No. 06-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: ESTATE OF FERDINAND E. MARCOS
HUMAN RIGHTS LITIGATION

HILAO,
Class Plaintiffs-Appellees

v.

ESTATE OF FERDINAND MARCOS,
Defendant-Appellee

REVELSTOKE INVESTMENT CORPORATION, INC.,
Applicant for Intervention and Appellant

On Appeal from the United States District Court
for the District of Hawaii (Judge Manuel L. Real),
Nos. MDL NO. 840, 86-390 & 86-330

BRIEF OF APPELLANT ON THE MERITS AND FOR SUMMARY REVERSAL

Thomas Benedict
GOODSILL ANDERSON
QUINN & STIFEL, LLP
Alii Place, Suite 1800
1099 Alakea Street
Honolulu, Hawaii 96813
(808) 547-5600

Richard A. Jones
COVINGTON &
BURLING LLP
One Front Street
San Francisco, CA 94111
(415) 591-7065

Eugene D. Gulland
Peter D. Trooboff
Neil K. Roman
Joshua D. Greenberg
Jason M. Knott
COVINGTON &
BURLING LLP
1201 Penn. Ave., NW
Washington, DC 20004
(202) 662-5846

Attorneys for Revelstoke Investment Corporation, Inc.

July 18, 2006

CORPORATE DISCLOSURE STATEMENT

Revelstoke Investment Corp., Inc. is a privately held Delaware corporation. No publicly held company owns 10% or more of its stock. Its parent company is Western Pacific Investment Corp.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF JURISDICTION

The district court for Hawaii (Judge Real) rendered the Final Judgment in this case on February 3, 1995. (Excerpts of Record ("ER") 1.) In the appeal of that judgment, this Court found that the "district court had jurisdiction over this case under the Alien Tort Claims Act, 28 U.S.C. § 1350." *Hilao v. Estate of Marcos*, 103 F.3d 789, 791-92 (9th Cir. 1996).

In April 2005, certain plaintiffs filed an action in Texas seeking to enforce the Final Judgment with respect to real property owned by appellant Revelstoke Investment Corporation, Inc. Counsel for Revelstoke notified plaintiffs' counsel of its intention to seek dismissal of the Texas action on the ground that the Final Judgment had expired under Hawaiian law. Without serving or otherwise notifying Revelstoke, plaintiffs then moved before Judge Real for an extension of the Final Judgment. Two weeks later, plaintiffs' counsel notified Revelstoke's counsel by telephone of the motion after the deadline for filing oppositions had already passed. Revelstoke immediately moved to intervene for the limited purpose of opposing plaintiffs' motion for an extension of the Final Judgment.

On June 26, 2006, Judge Real summarily denied the motion to intervene. Revelstoke then filed a second motion to intervene for the limited purpose of appealing Judge Real's June 27 order granting the extension of the Final Judgment. On July 3, that motion was also summarily denied.

This Court has jurisdiction to review Judge Real's denials of Revelstoke's motions to intervene as of right pursuant to FRCP 24(a)(2) because each "is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." *League of United Latin Am. Citizens v. Wilson* ("*LULAC*"), 131 F.3d 1297, 1302 (9th Cir. 1997). If the motions are viewed instead as requests for permissive intervention pursuant to FRCP 24(b)(2), this Court has jurisdiction because the orders denying intervention were an "abuse of discretion." *Canatella v. California*, 404 F.3d 1106, 1117 (9th Cir. 2005) ("we allow appeal of the denial of a motion for permissive intervention . . . if the trial court abused its discretion"); *see also LULAC*, 131 F.3d at 1307.

If the district court erred by "denying [Revelstoke's] motion to intervene in a limited way for the purpose of appeal," this Court has jurisdiction to "proceed with the merits of the case" and review the purported extension of the Final Judgment. *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *see also Bryant v. Yellen*, 447 U.S. 352, 366 (1980) (affirming this Court's ruling that, where non-parties "attempted to intervene for purpose of appeal, but the District Court denied the motion," they "had standing to intervene and press the appeal on their own behalf" after this Court "reversed the denial" of intervention). Having sought "intervention for purposes of appeal," Revelstoke would be a party upon a reversal of Judge Real's denial of intervention and would then be entitled to

review of the "extension" ruling. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam).

Alternatively, this Court also may review the purported extension of the Final Judgment pursuant to its mandamus jurisdiction, *see* 28 U.S.C. § 1651, if it deems the appeal to raise questions appropriate for resolution upon a petition for a writ of mandamus. *See, e.g., Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir. 1987) ("[W]e may, where appropriate, treat appeals as petitions for mandamus."); *Brown v. Baden*, 815 F.2d 575, 576 (9th Cir. 1987).

Revelstoke timely appealed on July 17, 2006. (ER 126); FRAP 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether the district court erred, and/or committed clear error, in denying Revelstoke's two unopposed motions to intervene for the purposes of opposing and then appealing the purported extension of the Final Judgment in this action, where (a) the Final Judgment was rendered in February 1995, (b) the Final Judgment is the basis for plaintiffs' claims in the action that they filed in April 2005 against Revelstoke in the U.S. District Court for the Northern District of Texas, and (c) Revelstoke's pending dispositive motion in the Texas action argues that the Final Judgment can no longer be enforced because it expired in February 2005.

2. Whether the district court's purported extension of the Final Judgment was precluded, and/or clearly precluded, by Haw. Rev. Stat. § 657-5, which provides that a judgment expires ten years after it is rendered unless an extension is sought and obtained within ten years after it was rendered.

3. Whether a different district judge should be assigned to resolve any issues remanded for consideration by the district court.

