

Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.
2009 NY Slip Op 32650(U)
November 5, 2009
Supreme Court, New York County
Docket Number: 104734/09
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART _____

Intelleg

Index Number : 104734/2009

SWEZEY, OSQUGAMA F.

VS.

MERRILL LYNCH PIERCE, FENNER

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/6/2009

CHARLES E. RAMOS *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----X
OSQUGAMA F. SWEZEY,

Petitioner,

-against-

Index No.
104734/09

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INCORPORATED,

Respondent.

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 001, 002, 003 and 004 are herein
consolidated for disposition.

In motion sequence 001, petitioner Osqugama F. Swezey
(Petitioner) seeks a writ of turnover and execution against
respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated
(Merrill) directing the transfer of all funds held in the account
of Arelma Inc. (Arelma), or any sums owed by Merrill to Arelma or
to the estate of Ferdinand E. Marcos (Estate), and a declaration
that all property held by Merrill for Arelma is the property of
the Estate is are subject to judgment enforcement (CPLR §§ 5225
and 5227).

In motion sequence 002, Merrill moves to dismiss the
petition without prejudice and dissolve the restraining notice
(CPLR 1001 [b]; 3211 [a] [10]), or alternatively, for a stay
pending the outcome of a proceeding pending in the United States
Court of Appeals for the Ninth Circuit (CPLR 2201).

In motion sequence 003, the Philippine National Bank (PNB)
and Arelma move to intervene (CPLR 402; 5225; 5227; 5239), or

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alternatively, to dismiss the petition (CPLR 3211 [a], [3], [7]), and for judgment on their counter and cross-claim to direct Merrill to transfer Arelma's assets to PNB.

In motion sequence 004, proposed intervenors PNB and Arelma move for admission pro hac vice of Charles Rothfield, Esq.¹

Background

Ferdinand E. Marcos served as the president of the Republic of Philippines until he was removed from power in 1986, whereupon he fled to Hawaii with his family. During his reign, he was responsible for grave human rights violations and corruption, including the alleged embezzlement of state funds to Switzerland and into fictitious corporations.

Subsequent to his removal from power, scores of his victims and victims' families commenced actions against him under the Alien Tort Act, seeking damages for torture, summary execution, and disappearance suffered at the hands of his henchmen. These actions were later consolidated, and certified as a class action (Class), comprising approximately 10,000 individuals in the Hawaii District Court in 1991.

The Class ultimately obtained a verdict of liability against Marcos' Estate (he died in 1989), and an award of nearly \$2 billion in damages. In 1996, the Court of Appeals for the Ninth Circuit affirmed the final judgment (Judgment) (*Hilao v Estate of Marcos*, 103 F3d 767 [9th Cir 1996]).

¹ The motion for pro hac vice admission was granted without opposition (7/28/09 Tr 3:9-23).

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This turnover proceeding has its genesis in the Class' fourteen year struggle to recover assets to fulfill the Judgment. Petitioner Swezey is a member of the Class and a New York resident.²

The Class previously sought to attach certain assets belonging to Marcos, including those of Arelma, a Panamanian corporation that he established while president. Arelma's share certificates were located in Switzerland, and its assets (Assets), totaling approximately \$35 million, are being held in a brokerage account at Merrill in New York. Upon a determination by Switzerland's highest court that Arelma was the alter ego and instrumentality of Marcos, Arelma's share certificates were confiscated and transferred to an escrow account at proposed intervenor PNB, a partly-owned state run bank of the Republic of the Philippines (Republic)³ (Exhibit F, annexed to the Swift Aff.).

The Republic created the Philippines Presidential Commission on Good Government (Commission) in order to recover property wrongfully taken by Marcos during his tenure. Since its creation, the Commission has purportedly recovered approximately \$1.93 billion from the Estate and other high-ranking officials who served under Marcos.

² The Class representative, Celsa Hilao, is deceased. Swezey has not yet been formally substituted as Class representative (Petition, ¶ 3).

