth the following: he is a citizen of Mexico; he does not own property in New York; he does not nor has not conducted business in New York; and he has not engaged in a persistent course of conduct in New York or derived substantial revenue from New York. Mr. Molina further denies that he is in possession of property belonging to decedent and that the decedent "never claimed to me that he owned stock or equity interests in the Mexican Bottling Plants or in any company that ultimately owns these plants" (Affidavit of Enrique Molina in support of the motion to dismiss). As a result of all of these factors, the

respondent states that the court lacks jurisdiction over him and that the proceeding must be dismissed.

SCPA 2103 provides that a fiduciary may present to the court a petition showing on knowledge or information and belief that property should be paid or delivered and is in the possession or control of a person who withholds it (SCPA2103[1][a]). SCPA 210[2][a], in turn, provides that "the court may exercise personal jurisdiction over any non-domiciliary...as to any matter within the subject matter jurisdiction of the court arising from any act or omission of the non-domiciliary within the state..". The commentary to this section sets forth the following: "the legislature has taken a broader path with the SCPA provision than it took with the CPLR 302...The legislature did not use the same limiting language it used with CPLR 302...It exploited the basic concept of the *International Shoe* case and went closer to the constitutional edge by adopting the "minimum contacts" standard of that case. That standard, the outer frontier of procedural due process, was stated in *International Shoe* as follows:

> "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does offend 'traditional notions of fair play and substantial justice'".

(Siegel, David D. and Connors, Patrick M., Practice Commentaries, McKinney's Book 58A citing *International Shoe Co. v Washington,* 326 US 310, 316 [1945]).

The party seeking to assert personal jurisdiction bears the burden of proof on this issue (*Ying Jun Chen v Lei Shi,* 19 AD3d 407 [2d Dept 2005]). "The burden, however, does not entail making a prima facie showing of personal jurisdiction; rather the plaintiffs need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant" (*id* at 408;

see also Peterson v Spartan Industries, Inc., 33 NY2d 463 [1974]). Further, a denial by the defendant as to the jurisdiction allegations may warrant the court holding the motion in abeyance pending a hearing on the jurisdictional issue (*American Banknote Corp. v Hernan Daniel Daniele,* 45 AD3d 338 [1st Dept 2007]).

In determining whether the defendant has "minimum contacts" with the state which would confer jurisdiction, "an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that is 'reasonable' and 'fair' to require him to conduct his defense in that State" (*Kulko v Superior Court of California,* 436 US 84, 92 [1978]). The test is not "susceptible to mechanical application, rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present" (*id.).* One of the factors is whether the respondent "affirmatively invoked the benefits and protections of the laws in this state and could reasonably anticipate being haled into court here" (*Matter of Casey,* 145 AD2d 632, 633 [2d Dept 1988]).

In the instant proceeding, the petitioners allege that the respondent met the minimum contacts in that the decedent and the respondent had many conversations and transactions regarding the Mexican Bottling Plants and that these transactions took place in New York. The respondent, however, denies having contacts in New York that would satisfy the minimum contacts requirement to confer personal jurisdiction. The respondent's denial of the allegations warrants a hearing on this issue (*American Banknote Corp. v Hernan Daniel Daniele,*45 AD3d 338 [1st Dept 2007]; *see also Matter of Preferred Mutual Ins. Co. v Fu Guan Chan*, 267 AD2d 181 [1st Dept 1999]). A hearing is therefore scheduled for October 23, 2008 at 10:00 a.m.

The respondent has also moved to dismiss the petition on the grounds of forum non conveniens. Rule 327 of the CPLR provides the following: "when the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action on any conditions that may be just". The United States Supreme Court in *Sinochem International Co., Ltd. v Malaysia International Shipping Corp* (549 US 422 [2007]) held that a court "may dispose of any action by forum non conveniens dismissal, bypassing subject-matter and personal jurisdiction, when considerations of convenience, fairness and judicial economy so warrants." The power to dismiss the matter is discretionary and the court declines to do so at this time pending the resolution of the factual issues regarding personal jurisdiction.

This constitutes the decision and order of the court.

Dated: September 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court