STATEMENT OF THE CASE

In the absence of a federal statute providing otherwise, federal courts apply the law of the forum state in determining when a federal court judgment expires. *See* Fed. R. Civ. P. 69(a); *Marx v. Go Publ'g Co.*, 721 F.2d 1272, 1273 (9th Cir. 1983), *Matanuska Valley Lines, Inc. v. Molitor*, 365 F.2d 358, 360 (9th Cir. 1966); *see also Barajas v. Bermudez*, 43 F.3d 1251, 1255 (9th Cir. 1994) ("'It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court borrows or absorbs the local time limitation most analogous to the case at hand.'") (quoting *Lampf v. Gilbertson*, 501 U.S. 350, 355 (1991)).

In Hawaii, the forum state for the Final Judgment, the governing statute provides that judgments cannot be enforced more than ten years after they are rendered, unless an extension is granted within that period. Haw. Rev. Stat. § 657-5. The Hawaii Supreme Court has held that the text of section 657-5 means what it

says: judgments are "conclusively presumed paid and discharged after ten years unless timely renewed." *Int'l Sav. & Loan Ass'n v. Wiig*, 921 P.2d 117, 121 (Haw. 1996).

On February 3, 1995, Judge Real rendered the Final Judgment in this action. More than ten years later, plaintiffs registered the Final Judgment — which had already expired — for enforcement in the Northern District of Texas. Plaintiffs then sued Revelstoke and six other corporations (collectively referred to as "Revelstoke") in that court (the "Texas action"), alleging that real properties they own in Texas are actually beneficially owned by the Ferdinand Marcos Estate. (Compl., *Pimentel v. B.N. Dev. Co.*, C.A. No. 4-05CV-234-Y (N.D. Tex. filed Apr. 8, 2005) (attached as Ex. 3 to Revelstoke's Unopposed Mot. to Intervene), ER 43.) The Texas action seeks execution and foreclosure on these properties to satisfy the Final Judgment, which is Exhibit A to the Complaint. (ER 50.) (In fact, the Philippine Government rejected claims that the properties were owned by Ferdinand Marcos after conducting an investigation following Marcos's removal from office.)

On May 9, 2006, Revelstoke formally notified plaintiffs that the Final Judgment had expired under the Texas statute of limitations (which is a borrowing statute that looks to its Hawaii counterpart), Tex. Civ. Prac. & Rem. Code § 16.066(a). (Letter from Eugene Gulland, Esq. to Robert Swift, Esq. (attached as

Ex. 1 to Decl. of Eugene D. Gulland), ER 38.) Plaintiffs responded on May 26 by insisting that the Final Judgment could still be enforced. (Letter from Robert Swift, Esq. to Eugene Gulland, Esq. (attached as Ex. 2 to Decl. of Eugene D. Gulland), ER 40.) On June 15, Revelstoke moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that the Final Judgment had expired pursuant to Haw. Rev. Stat. § 657-5 as applied through the Texas borrowing statute. (Ex. 5 to Decl. of Eugene D. Gulland, ER 91.)

Unbeknownst to Revelstoke, plaintiffs had filed a motion in the District of Hawaii asking Judge Real to "extend" the Final Judgment on June 5, 2006. The extension motion was filed for the express purpose of thwarting Revelstoke's ability to assert its expired judgment defense in the Texas litigation. (Mem. in Supp. of Mot. for Extension of Judgment at 1, ER 17.) Plaintiffs first informed Revelstoke of this motion by telephone on June 19 — the day after the deadline for filing oppositions. (Decl. of Eugene D. Gulland ¶ 4, ER 36.) On June 22, Revelstoke moved to intervene for the limited purpose of opposing the motion. (ER 24.) Plaintiffs consented to permissive intervention.

During a hearing on June 26, Judge Real — without receiving any briefing or argument opposing plaintiffs' motion, and *before* he considered the intervention motion — purported to extend the Final Judgment beyond the ten-year limit provided by Hawaii law. (Tr. of Hr'g, at 10:21-11:5, ER 109-110.) Judge Real

then denied Revelstoke's motion to intervene. (*Id.* at 13:12-19, ER 112.) On June 27, Judge Real signed and entered an order in the form submitted by plaintiffs that recited their arguments for extending the Final Judgment. (ER 115.) Judge Real did not enter a formal order memorializing his denial of Revelstoke's motion for intervention.

On June 29, Revelstoke moved to intervene for the limited purpose of appealing the district court's Order of June 27, 2006. (ER 120.) On July 3, Judge Real denied this motion in handwritten notes on Revelstoke's proposed order. (ER 125.) Revelstoke filed a timely notice of appeal from Judge Real's rulings on the intervention motions during the June 26 hearing and in his Order of July 3, and from his ruling on the extension issue during the June 26 hearing and in his Order of June 27. (ER 126.)

On the same day as Revelstoke filed this brief, it filed its Motion for Summary Reversal or, in the Alternative, Expedited Briefing and Argument.

STATEMENT OF FACTS

A. The Final Judgment Rendered In 1995.

On February 3, 1995, in an order titled "Final Judgment," Judge Real expressly "enter[ed] final judgment" for plaintiffs. (ER 1.) On March 14, 1995, Judge Real directed the Clerk of the Court to "certify the Final Judgment of February 3, 1995 for transfer to other districts," and stated that "there is no bar to

execution on the Final Judgment." (ER 16.) Judge Real also ordered that "plaintiffs and the Class should be permitted to execute upon the Final Judgment as soon as possible notwithstanding the pendency of any posttrial motions or appeals." (*Id.*)

This Court later observed that "[o]n February 3, 1995, the district court entered final judgment in the class action suit." *Hilao v. Marcos*, 103 F.3d 767, 772 (9th Cir. 1996). Even before the appeal, plaintiffs had already registered the Final Judgment and had begun executing on it. *Hilao v. Estate of Marcos*, 95 F.3d 848, 850 (9th Cir. 1996).