³ In 1995, the Commission and PNB entered into an escrow agreement, pursuant to which PNB is holding the shares pending a decision of the Philippines court as to their rightful owner.

[* 5]

The Commission claimed entitlement to the Assets on behalf of the Republic. In 1991, the Commission commenced a forfeiture proceeding against the Estate (Philippines Proceedings) seeking the forfeiture of certain funds purportedly belonging to Marcos, including the Assets (Swift Affidavit; see also *Republic of Philippines v Pimentel*, __US__, 128 S Ct 2180, 2185-87 [2008]).

Facing conflicting claims of ownership to the Arelma Assets from the Class, the Republic and others,⁴ Merrill initiated an interpleader action in the Hawaii District Court in 2000. The Republic and the Commission sought dismissal on the ground of sovereign immunity. On an interlocutory appeal, the Ninth Circuit stayed the action pending the outcome of the Philippines Proceedings (*In re Republic of Philippines*, 309 F 3d 1143 [9th Cir 2002]).

On remand, the Hawaii District Court determined that the Republic and the Commission were not indispensable parties, and

⁴ The estate of Roger Roxas and his corporation, the Golden Buddha Corporation (together, Roxas Claimants) also asserted a claim to the Assets.

The Roxas Claimants obtained a judgment against Marcos' widow, Imelda. Roger Roxas purportedly discovered the "Yamashita Treasure," a cache of gold, precious stones and other valuable works of art allegedly plundered by a high-ranking Japanese military officer and hidden in the Republic by Japanese forces during World War II (*Roxas v Marcos*, 969 P 2d 1209 [Sup Ct HI 1998; *Golden Buddha Corp. v Canadian Land Co. of America*, 931 F 2d 196 [2d Cir 1991]). When Marcos allegedly discovered that Roxas had unearthed the treasure, Roxas was arrested, tortured and imprisoned, and the treasure seized by Marcos. Although the existence of the treasure is still shrouded in mystery and some historians question its existence, Roxas obtained a judgment under the Alien Tort Act for the human rights abuses he suffered. He was not a member of the Class because of when his injury accrued.

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permitted a trial as to ownership of the Assets to proceed. Extensive factual findings were rendered, and the court awarded the Assets to the Class upon the determination that the funds transferred to Arelma belonged to Marcos, and that Arelma was Marcos' alter ego (*Merrill Lynch, Pierce, Fenner & Smith v Arelma, Inc.*, 2004 WL 5326929 [D HI 2004]).

The Ninth Circuit affirmed the dissolution of the stay and the judgment, reasoning that, although the Republic and Commission were necessary parties, the action could proceed in their absence because they were unlikely to succeed on their claim to the Assets because it would be time-barred under New York law (*Merrill Lynch, Pierce, Fenner and Smith, Inc. v ENC Corp.*, 446 F 3d 1019 [9th Cir 2006]).

Shortly thereafter, the Republic moved in the Philippines Proceedings for summary judgment as to its claim that the Assets (and other funds not at issue here) were the ill-gotten gains of Marcos. The Class and other claimants to the Assets were not permitted to intervene in the Philippines Proceedings (Swift Aff., ¶¶ 5-6).

In 2007, the U.S. Supreme Court granted certiorari, reversed the Ninth Circuit, and dismissed the interpleader action (*Republic of the Philippines*, 128 S Ct 2180). The Supreme Court held that where a sovereign asserts a claim to property, and that claim is not frivolous, dismissal for non-joinder under Federal Rule 19 is appropriate where the sovereign elects to assert immunity (*Republic of Philippines*, 128 S Ct at 2190-91).

[*7]

In the meantime, on April 2, 2008, the court in the Philippines Proceedings determined that the Assets be forfeited to the Republic as ill-gotten gains, and is subject to an appeal by the Estate. The judgment is not yet final, and is being appealed by the Estate (Tr 14:22-25). The Republic has not sought satisfaction of the foreign judgment in New York.

