

<b>Swezey v Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</b>
2014 NY Slip Op 32889(U)
February 19, 2014
Supreme Court, New York County
Docket Number: 155600/2013
Judge: Charles E. Ramos
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CE Ram

Justice

PART 53

Index Number : 155600/2013  
SWEZY, OSQUGAMA F  
vs.  
MERRILL LYNCH  
SEQUENCE NUMBER : 004  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Is decided in accordance with  
accompanying memorandum decision and order.

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

Dated: 2/19/14

Charles E. Ramos  
**CHARLES E. RAMOS**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
OSQUGAMA F. SWEZEY and JOSE DURAN, on their  
Behalf and as Representatives of a Class of  
Judge Creditors of the Estate of Ferdinand  
E. Marcos

Petitioners,

Index No.  
155600/13

-against-

MERRILL LYNCH, PIERCE, FENNER & SMITH,  
INCORPORATED and NEW YORK CITY DEPARTMENT OF  
FINANCE,

Respondents.

-----X

**Hon. Charles E. Ramos, J.S.C.:**

Proposed intervenors the Philippines National Bank (PNB) and Arelma, Inc. (Arelma) (together, Respondents), move to intervene in this turnover proceeding.<sup>1</sup> Upon intervention, Respondents move to dismiss pursuant to the Court of Appeals' decision in *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (19 NY3d 543 [2012]), and CPLR 3211 (a) (10), on the ground that the Court should not proceed to adjudicate the issues raised in the petition in the absence of the Republic of the Philippines (the Republic).

**Background<sup>2</sup>**

This proceeding arises out of attempts by petitioners

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<sup>1</sup> There is no opposition to Respondents' intervention in this proceeding.

<sup>2</sup> For a full recitation of the factual background in this action, see this Court's prior decision, dated November 5, 2009.

(Petitioners), a certified class of approximately 10,000 individual victims and survivors of grave human rights violations at the hands of the regime of the former president of the Republic, Ferdinand E. Marcos, to execute on a \$2 billion federal judgment obtained against Marcos's estate and his former wife, Imelda.

Petitioners seek a declaration that the property and assets of Arelma, a Panamanian corporation that Marcos established while president, are assets of Marcos' estate.<sup>3</sup> Arelma's assets total approximately \$42 million (the Arelma funds), and were held in a brokerage account at Merrill in New York prior to their transfer to the New York City Department of Finance.

#### Forfeiture Proceeding

Shortly after Marcos' reign ended, the Republic organized the Philippine Presidential Commission on Good Government (PCGG) for the purpose of identifying, locating and retrieving national assets stolen by Marcos and his administration. In 1991, the PCGG commenced a proceeding against the Marcos estate seeking the forfeiture of public funds that Marcos had transferred to his personal control, including the Arelma funds (Forfeiture proceeding).

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<sup>3</sup> PNB, as a court-appointed escrow agent, holds all the bearer certificated shares in Arelma.

### Federal Interpleader Action

Merrill previously initiated a federal interpleader action to determine entitlement to the Arelma funds, and naming a number of potential claimants including Petitioners, Respondents, the Republic, PCGG in the US District Court for the District Hawaii in 2000. The Republic invoked sovereign immunity and declined to appear, and the PCGG moved to dismiss the action. After numerous appeals, the issue reached the Supreme Court of the United States (*Republic of Philippines v Pimentel*, 553 US 851, 867-868 [2008]). The Supreme Court dismissed the action, holding that where a sovereign asserts a claim to property and that claim is not frivolous, dismissal for non-joinder is appropriate under Rule 19 of the Federal Rules where the sovereign elects to assert immunity (*Id.*). Nonetheless, the Supreme Court cautioned that the passage of time or other events could alter the balance of the equities under the applicable analysis (*Id.*).

### Swezey I

Following dismissal of the federal interpleader action by the US Supreme Court, Petitioners filed a turnover proceeding pertaining to the Arelma funds in the Supreme Court of the State of New York, entitled *Swezey v Merrill Lynch*, and bearing the index number 104734/09 (Swezey I), which was assigned to this Court.