B. Plaintiffs Did Not Seek An Extension Of The Final Judgment Within The Time Provided By Hawaii Law.

Haw. Rev. Stat. § 657-5 imposes a strict ten-year limit on the life of Hawaii judgments, which are "conclusively presumed paid and discharged after ten years unless timely renewed." *Wiig*, 921 P.2d at 121. The full text of section 657-5 provides:

> "Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. No action shall be commenced after the expiration of ten years from the date a judgment or decree was rendered or extended. *No extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered.* A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. No extension shall be granted without notice and the filing of a non-

hearing motion or a hearing motion to extend the life of the judgment or decree." (Emphasis added.)

Before June 5, 2006, plaintiffs had not sought an extension of the Final Judgment, and none had been granted.

C. The Pending Dispositive Motion In The Texas Action.

On May 9, 2006, to discharge its "meet-and-confer" obligations before filing a motion, Revelstoke informed plaintiffs that the Final Judgment had expired on February 3, 2005, pursuant to Haw. Rev. Stat. § 657-5. (Letter from Eugene Gulland, Esq. to Robert Swift, Esq., ER 38.) On May 26, plaintiffs responded by asserting that the lack of a timely extension of the Final Judgment did not prevent them from executing on it in the Texas action. (Letter from Robert Swift, Esq. to Eugene Gulland, Esq., ER 40.)

On June 15, Revelstoke moved in the Texas action for judgment on the pleadings under Rule 12(c). (ER 91.) Revelstoke's supporting memorandum explained that Tex. Civ. Prac. & Rem. Code § 16.066(a) is a borrowing statute that provides that "[a]n action on a foreign judgment is barred in [Texas] if the action is barred under the laws of the jurisdiction where rendered;" that the Final Judgment had expired in February 2005 pursuant to Haw. Rev. Stat. § 657-5; and that plaintiffs' Texas action was therefore time-barred. (*Id.*)

D. Plaintiffs' Unserved Motion For An Extension Of The Final Judgment.

Having learned that Revelstoke was about to file its dispositive motion in the Texas case, plaintiffs filed a motion on June 5 asking Judge Real to grant an extension of the Final Judgment under Hawaii law. The next day, the district court scheduled a hearing on the motion for June 26. No one served or otherwise informed Revelstoke about the motion.

On June 19 – the day after the deadline for responses to the motion – Robert Swift (lead counsel for plaintiffs) called Eugene Gulland (lead counsel for the Corporations) to inform Revelstoke for the first time that plaintiffs had moved for an extension of the Final Judgment two weeks earlier. (ER 36.) Until this conversation, Revelstoke was unaware of the "extension" motion. On June 22, the Corporations moved to intervene in the Hawaii action for the limited purpose of opposing the extension motion. (ER 25.)

E. The District Court's Rulings.

During the hearing on June 26 — *before he had considered Revelstoke's motion to intervene* — Judge Real granted plaintiffs' request for an "extension" of the Final Judgment during the following colloquy with plaintiffs' counsel:

> "JUDGE REAL: Then we have the motion for the extension of the judgment.
>
> PLAINTIFFS' COUNSEL: Yes, Your Honor. We filed this motion –

JUDGE REAL: I thought I already signed an order on that.

PLAINTIFFS' COUNSEL: Did you already sign an order?

JUDGE REAL: I thought so. And my secretary thought so, but we'll check that out. But in any event I have no problem with that." (Tr. of Hr'g, at 10:21-11:5, ER 109-110.)

The district court's ruling on the extension motion was without benefit of any argument or briefing in opposition. Neither the Marcos Estate nor any other party responded to the motion.

Judge Real then turned to Revelstoke's motion to intervene. He denied the motion without addressing any of the factors that this Court has held must be considered when ruling on such a motion. He stated that no extension of the Final Judgment could affect the Texas action:

"REVELSTOKE'S COUNSEL: [W]hat we sought to do was to intervene in this action because it will substantively affect the rights of the proposed intervenors in the Texas action.

JUDGE REAL: Well, this action in Hawai'i doesn't affect them at all.

* * * * *

REVELSTOKE'S COUNSEL: So are you denying our motion, Your Honor?

JUDGE REAL: I'm going to deny the motion on the basis that I have no jurisdiction over the matters in Texas at this point of any litigation in Texas; that this has not been sent to this district for litigation under the multidistrict case or the trial of the case in this district. Nothing . . . that happens in this district can affect the judgment in Texas; so

there's no need for intervention of your clients here." (Tr. of Hr'g, at 12:6-11, 13:10-19, ER 111-112.)