Petitioner, on behalf of the Class, registered the original Judgment obtained against the Estate in the class action in New York Supreme Court. By this petition (Petition), Petitioner seeks a writ of execution and turnover against Merrill for the Assets, pursuant to CPLR 5225 and 5227.⁵

Discussion

Merrill⁶ moves to dismiss the Petition for non-joinder of the Republic and Commission. Alternatively, Merrill moves for a stay pending the outcome of accounting proceedings that is currently before the Ninth Circuit.⁷

PNB and Arelma (together, PNB) move to intervene in this proceeding. Upon intervention, they move to dismiss the Petition on the ground of non-joinder, and alternatively, on the ground that the Judgment against the Estate has lapsed. Additionally,

⁵ Petitioner served notice of this proceeding upon the Estate, who has not appeared.

⁶ Merrill adopts and incorporates proposed intervenors Arelma's and PNB's arguments.

⁷ The interpleader action was remanded by the Supreme Court to the Hawaii District Court for dismissal. Thereafter, PNB sought an accounting, alleging irregularity involving management of the Assets, which is still pending before the Ninth Circuit (Tr 16:4-15).

they move for judgment on their counter and cross-claim for an order directing Merrill to transfer the Assets to PNB.

The Petitioner contends that the Class is entitled to seek satisfaction of its valid Judgment because it was the first judgment creditor to file and seek to levy against the Assets. Further, she asserts that a turnover proceeding is exempt from the application of joinder principles, and, even if applicable, dismissal for non-joinder is strongly disfavored in New York. As to the PNB and Arelma's application for intervention, she asserts that only adverse claimants are entitled to participate in a turnover proceeding.

I. Enforcement of Money Judgments

CPLR 5225 (b) enables a judgment creditor to seek satisfaction of a judgment by the commencement of a special proceeding against a third person in possession or custody of money or property in which the judgment debtor has an interest ("turnover proceeding"). A related provision is CPLR 5227, that is applicable where the garnishee is indebted to the judgment debtor.

Under its plain terms, CPLR 5225 and 5227 do not require a petitioner to join rival claimants to the property as respondents (accord *Togut v Thurm & Heller*, NYLJ, September 16, 1999, at col 1 [Sup Ct, NY County 1999]; *Ruvolo v Long Island R. Co.*, 45 Misc 2d 136, 145-47 [Sup Ct, Queens County 1965]; *RCA Corp. v Tucker*, 696 F Supp 845, 851 [ED NY 1988]; but see *Bergdorf Goodman, Inc. v Marine Midland Bank*, 97 Misc 2d 311 [Sup Ct, NY County 1978]).

By reference to CPLR 5239, CPLR 5225 and 5227 expressly contemplate that any person claiming an interest in the property may seek intervention in the proceeding, that effectively converts it into a "race of diligence" between rival claimants (*Ruvolo*, 45 Misc 2d at 145-47). Upon intervention of adverse claimants, the court may proceed to determine the validity and priority of the rival claims to the disputed property, as in a plenary action (*National Union Fire Ins. Co. of Pittsburgh, Pa v Eland Motor Car Co.*, 85 NY2d 725, 729 [1995]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5225:5, CPLR C5239:1). Property is applied in satisfaction of the execution in the order in which the execution order is delivered (CPLR 5234 [b]).

Although there is no explicit requirement in Article 52 that a petitioner join adverse claimants in a turnover proceeding, joinder principles are relevant, particularly to the extent that the rights of persons who cannot be joined, or who decline to intervene and are not subject to the court's jurisdiction, might be inequitably affected by the outcome (CPLR 1001; *see also Ferrando v New York City Bd. of Standards and Appeals*, 12 AD3d 287, 12 AD3d 287 [1st Dept 2004]; *Togut*, NYLJ at col 1).

The Republic and the Commission are necessary parties to these proceedings within the meaning of CPLR 1001 (a) to the extent that the Commission claims an interest in the Assets on behalf of the Republic and thus, will be practically effected in

the event that the Petition is granted. Further, the Commission's claim raises the potential that Merrill, as garnishee, may face double liability if ordered to turn the Assets over to Petitioner.