Meanwhile, the Republic moved for summary judgment in the

Forfeiture proceeding before a Philippine court on the claim that the Arelma funds (and other funds not at issue here) were the ill-gotten gains of Marcos, which was granted (Forfeiture judgment).

Petitioners and other claimants to the funds were not permitted to intervene in the Forfeiture proceeding, and Philippine courts have refused to recognize Petitioners' judgment. As of that time, 2009, the Republic had not sought to enforce the Forfeiture judgment in New York.

This Court permitted the Respondents to intervene in *Swezey I*, but the Republic declined to appear and invoked sovereign immunity. Respondents moved to dismiss the proceeding for failure to join a necessary party, the Republic, under CPLR 1001 (b). This Court denied the motion on the ground that the balance of the enumerated factors of CPLR 1001 (b) did not mandate dismissal for non-joinder (*Swezey v Merrill Lynch*, 2009 NY Slip Op 32650[U] Sup Ct, NY County 2009]). According to this Court's decision, dismissal for non-joinder would leave Petitioners without an alternative forum, the Republic had taken no steps to seek recognition of its foreign judgment that it obtained with respect to the Arelma funds, and a legal stalemate would effectively result so long as the Republic declined to waive sovereign immunity while not attempting to enforce its judgment in New York, where the Funds are located.

The First Department reversed this Court's decision, which was upheld by the Court of Appeals, who substituted its own analysis of the CPLR 1001 (b) factors (19 NY3d 543 [2012]).

The Court of Appeals reasoned that, under the circumstances, the assertion of sovereign immunity by the Republic required dismissal because the Republic's claims to the Arelma funds are not frivolous and to that extent, the potential remained for injury to its interests (*Id.*). The Court of Appeals did conclude that "final judicial disposition of the Arelma assets will have to await the Republic's voluntary submission to our jurisdiction," and admonished that if the Republic failed to timely seek enforcement of its judgment, "the time may come when the [Class] could again ask a New York court to reconsider the enforcement of its judgment." As of this decision, nothing had been resolved, funds were frozen and the claimants' judgment unsatisfied.

#### Motion to Reconsider

In 2012, the Philippines Supreme Court finally affirmed the Forfeiture judgment declaring the Arelma funds forfeited to the Republic (Forfeiture judgment) (*Marcos v Republic of the Philippines*, G.R. Nos. 189434 & 189505 [Sup Ct., 2d Div, 2012] [Phil]). Shortly after the Philippines Supreme Court affirmed the Forfeiture judgment, Imelda Marcos and Marcos' estate separately moved in the Forfeiture proceeding for a

reconsideration of that decision, which remains sub judice before the Philippines Supreme Court since the summer 2012 (Exhibits 1-2, annexed to the Ware Aff.).

### Swezey II

Petitioners commenced this special proceeding (Swezey II) approximately one year following the Court of Appeals' dismissal of Swezey I, seeking largely identical relief and arguing that the passage of time has altered the landscape in its favor.

### **Discussion**

#### **1. Is the Republic's Forfeiture judgment final, conclusive and enforceable in New York?**

Respondents move to dismiss the petition for failure to join the Republic under CPLR 1001 (b) and upon the Court of Appeals' decision in Swezey I. Respondents argue that the relevant CPLR 1001 (b) analysis remains unaltered since the Court of Appeals' dismissal of Swezey I, mandating dismissal of Swezey II.

In dismissing Swezey I, the Court of Appeals noted that "if the Republic failed to seek enforcement of its judgment or some other avenue of recourse, the time may come when the class could against ask a New York court to reconsidered the enforcement of its judgment (Swezey, 19 NY3d at 555), which Respondents argue has not come. Respondents assert that the Forfeiture judgment is not yet final under Philippines law, because a motion for reconsideration of the affirmance of the Phillippines Supreme

Court's ruling that the Arelma funds were forfeited to the Republic is still pending. Thus, it would be premature for the Republic to attempt to domesticate its Forfeiture judgment in New York (Exhibits 1-2, annexed to the Ware Aff.). Respondents rely upon Rule 52, section 4 of the Philippines Revised Rules of Civil Procedure, which states:

"The pendency of a motion for reconsideration ... shall stay the execution of the judgment or final resolution sought to be reconsidered."