The next day, Judge Real entered an order — in the form prepared and submitted by plaintiffs' counsel — that purported to memorialize his ruling from the bench on the extension issue. (Order of June 27, 2006, ER 115.) That written order repeated virtually verbatim the arguments in plaintiffs' memorandum in support of their extension motion — none of which was addressed by the Court or any party during the hearing on June 26:

Judge Real's Order of June 27, 2006	**Plaintiffs' Memorandum**
"The Judgment rendered in the above action on February 3, 1995 was not final until issuance of the mandate of the Ninth Circuit . . . on January 8, 1997." ER 116.	"The judgment . . . was final when . . . the [Ninth Circuit's] mandate was issued on January 8, 1997." ER 19-20.
"HRS 657-5 only applies to . . . judgments rendered by Hawaii state courts." ER 116.	"H.R.S. 657-5 is limited to courts of the State of Hawaii." ER 21.
"Application of HRS 657-5 to federal court judgments on federal causes of action would be barred by the Supremacy Clause of the United States Constitution." ER 116.	Applying Haw. Rev. Stat. § 657-5 to federal court judgments "would violate the Supremacy Clause, U.S. Constitution, Art. VI." ER 21.
"[I]f HRS 657-5 were applicable, there is good cause to grant an extension of the Judgment" because "Marcos had a pattern and practice to fraudulently secrete his assets." ER 116.	"The text of the Judgment and later Contempt Order establish fraudulent concealment by the judgment debtor." ER 23.

On June 29, Revelstoke moved to intervene for the purpose of appealing the extension of the Final Judgment. (ER 24.) Without waiting for a response from

plaintiffs, Judge Real denied Revelstoke's motion on July 3. As with the first intervention motion, the court did not mention any of this Court's factors for determining whether intervention is appropriate. Instead, the court crossed out the word "granted" in Revelstoke's proposed order, wrote the word "DENIED" above it, and wrote the following: "This matter rests in the jurisdiction of the Texas litigation." (Order of July 3, 2006, ER 125.) Revelstoke timely appealed.

SUMMARY OF ARGUMENT

The Court should summarily reverse the district court's denial of Revelstoke's motions to intervene for the limited purposes of (i) opposing an extension and (ii) appealing the decision granting the extension. Judge Real failed to consider any of this Court's requirements for intervention as of right under Rule 24(a), and Revelstoke clearly satisfies these requirements. The court also ignored that — as plaintiffs conceded — whether the Final Judgment has expired is a legal issue that is "common" to plaintiffs' motion for an extension in Hawaii and Revelstoke's defense in the Texas action, and therefore supports permissive intervention under Rule 24(b). Plaintiffs have already argued in the Texas action that Judge Real's ruling is "dispositive" and should not be relitigated in that case.

Plaintiffs sought and obtained the extension of the Final Judgment for the express purpose of thwarting Revelstoke's defense in the Texas action. (ER 123.) Because the Texas action is continuing, Revelstoke requests that the Court exercise

its power to review Judge Real's purported extension of the Final Judgment immediately and to reverse that ruling. The Final Judgment was rendered on February 3, 1995. Under the Rules of Decision Act, FRCP 69(a), and this Court's precedents, the law of the forum state — Hawaii — determines whether the Final Judgment can be extended. Haw. Rev. Stat. § 657-5 categorically provides that "[n]o extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered." Judge Real clearly erred by purporting to extend the Final Judgment on June 27 because he rendered it more than 11 years earlier.

The district court's rulings denying Revelstoke's intervention and granting an extension of the expired Final Judgment flout clear standards set forth in the decisions of this Court and in Hawaii law. The district court's rulings fall within a pattern of strikingly erroneous decisions in this same docket that have required this Court's supervisory intervention by mandamus and otherwise, including *In re Philippine Nat'l Bank*, 397 F.3d 768, 775 (9th Cir. 2005); *In re Republic of the Philippines*, 309 F.3d 1143, 1149, 1153 (9th Cir. 2002); and *Credit Suisse v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 130 F.3d 1342, 1348 (9th Cir. 1997). If the Court remands for further consideration by the district court, Revelstoke respectfully urges that a different judge be assigned.

ARGUMENT

Standards of Review

Special Standard For Summary Reversal. Summary reversal is appropriate when a "clear error" by the district court "requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings." 9th Cir. R. 3-6; *see also United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) ("Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned.").

Ordinary Appeal Standards For Intervention. This Court "review[s] *de novo* a district court's denial of a motion to intervene as of right." *Canatella*, 404 F.3d at 1112. Although *de novo* review always applies to the other three factors that determine whether intervention as of right was wrongly denied, "'the timeliness of intervention is generally reviewed for abuse of discretion.'" *LULAC*, 131 F.3d at 1302 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 n. 2 (5th Cir. 1994)). Because Judge Real "'ma[de] no finding regarding timeliness,'" however, the Court "must review the timeliness issue in this case *de novo*." *Id.* This Court reviews for abuse of discretion the denial of a motion for permissive intervention, but "[w]here, as here, the district court's decision turns on a legal question . . . its underlying legal determination is subject to *de novo* review." *San Jose Mercury News, Inc. v. U.S. Dist. Court — Northern Dist. (San Jose)*, 187 F.3d 1096, 1100

(9th Cir. 1999). Indeed, a decision based on an erroneous legal determination is "by definition" an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

Ordinary Appeal Standards For Extension of Judgment. Judge Real's purported extension of the Final Judgment is subject to *de novo* review for three separate reasons. *First*, it involves the limitations period that applies to the Final Judgment, and "a ruling on the appropriate statute of limitations is a question of federal law which requires de novo review." *Felton v. Unisource Corp.*, 940 F.2d 503, 508 (9th Cir. 1991). *Second*, it involves the interpretation of Rule 69(a). *See Cal. Scents v. Surco Prods., Inc.*, 406 F.3d 1102, 1105 (9th Cir. 2005) ("This court reviews de novo a district court's interpretation of the Federal Rules of Civil Procedure."). *Third*, it involves the "interpretation of a statute," Haw. Rev. Stat. § 657-5. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006).