The Court must resolve whether a claim by a foreign sovereign that property of a judgment debtor belongs to it, but who elects not to participate in an attempt to demonstrate its superior right to the property, has a dispositive effect and mandates dismissal of a turnover proceeding.⁸

Under the circumstances, the Court determines that dismissal is not appropriate.

II. Joinder

When a necessary party can be joined only by consent or appearance, the court must consider the five factors set forth in CPLR 1001 (b) to determine whether joinder of the absentee may be excused where justice requires (*Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726 [2008]; *Red Hook/Gowanus Chamber of Commerce, v New York City Board of Standards and Appeals*, 5 NY3d 452, 457-59 [2005]).

Dismissal for non-joinder is a last resort (*Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 459), and is particularly disfavored where the plaintiff would be left without a remedy (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 10-11 [1st

⁸ On the eve of oral argument on these motions, this Court received a letter purportedly from the Ambassador of the Philippines indicating that neither the Republic nor the Commission intended to intervene in these proceedings on the basis of sovereign immunity (July 13, 2009 Letter).

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Dept 2007]).

The five joinder factors are: (1) whether the plaintiff has another remedy if the action is dismissed for non-joinder; (2) the prejudice which may accrue from non-joinder to the defendant or to the non-joined party; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision; and (5) whether an effective judgment may be rendered in the absence of the non-joined person (CPLR 1001 [b]; *Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 459).

A. Whether the Petitioner Has Another Effective Remedy

The parties to this proceeding, including the Petitioner and Merrill, are not permitted to intervene in the Philippines Proceedings (Swift Aff., ¶¶ 5-6). Moreover, although five class members sought enforcement of the Judgment in the Philippines as against other property of the Estate, it was dismissed by a Philippines court for failure to pay a \$8.4 million filing fee.⁹

⁹ The Class members sought a determination that a smaller filing fee was sufficient. While the motion was pending for five years, the same court entered judgment that the property be forfeited to the Republic.²

Thereafter, the Class members sought relief before the United Nations (UN) Human Rights Committee, claiming that the proceedings were unreasonably prolonged and that the exorbitant filing fee amounts to a de facto denial of their right to an effective remedy to obtain compensation ((Eighty-ninth Session of the United Nations Human Rights Committee at ¶¶ 2.5, 3, Exhibit G, annexed to the Swift Aff.)). The UN Human Rights Committee determined that the length of the proceedings relating to the issue of the filing fee (a total of eight years) violated the Article of the Covenant of the UN, and that the Republic was under an obligation to ensure an adequate remedy to the filing Class members, including compensation and a prompt resolution of

Consequently, if the Petition is dismissed, there is no alternative forum available where all necessary parties can be joined that can produce an all-inclusive resolution as to entitlement to the Assets. Thus, dismissal will leave the Petitioner without an alternative remedy (see *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 820, cert denied 540 US 1017 [2003]; *L-3 Communications Corp.*, 45 AD3d at 10-11; *St. Regis Tribe of Mohawk Indians v State*, 4 Misc 2d 110, 118-19¹⁰ [NY Ct of Claims, 1956], reversed on other grounds 5 AD2d 117 [3d Dept 1957], affirmed 5 NY2d 24, rearg denied 5 NY2d 793 [1958], cert denied 359 US 910 [1959]; compare *Horwitz v Sax*, 16 AD3d 161 [1st Dept 2005]).

B. The Prejudice That May Accrue to the Absentee or Respondent

The principal purposes behind joinder rules are to protect against multiple lawsuits and inconsistent judgments, and guarantee that absent parties at risk of prejudice will not be

their case seeking enforcement of the Judgment (§ 10, *Id.*). Since the Human Rights Committee's ruling in 1997, there has been no movement on the Class' attempt to enforce the Judgment against property of Marcos located in the Philippines.