Rule 51, section 10 of the Philippines Rules of Court additionally provides that when a judgment becomes final it is entered by the clerk, and "[t]he date when the judgment or final resolution becomes executory shall be deemed as to the date of its entry."

CPLR 5302 states that the article applies to any foreign country judgment which is "final, conclusive and enforceable where rendered," and CPLR 5303 declares that such foreign judgments are enforceable in an action on the judgment.

Under the rules of the Philippines Courts cited above, it appears that the Forfeiture judgment is not yet enforceable because there remains an "impediment to their immediate enforcement" under Philippines law (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, C5302:1).

**2. Does the Republic have any claim against Merrill which could satisfy the New York statute of limitations, and is the**

**Republic's Forfeiture judgment junior to Petitioners' senior creditor status?**

Alternatively, Petitioners assert that the Republic cannot be deemed a necessary party to this proceeding under CPLR 1001 (b) because any potential claim that the Republic could assert to establish entitlement to the Arelma funds is untimely. Petitioners argue that no court has ever addressed the timeliness of the Republic's potential claims against Merrill for breach of contract or replevin, which is now before the Court on a full record and ripe for decision for the first time.

The Respondents argue in opposition that collateral estoppel bars this assertion. The U.S. Supreme Court addressed the issue of the viability of the Republic's potential claims against Merrill in its own non-joinder analysis, and concluded that, so long as the claims of the sovereign are not frivolous, it would be "improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit" (*Republic of Philippines*, 553 US at 867-868).

The Court of Appeals also ruled that Petitioners had failed to definitely establish that any statute of limitations precludes the Republic from obtaining the Arelma funds, although the Court did not have the benefit of a full record.

Nonetheless, this Court rejects the assertion that it is an

absolute certainty that the Republic has no rights that would be affected were this Court to proceed to determine entitlement to the Arelma funds in its absence. Irrespective of whether the Republic can satisfy the New York statute of limitations (which this Court need not now evaluate), the Republic could elect not to sue Merrill altogether. On the other hand, as Respondents have represented will occur, the Republic could attempt to enforce its Forfeiture judgment by asking the U.S. Department of Justice to register it, once final, as a "forfeiture or confiscation judgment" pursuant to 28 USC § 2467 (a) (2).

Petitioners also assert that they were first to levy on the Arelma funds, and thus, have achieved priority under CPLR 5234 (b), while the Republic has been relegated to the status of a potential junior creditor and to this extent, lacks superior rights in the property.

CPLR 5234 addresses the priority of competing creditors to a judgment debtors' property, which is relevant assuming that the Arelma funds constitute property of the Marcos estate. If the Republic succeeds in registering its judgment under section 2467 of the US Code declaring the Arelma funds to be the property of the Republic, it is likely that the Arelma funds will no longer be regarded as property of the Marcos estate and thus, CPLR 5234 would not be applicable (see generally *Swezey*, 19 NY3d at 555). The Petitioners' are also concerned that the political situation

in the Philippines may result in a total frustration of their years long attempt to enforce their judgment.

However, the inevitable and unfortunate conclusion is that this petition cannot proceed to a final conclusion in the present landscape. Despite the undeniable prejudice to Petitioners, but for the passage of time, the issues remain unaltered since the Court of Appeals' dismissal of Swezey I. However, it was the prospect of unreasonable delay that prompted the Court of Appeals to leave the door ajar for these further proceedings.

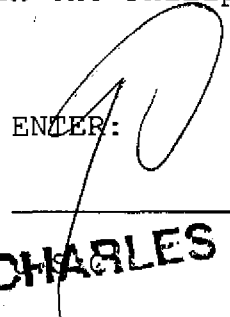
The continuing delay of the adjudication of the Petitioners' claims, combined with the inexplicably slow progress of the resolution of the forfeiture judgment, compels this Court deny dismissal, but rather to merely stay the adjudication of these claims (for a "reasonable" time only), in order to permit the rendering of a final judgment of forfeiture, or its dismissal.

Accordingly, it is

ORDERED the motion is granted only to the extent of staying the adjudication of the Petitioners' claims for a reasonable time pending the outcome of the proceedings in the Philippines.

Dated: February 19, 2014

ENTER:

  
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**CHARLES E. RAMOS**