I. THE DISTRICT COURT COMMITTED CLEAR ERROR IN DENYING REVELSTOKE'S MOTIONS TO INTERVENE.

The district court not only erred, but committed clear error in denying Revelstoke's motion to intervene in opposition to plaintiffs' motion to extend the Final Judgment, and then in denying Revelstoke's motion to intervene for the purpose of appealing the order granting the extension motion. We discuss the denials of Revelstoke's intervention motions together because, other than the

standing requirement discussed in the text below, the requirements for intervention for purpose of appeal mirror those for intervention in district court proceedings generally. *See Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

A. The District Court Clearly Erred In Denying Intervention As Of Right.

Judge Real clearly erred in denying intervention as of right under Rule 24(a), which must be "construe[d] liberally in favor of potential intervenors." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006). Revelstoke satisfied each of the four requirements: (1) its motions were timely, (2) it was "'inadequately represented'" by the existing parties, (3) it had a "'significantly protectable interest'" in opposing plaintiffs' motion for an "extension" of the Final Judgment, and (4) it was "'so situated that the disposition of [that motion] may as a practical matter impair or impede its ability to protect that interest.'" *Id.* at 440 (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)).

First, the Court "need not address" the timeliness of Revelstoke's motions to intervene because plaintiffs, by declining to oppose the motions, implicitly "agree[d]" that they were timely. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *see also California ex rel. Lockyer*, 450 F.3d at 441 ("Appellees concede that the intervention motions were timely, so we address only the last three factors"). In any event, the motion was unquestionably timely. Revelstoke filed it on June 22 — just three days after learning that plaintiffs had

moved for an extension of the Final Judgment — which was "as soon as possible" because Revelstoke not only had to prepare its motion papers, but also had to retain local counsel in Hawaii. *United States ex rel. Killingsworth*, 25 F.3d at 720 (district court abused its discretion in finding that motion was untimely where proposed intervenor filed it "as soon as possible").

Second, Revelstoke clearly met its "minimal" burden of showing inadequate representation, under which it needed demonstrate only that the representation of its interests by the existing parties "'may be' inadequate." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). "The most important factor in determining the adequacy of representation is how [the proposed intervenor's] interest compares with the interests of existing parties." *Id.* Revelstoke's interests are diametrically opposed to the existing parties' interests. The Final Judgment is the basis for plaintiffs' claims in the Texas action, and neither the Marcos Estate nor any other party opposed plaintiffs' motion for an extension of the Final Judgment. By preventing Revelstoke from protecting its interests, Judge Real violated the principle that "[o]ur adversary process requires that we hear from both sides before the interests of one side are impaired by a judgment." *Sierra Club v. EPA*, 995 F.2d at 1483 (reversing denial of intervention as of right).

Third, Revelstoke clearly satisfied the "significantly protectable" interest requirement, which "'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *So. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). A proposed intervenor has a "significantly protectable" interest — meaning "a sufficient interest for intervention" — if it (1) "'asserts an interest that is protected under some law'" and (2) "'there is a relationship between its legally protected interest'" and the proceeding in which intervention is sought. *California ex rel. Lockyer*, 450 F.3d at 441 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). Revelstoke has an interest — avoiding the loss of its real property in the Texas action — that is protected under Haw. Rev. Stat. § 657-5, which shields persons such as Revelstoke from efforts to enforce a stale, expired judgment. Revelstoke's pending dispositive motion in the Texas action seeks to vindicate its protected interest under section 657-5. Plaintiffs sought an extension of the Final Judgment for the express purpose of thwarting Revelstoke's defense in the Texas action. (ER 123.) Revelstoke therefore has "a sufficient interest for intervention purposes." *California ex rel. Lockyer*, 450 F.3d at 441.

Fourth, it is clear that "the disposition of" plaintiffs' motion to resurrect the Final Judgment "may, as a practical matter, affect" Revelstoke's interest. *Id.* at

442. The Texas action cannot proceed if the Final Judgment can no longer be enforced. Under the ten-year expiration period imposed by section 657-5 (which applies in the Texas action pursuant to Tex. Civ. Prac. & Rem. Code § 16.066(a)), the Final Judgment expired in February 2005 and can no longer be enforced. In their opposition to Revelstoke's dispositive motion in the Texas action, however, plaintiffs argue that Judge Real's purported extension of the Final Judgment "is entitled to deference and comity" and "is dispositive of defendants' Motion." (Docket No. 66 at 2, *Pimentel v. B.N. Dev. Co.*, C.A. No. 4-05CV-234-Y (N.D. Tex. filed July 5, 2006).[1]) Plaintiffs' argument confirms that Judge Real clearly erred in ruling, without considering the relevant circumstances, that "[n]othing . . . that happens in this district can affect the judgment in Texas." (Tr. of Hr'g at 13:17-18, ER 112.)

Because no party has appealed, to be entitled to intervention as of right for purpose of appeal, Revelstoke had to satisfy one additional requirement: it had to show that it has Article III standing. *See Yniguez*, 939 F.2d at 731. Revelstoke clearly has standing because (i) the "extension" of the Final Judgment presents an "imminent" threat to its "concrete and particularized" interest in vindicating its

---

[1] Plaintiffs' opposition to Revelstoke's dispositive motion in the Texas case is not part of the record below, but is available on Pacer and is subject to judicial notice because it is a "matter[ ] of public record" that is "readily verifiable." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

"legally protected interest[s]" under section 657-5 through its dispositive motion in the Texas action, (ii) the extension of the Final Judgment is "fairly traceable" to plaintiffs' motion and Judge Real's decision to grant it, and (iii) the threat of harm to Revelstoke would be "redressed" by a denial or reversal of the extension. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

B. The District Court Clearly Erred In Denying Permissive Intervention.

Under Rule 24(b), permissive intervention was appropriate if (1) Revelstoke's motions to intervene were timely filed, (2) the district court had an independent basis for jurisdiction over Revelstoke's claim or defense, and (3) Revelstoke's claim or defense and the extension motion have a question of law or fact in common. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989). Revelstoke clearly satisfied all three requirements.