¹⁰ In a proceeding by the St. Regis Tribe of Mohawk Indians against the state of New York for compensation for the taking of its undivided interest in an island in the St. Lawrence River, and interest to the island was also claimed by other tribes including a tribe on the Canadian side of the river, the Court of Claims declined dismissal, in part, for non-joinder. The court concluded that dismissal was inappropriate where the claimant was barred completely from any other remedy and thus, unable to enforce its claim because it could not sue in Canada, and the state had no jurisdiction over the Canadian tribe, and any order to join it would be futile.

"embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard" (*Red Hook/Gowanus Chamber of Commerce, v New York City Board of Standards and Appeals*, 5 NY3d 452, 457-59 [2005]; *Saratoga County Chamber of Commerce, Inc.*, 100 NY2d at 820).

In the first instance, it cannot be said that the Republic and the Commission have been denied the opportunity to be heard, where they have elected not to participate in this proceeding (see *Id.*).

Nonetheless, the Court is mindful of Merrill's precarious position in facing the potential for multiple litigation. However, dismissal will likely not decrease that potential. So long as the Assets remain in Merrill's hands, it may be forced to defend lawsuits by various purported claimants indefinitely (compare *JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 311 [1st Dept 2007]).

On the other hand, if the proceeding is not dismissed and the Petitioner succeeds in demonstrating its superior right to the Assets and Merrill is ordered to turn them over, should other purported claimants subsequently institute actions against Merrill, our courts certainly would not permit it to be subject to double liability.

C. Whether Prejudice Might Have Been Avoided by the Petitioner

The Petitioner's attempt to join the Republic and the Commission likely would have been futile, in light of their

anticipated assertion of sovereign immunity. Thus, there is little, if any, that the Petitioner can do to avoid or lessen the potential for prejudice to the absentees or to Merrill.

D. The Feasibility of a Protective Provision

As a protective measure, the only relief that the Court can suggest is the Republic and Commission's voluntary appearance in this proceeding by waiver of sovereign immunity. Their voluntary intervention ensures that their purported interests in the Assets are protected, and will entirely eliminate the risk of piecemeal litigation and the unnecessary waste of judicial resources.

Because the Assets themselves are located here, they cannot be released to any claimant without that claimant first submitting to New York jurisdiction. Thus, it is likely that at some point, the Republic will seek to voluntarily enter New York courts in order to pursue its recovery, or seek to have a foreign judgment recognized here (CPLR 5301; Restatement [Third] of Foreign Relations § 421; see also *Republic of the Philippines*, 128 S Ct at 2195-97 [Stevens, J., concurring, in part and dissenting, in part]; *Lamont v Travelers Ins. Co.*, 281 NY 362, 371 [1939], *rearg denied* 282 NY 676 [1940]).

Incidentally, between 1986 and 2000, the Republic filed or was a party in at least a dozen actions in U.S. courts seeking to recover Marcos' assets (Swift Affidavit, ¶ 8), including an interpleader action initiated by the Republic itself in New York state court (*Republic of the Philippines v Marcos*, 1986 WL 7274 [SD NY 1986]). The Republic did not assert, or agreed to waive,

sovereign immunity in these actions (see e.g. *Sotheby's, Inc. v Garcia*, 802 F Supp 1058 [SD NY 1992]; *New York Land Co. v Republic of Philippines*, 634 F Supp 279 [SD NY], affirmed 806 F 2d 344 [1986], cert dismissed 480 US 942, cert denied 481 US 1048 [1987]).

Further, the Court notes the recent turn of events in an interpleader action pending in Singapore concerning competing claims to approximately \$22 million from an account belonging to Marcos (March 24, 2008 Decision of the Singapore Court of Appeal, Exhibit J, annexed to the Swift Aff.). Previously, the Swiss government located several of Marcos' accounts and released approximately \$600 million to PNB, as escrowee, who thereafter, deposited the funds in Singaporean banks. In 2003, a Philippines appellate court affirmed a final judgment declaring the funds at issue forfeited to the Republic as ill-gotten gains of Marcos and his widow, Imelda (*Id.*, ¶ 10). The bulk of the funds were released to the Republic. However, one of the Singaporean banks refused to release the funds it held after eight other claimants, including the Class, notified it of their claims (*Id.*, ¶ 11).