First, Revelstoke's motions to intervene were timely. (*See supra* at 17-18.)

Second, as to jurisdiction, Revelstoke needed only to show that it has Article III standing. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002). As explained above, Revelstoke has standing.

Third, Revelstoke's defense in the Texas action and plaintiffs' extension motion presented a common question of law: whether the Final Judgment expired in February 2005 pursuant to section 657-5. Judge Real committed a clear error of law in concluding that Revelstoke's arguments on the extension issue could only

"be addressed to the court in Texas" and that "[n]othing . . . that happens in this district can affect the judgment in Texas" (Tr. of Hr'g, at 11:24-25, 13:17-19, ER 110, 112). As discussed above, plaintiffs have already urged the Texas court to "defer" to Judge Real's decision on grounds of comity and argued that Judge Real's ruling on Hawaii law is "dispositive." *See supra* at 20.

The Court should resolve the permissive intervention issue now rather than remanding it for reconsideration (unless its ruling on intervention as of right issue obviates the need to address permissive intervention). Judge Real denied permissive intervention based on a clear error of law and thus "by definition" abused his discretion. *Koon*, 518 U.S. at 100. In *Venegas*, this Court declined to remand the case for a reassessment of an erroneous denial of permissive intervention because, as is true here, "all of the considerations which guide the exercise of judicial discretion clearly weighed in favor of permissive intervention." 867 F.2d at 530. As in *Venegas*, no party below opposed Revelstoke's motion for permissive intervention, its participation will not unduly delay or unfairly prejudice any party's rights, and the existing parties do not adequately represent Revelstoke's interests. *Compare id.* at 530-31. Allowing Revelstoke to intervene would also promote "judicial economy," *id.* at 531, because it would foster "'efficient resolution'" of whether the Final Judgment is enforceable, a question central to the pending dispositive motion in the Texas action, *United States v. City*

of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995)).[2]

II. THE DISTRICT COURT COMMITTED CLEAR ERROR IN PURPORTING TO EXTEND THE FINAL JUDGMENT.

Section 657-5 categorically provides: "No extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered." The statute further provides (again, without making any exception): "Unless an extension is granted, *every* judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered." (Emphasis added.) The Hawaii Supreme Court has confirmed that the text of section 657-5 means what it says: "*The plain language of HRS § 657-5 clearly mandates that all judgments and decrees be deemed extinguished after ten years unless timely renewed.*" *Wiig*, 921 P.2d at 119 (emphasis added).

---

[2] In a previous case where, as here, "[t]he district court did not specifically apply the standards for permissive intervention," the Court reversed the denial of permissive intervention and remanded the case "so that the district court may reassess the request for permissive intervention." *City of Los Angeles*, 288 F.3d at 403-04. In that case, however, the district court had "demonstrate[d] that it [was] perfectly capable of managing this litigation in a fair, but expedient fashion." *Id.* at 404. In any event, this Court has not allowed district courts to reassess intervention in cases where, as here, the standards for intervention as of right were satisfied. *See, e.g.*, *California ex rel. Lockyer*, 450 F.3d at 445; *Southwest Ctr. for Biological Diversity*, 268 F.3d at 820.

Because the Final Judgment was rendered in February 1995 and plaintiffs did not seek its extension until 2006, the district court clearly erred in resurrecting the Final Judgment.

A. The District Court Clearly Erred In Asserting That Applying The Hawaii Limitations Period Would Violate The Supremacy Clause.

Judge Real adopted plaintiffs' order stating that applying the Hawaii limitations period to the Final Judgment "would be barred by the Supremacy Clause." (Order of June 27, 2002, at 2, ER 116.) At the broadest level, this ruling ignores the principle "that the Rules of Decision Act, 28 U.S.C. § 1652, requires application of state statutes of limitations unless 'a timeliness rule drawn from elsewhere in federal law should be applied.'" *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987) (quoting *Del Costello v. Teamsters*, 462 U.S. 151, 159 (1983)). Under this "longstanding" and "settled" principle, "state statutes have repeatedly supplied the periods of limitations for federal causes of action when the federal legislation made no provision." *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (internal quotation marks omitted); *see also Barajas*, 43 F.3d at 1255 ("'It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court borrows or absorbs the local time limitation most analogous to the case at hand.'") (quoting *Lampf*, 501 U.S. at 355).

Here, because no federal legislation determines when the Final Judgment expires, FRCP 69(a) and this Court's decisions make clear that Hawaii's statute of limitations governs.

Rule 69(a) — which Judge Real did not address — "unmistakably contemplates proceedings in federal court according to state practice and procedure." *Duchek v. Jacobi*, 646 F.2d 415, 417 (9th Cir. 1981). It provides that "[t]he procedure in execution, in proceedings supplementary to and in aid of a judgment . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . except that any statute of the United States governs to the extent that it is applicable." FRCP 69(a). No federal statute determines whether an extension of the Final Judgment can be granted. Under Rule 69(a), Hawaii law controls this issue, and Judge Real "ha[s] the same authority to aid judgment creditors as that provided to state courts under local law." *Dias v. Bank of Hawaii*, 732 F.2d 1401, 1402 (9th Cir. 1984).

This Court has repeatedly held that the law of the forum state determines when a federal court judgment expires. For example, in *Marx*, this Court held that the "California period of limitations" determined when a federal court judgment expired for purposes of a proceeding in the Central District of California. 721 F.2d at 1273. This Court saw "no reason why the statute of limitations rule of the state should not apply to the federal proceeding." *Id.* Likewise, in *Matanuska*, this

Court held that the Western District of Washington "correctly applied the statute of limitations of the forum state," Washington, to determine when a federal court judgment expired. 365 F.2d at 360.

Marx and *Matanuska* — neither of which was addressed by Judge Real — foreclose his ruling that the Final Judgment is not governed by Hawaii's limitation period. The judgments in both those cases had been rendered by other federal district courts, were registered in the district courts whose rulings were on appeal, and were held to have expired under the law of the rendering court's forum state. *See Marx*, 721 F.2d at 1273; *Matanuska*, 365 F.2d at 360. The law of the forum state applies *a fortiori* where, as here, the judgment was rendered by the same federal district court in which the proceeding is being held. *See, e.g., United States v. Fiorella*, 869 F.2d 1425, 1426 (11th Cir. 1989) ("It is well settled that Alabama law controls the procedure on the execution of a judgment rendered in a district court located in Alabama.").

Judge Real's "Supremacy Clause" ruling also ignores this Court's holding that "[w]here a federal statute does not provide a limitations period for bringing a cause of action, a court must select a period from a [state] statute governing analogous causes of action." *Hawaii Carpenters Trust Fund v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 297 (9th Cir. 1987). In *Hawaii Carpenters*, this Court held that a Hawaii statute of limitations "is applicable" to an ERISA claim for

unpaid trust fund contributions. *Id.* at 298.[3] Here, there is no federal law stating a limitation period for judgments, like the Final Judgment, based on the Alien Tort Claims Act. The Hawaii law necessarily governs.

B. The District Court Clearly Erred In Asserting That Haw. Rev. Stat. § 657-5 Applies Only To Judgments Rendered By Hawaii State Courts.

The district court clearly erred in asserting that "HRS 657-5 only applies to 'domestic' judgments, that is, judgments rendered by Hawaii state courts." (Order of June 27, 2002, at 2, ER 116.) As discussed above, the forum state's statute of limitations governs the judgments of a federal court sitting in that state unless a specific federal statute of limitations applies, and none applies here. State statutes of limitations by necessity will refer only to state court judgments. This is because such statutes "cannot apply *by force of state law* to federal causes of action filed in federal court." *Hawaii Carpenters*, 823 F.2d at 297-98 (emphasis added). But state statutes of limitations can (and, in situations like the one here, must) apply to federal causes of action *by force of federal law*. *See id.* (federal law determined which state statute of limitations applied).

---

[3] Because this Court had previously "held that state statutes of limitations governing claims for breach of contract are to be borrowed for ERISA collection actions," the district court erred in *Hawaii Carpenters* by applying a different Hawaii statute of limitations that allowed only one year to bring the claim. *Id.* In contrast, here there is no doubt about *which* Hawaii limitations period applies. *See* Fed. R. Civ. P. 69.

Because federal law — the Rules of Decision Act and FRCP 69(a) — requires a federal court to "borrow[ ]" the "most analogous" state statute of limitations, it is irrelevant whether the state statute that is borrowed refers to federal court judgments. *Barajas*, 43 F.3d at 1255 (internal quotation marks omitted). Indeed, the whole point of *borrowing* a state statute of limitations to limit the life of a federal court judgment is that the statute does not otherwise apply to that judgment; if it did, there would be no need to *borrow* it. Thus, this Court has applied state statutes of limitations to judgments rendered by federal courts without even considering whether the statutes' terms encompassed federal court judgments. *See Marx*, 721 F.2d at 1273; *Matanuska*, 365 F.2d at 360.

Other courts of appeals have likewise applied state statutes of limitations to federal court judgments regardless of whether, as here, the statutes referred only to the judgments of state courts. For example, the Fifth Circuit held that a Louisiana statute of limitations — which referred only to "'[a] money judgment rendered by *a trial court of this State*'" — applied to a judgments rendered by a federal court in Louisiana. *Home Port Rentals , Inc. v. Int'l Yachting Group, Inc.*, 252 F.3d 399, 403 n.5 (5th Cir. 2001) (quoting La. Civ. Code Ann. art. 3501) (emphasis added). Similarly, in an opinion by Justice Blackmun (who was then a Circuit Judge), the Eighth Circuit concluded that a Mississippi statute of limitations, which referred to "'[a]ll actions founded on any judgment or decree rendered by *any court of record*

in this state,'" governed a judgment rendered by a federal court in Mississippi for purposes of enforcement proceedings in that State. *Stanford v. Utley*, 341 F.2d 265, 266 & n.2 (8th Cir. 1965) (quoting Miss. Code § 733) (emphasis added). Likewise, the Eleventh Circuit applied Ala. Code §§ 6-9-190 and 6-9-192 — which say nothing about federal courts — to a federal court judgment in an action to recover federal income taxes. *Fiorella*, 869 F.2d at 1426 & n.2.

In sum, Judge Real clearly erred in asserting that a state statute of limitations cannot be borrowed unless it refers to federal court judgments.

C. The District Court Clearly Erred In Asserting That The Ten-Year Limit On The Final Judgment Did Not Begin To Run Until 1997.

Section 657-5 provides that the ten-year limitations period begins to run on "the date the original judgment or decree was rendered." The Final Judgment was "rendered" on February 3, 1995, and this Court specifically observed that "[o]n February 3, 1995, the district court entered final judgment in the class action suit." *Hilao*, 103 F.3d at 772. Enforcement of the Final Judgment was promptly authorized and undertaken even before appeal. Judge Real thus clearly erred in asserting that the ten-year period did not begin to run until "January 8, 1997" and that "[t]he Judgment will not be ten years old until January 8, 2007." (Order of June 27, 2002, at 2, ER 116.)