In 2004, the bank commenced an interpleader action in Singapore. The Republic sought intervention in the action in order to seek a stay on the basis of sovereign immunity, and to assert its entitlement to the funds (*Id.*, ¶¶ 19-20).

In a fifty-three page decision, the Singaporean appellate court denied the Republic's application for a stay on the ground that the doctrine of sovereign immunity should not be extended to

a case involving debt or choses in action in the possession of a third party in respect of which the claimant-state has yet to prove its ownership (*Id.*, ¶ 53). Thereafter, the Republic agreed to waive sovereign immunity and to participate in the interpleader action (7/28/09 Tr 19:19-26, 20:2-6). A trial on the merits is scheduled for sometime this fall.

It is certainly the Republic's prerogative not to participate in this proceeding as a nation entitled to sovereign immunity. Further, the assertion by letter from the Ambassador to the Philippines that a Philippines court awarded the Assets to the Republic is entitled to weight under principles of comity, although the Republic has yet to take steps to attempt to seek recognition of that judgment in this state under Article 53 of the CPLR.

This Court takes note of the Republic's waiver of sovereign immunity on other occasions and the likelihood that it will have to seek intervention into New York courts at some point to attempt to recover the Assets in order to highlight that any unfairness to the Republic and the Commission's interests is mitigated by their own ability to avoid that prejudice by voluntary intervention in this proceeding (*accord Saratoga County Chamber of Commerce*, 100 NY2d at 820-21; *L-3 Communications Corp.*, 45 AD3d at 13).

However, should it continue to elect not to participate, all other parties to this proceeding should not be forced to forego a resolution as to the disposition of this property.

E. Whether an Effective Judgment May be Rendered in the Absence of the Non-joined Person

Despite the Republic's absence, an effective judgment may be rendered. In accordance with Article 52 of the CPLR, the Court is permitted to proceed to determine the priority and validity of the rival claims to the disputed Assets (*National Union Fire Ins. Co. of Pittsburgh, Pa*, 85 NY2d at 729), in this race of diligence (*Ruvolo*, 45 Misc 2d at 145-47).

F. Weighing the Factors

The balance of factors do not weigh in favor of dismissal of the Petition for non-joinder. On the one hand, the Petitioner would be left without an alternative forum to demonstrate its entitlement to the Assets. The Class has been attempting to obtain satisfaction of the Judgment since 1995, and has yet to recover virtually any property (Swift Affidavit). The Class includes individuals who suffered tremendous crimes under Marcos' reign, including torture, kidnaping, death, and the loss of loved ones. Legal representatives of the Estate, including his heirs, concealed the existence of the Arelma account and other Marcos property, and even attempted to dissipate the Assets in an effort to prevent satisfaction of the Judgment, resulting in a finding of contempt against them (*Hilao v Estate of Marcos*, 103 F 3d 762, 765-67 [9th Cir 1996]). The prejudice to the Class that will result from dismissal is palpable.

On the other hand, the stalemate that would result from dismissal does not serve the purposes of joinder. The various

claims to the Assets will simply be left undetermined and indeterminable, so long as the Republic declines to participate and waive sovereign immunity. Further, the risk of multiple litigation will not be ameliorated, because the Assets will remain in Merrill's hands indefinitely. In fact, forcing the Petitioner and Merrill to forgo resolution of the issue of entitlement to the Assets indefinitely would likely create more problems and waste precious judicial resources.

PNB and Arelma assert that the issue of dismissal for non-joinder of the Republic has already been determined by the Supreme Court and thus, is *res judicata*. However, the Supreme Court addressed the issue in the context of an interpleader action under Federal Rule 19. While it is similar to CPLR 1001 (*Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 458), the Supreme Court's interpretation of federal procedure, while informative, is not binding on New York courts.

In New York, dismissal for non-joinder is disfavored, particularly, where, as here, the party seeking relief would be left without a judicial remedy, the absentee, even a sovereign absentee, elects not to participate, and dismissal would not bring the parties any closer to an all-inclusive resolution (see *Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 459; *Saratoga County Chamber, Inc.*, 100 NY2d at 820-21).

In any event, the Supreme Court noted that the balance of equities may change in light of changed circumstances. The Court notes two factors that tips the balance. First, in April 2008 a

lower court in the Philippines Proceedings declared the Assets forfeited to the Republic. As of this date, no steps have been taken to seek recognition of that foreign judgment in New York courts in accordance with Article 53 of the CPLR. Further, in factually similar proceedings conducted in Singapore, the Republic agreed to waive sovereign immunity in order to participate in an interpleader action in an attempt to recover funds held in an account there, suggesting that, if given an opportunity, the Republic may elect to participate in this turnover proceeding.

Therefore, in the interests of justice, dismissal for non-joinder is denied.

III. PNB's and Arelma's Intervention

To the extent that PNB and Arelma have an interest in the outcome of this proceeding, their motion to intervene is granted. Intervention in a turnover proceeding is not limited only to parties claiming an ownership interest in the judgment debtor's property or debt. CPLR 5239 permits "any interested person ... with whom a dispute exists to determine rights in the property or debt" to intervene.

PNB holds all of Arelma's bearer shares, while Arelma is the legal owner of the disputed account which holds the Assets. PNB is a party to escrow agreements with the Commission pursuant to which it purports to have a duty to hold the Assets until a final determination of their ownership is made, and then to deliver the assets to the appropriate party as directed by the Philippines

courts. Moreover, because this is a proceeding to determine title to the Assets and they challenge the Petitioner's rights to the Assets, PNB and Arelma are interested persons within the meaning of CPLR 5239, and thus, may intervene.

Nonetheless, PNB's and Arelma's motion for judgment on their counter-and cross-claim against Merrill is denied. Triable issues remain as to which party has superior rights to the Assets.

IV. Enforceability of the Judgment

Finally, PNB and Arelma challenge the enforceability of the Judgment on the ground that it has lapsed.

The Class obtained the Judgment in the Hawaii District Court in 1995. On July 17, 2008, the Class registered the Judgment in the Southern District of New York. On July 31, 2008, the Ninth Circuit determined that the Judgment had expired under Hawaii's ten-year period applicable for enforcing judgments (*Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F 3d 980, 987 [9th Cir 2008], *cert denied* 129 S Ct 1993 [2009]). On October 15, 2008, the Class registered the Judgment in New York Supreme Court (Exhibit A, annexed to the Swift Aff.).

On March 10, 2009, the Class obtained an order of the United States District Court for the Northern District of Illinois reviving the Judgment (Illinois Judgment). On July 1, 2009, the Class registered the Illinois judgment in New York Supreme Court (NY- Registered Illinois Judgment) (Exhibit A, annexed to the Swift Aff.).

Petitioner's NY-Registered Illinois Judgment is enforceable under the full faith and credit clause of the Constitution (see CPLR 5401). Further, because the statute of limitations applicable to enforcing judgments is twenty years in both New York and Illinois, New York's borrowing statute is inapplicable.

New York courts will disregard the statute of limitations of the state where a foreign judgment has been initially returned when that judgment has been registered in New York, because the judgment is then treated as if it were a New York judgment, even if the statute of limitations in the foreign state where the judgment was returned had already run (*Roche v McDonald*, 275 US 449, 452-55 [1928]; *Cadle Co. v Tri-Angle Assocs.*, 18 AD3d 100, 103 [1st Dept 2005]; *Mee v Sprague*, 144 Misc 2d 1057, 1058 [Sup Ct, Westchester County 1989]; see also *Parker v Hoefer*, 2 NY 612, 616 [1957] [recognizing that *Roche*, 275 US 449 is good law in New York]).

Here, the NY-Registered Illinois Judgment is entitled to full faith and credit irrespective of whether the statute of limitations in Hawaii (where the Judgment was originally returned) has run. "Where a judgment in one State is based upon a cause of action which arose in the State in which it is sought to be enforced ... the judgment, if valid where rendered, must be enforced in such other State although repugnant to its own statutes" (*Roche*, 275 US at 452-55).

The NY-Registered Illinois Judgment was valid and conclusive in Illinois at the time of its registration in New York. Thus,

it is equally conclusive in this state upon registration, and must be enforced under the full faith and credit clause of the Constitution and CPLR 211 (b), even though the Judgment is no longer enforceable in Hawaii where the Judgment was originally returned.

Otherwise, if the judgment debtor (the Estate) wishes to challenge the validity of the Illinois Judgment (that is now valid in New York upon registration in New York), the issue should have been submitted to the courts of Illinois, where the original Judgment was revived on March 10, 2009 (*Roche*, 275 US at 452-55). Therefore, the NY-Registered Illinois Judgment is enforceable.

V. Application For A Stay

Merrill seeks a stay of this proceeding pursuant to CPLR 2201 pending the outcome of an appeal before the Ninth Circuit. PNB and Arelma appealed the Hawaii District Court's denial of their motion for an accounting to determine whether the Assets earned interest while in the custody of the court clerk.

CPLR 2201 authorizes the granting of a stay "in a proper case," and is within the trial court's discretion. Further, where a party seeks the stay of an action pending the outcome of another action, complete identity of parties, causes of action and judgment sought are required (*952 Associates, LLC v Palmer*, 52 AD3d 236, 236-37 [1st Dept 2008]). Although these elements are not specifically set forth in CPLR 2201, they are generally adhered to (*Mt. McKinley Ins. Co. v Corning, Inc.*, 33 AD3d 51,

56-57 [1st Dept 2006]).

Although there is complete identity of parties, the cause of action and judgment sought are dissimilar. At most, Merrill may obtain additional monies from the clerk of the Hawaii District Court if the appeal is successful. However, the Hawaii District Court's handling of the Assets (McLaughlin Aff., ¶¶ 8-9), is not dispositive of the issue raised in this turnover proceeding, which is the Petitioner's superior entitlement to the Assets. Therefore, there is no basis for a stay.

Accordingly, it is

ORDERED that the Petition (001) seeking a writ of turnover and execution is set down for a hearing; and it is further

ORDERED that Respondent's motion (002) to dismiss the Petition and dissolve the restraining notice, and alternatively to stay, is denied; and it is further

ORDERED that the Philippine National Bank and Arelma, Inc.'s motion (003) to intervene is granted, and that Philippine National Bank and Arelma, Inc. be permitted to intervene in the above-entitled proceeding as respondents; and it is further

ORDERED that the Petition in this proceeding be amended by adding Philippine National Bank and Arelma, Inc. thereto as respondents; and it is further

ORDERED that the Philippine National Bank and Arelma, Inc. be and hereby is permitted to serve its answer upon counsel for Petitioner and the respondent, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the intervenors shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the Philippine National Bank and Arelma, Inc.'s motion is otherwise denied in its entirety; and it is further

ORDERED that the Philippine National Bank and Arelma, Inc.'s motion (004) for admission pro hac vice of Charles Rothfield, Esq. is granted without opposition; and it is further

ORDERED that within 20 days from service of a copy of this order with notice of entry Petitioner shall send a copy of this order to Will C. Gaa, Ambassador to the Republic of the Philippines, and the legal representatives of the Estate of Roger Roxas; and it is further

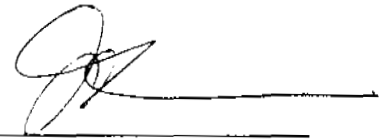
ORDERED that Petitioner shall seek formal substitution as class representative before the Hawaii District Court; and it is further

ORDERED that the parties shall appear for a pre-trial conference for the purpose of scheduling a hearing on December 15 at 10:30 AM in Part 53.

This constitutes the decision and judgment of the Court.

Dated: November 5, 2009

ENTER:



J. S. C.
CHARLES E. RAMOS

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).