D. The District Court Clearly Erred In Asserting That Haw. Rev. Stat. § 657-5 Allows An Untimely Extension For "Good Cause."

The Hawaii Supreme Court has held that, under section 657-5, if no extension is granted within ten years, the judgment expires and cannot be revived: "The plain language of HRS § 657-5 clearly mandates" that "the judgment, together with all the rights and remedies appurtenant to it, are *conclusively presumed* paid *and discharged* after ten years *unless timely renewed*." *Wiig*, 921 P.2d at 119, 121 (emphases added). The Hawaii Supreme Court has further held that "HRS § 657-5 places the burden on the judgment creditor to seek judicial extension of the judgment prior to the expiration of the ten year statutory period." *Id.* at 119. The Final Judgment was rendered on February 3, 1995, but plaintiffs did not seek an extension of it until June 5, 2006. The Final Judgment having expired is "conclusively presumed paid and discharged" and could not be extended in 2006.

The statute cannot be circumvented by ruling that alleged "fraudulent concealment" of Marcos assets provides "good cause" for an untimely extension of the Final Judgment. (Order of June 27, 2002, at 2, ER 116.) Section 657-5 says nothing about "good cause" and does not otherwise allow for any exceptions to the strict ten-year limit that it imposes. The district court (and plaintiffs' form of order) did not — and could not — reasonably rely on another Hawaiian statute,

titled "[e]xtension by fraudulent concealment," which provides for a six-year extension of "actions" after discovery of a "cause of action" or "person who is liable for a claim" that has been fraudulently concealed.[4] Once a judgment has reached the ten-year mark without being extended, section 657-5 expressly precludes any extension of a judgment for fraudulent concealment or any of the other grounds for "extension" of "actions" set forth in Part 657:

> "*No extension* of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered." (Emphasis added.)

By its terms, moreover, section 657-20 applies to "actions" and "causes of action," *not* to "judgments."[5]

---

[4] The full text of Haw. Rev. Stat. § 657-20 provides:

> If any person who is liable to any of the actions mentioned in this part or section 663-3, fraudulently conceals the existence of the cause of action or the identity of any person who is liable for the claim from the knowledge of the person entitled to bring the action, the action may be commenced at any time within six years after the person who is entitled to bring the same discovers or should have discovered, the existence of the cause of action or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

[5] Section 657-5 and the Hawaii Supreme Court's ruling in *Wiig* foreclose any contention that the registration of the Final Judgment in other jurisdictions might "toll" the limitations period. Section 657-5 makes no exception for registration or partial collection of a judgment – or for anything else – and *Wiig* specifically rejected "the proposition that a garnishment proceeding *or any other enforcement action* 'tolls' the time limitation imposed by HRS § 657-5." 921 P.2d at 120 (emphasis added).

III. THIS COURT SHOULD RULE NOW ON THE EXTENSION, WHICH PRESENTS CLEAR ISSUES OF LAW.

This Court can and should reverse the district court's purported extension of the Final Judgment immediately, pursuant either to its appellate jurisdiction or its mandamus jurisdiction. Reserving this issue for remand is unwarranted. The district court clearly erred on the straightforward legal issue of whether Haw. Rev. Stat. § 657-5 allows an extension of the Final Judgment. As noted above, plaintiffs' opposition to Revelstoke's pending dispositive motion in the Texas action relies heavily on the purported extension granted by Judge Real, asserting that it "is entitled to deference and comity" and "is dispositive." While the district court's ruling stands, Revelstoke's dispositive motion in the Texas case is delayed, it incurs large costs in discovery and other phases of the Texas case, and its Texas property is not marketable.

A. This Court Has Appellate Jurisdiction To Resolve The Extension Issue.

Because the district court should have allowed Revelstoke to intervene for the purposes of opposing and appealing his purported extension of the Final Judgment, this Court has appellate jurisdiction to rule on the validity of the extension.

The opinions of the Supreme Court, this Court, and other courts of appeals leave no doubt that the extension issue is ripe for consideration here. For example,

in *United States v. Imperial Irrigation District*, 559 F.2d 509, 520 (9th Cir. 1977), as here, the district court erred by denying a motion by non-parties to intervene for the purpose of appealing the court's judgment. This Court reversed the denial of intervention and "proceed[ed] to consider the merits of the case." *Id.* at 524. The Supreme Court "agree[d] with" this Court's ruling that the non-parties "had standing to intervene and press the appeal on their own behalf," and it likewise considered the merits. *Bryant*, 447 U.S. at 366.[6]

Similarly, in *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994), this Court held that "the district court erred in denying the government's motion to intervene in a limited way for the purpose of appeal" and "therefore proceed[ed] with the merits of the case." Likewise, in *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1396 (9th Cir. 1992), this Court "conclude[d] the district court erred in denying the government's motion to intervene to appeal the district court's order" and proceeded to "a

---

[6] The Supreme Court's ruling in *Bryant v. Yellen* effectively overruled *Pellegrino v. Nesbit*, 203 F.2d 463, 468-69 (9th Cir. 1953), in which this Court reversed the denial of a motion to intervene for purposes of appeal, but refused to "review the entire case on its merits" on the grounds that "[t]he original parties to the suits have not appealed" and "[t]he present appellant would not be in a position to perfect an appeal until the question of his right to intervene for that purpose has been decided in his favor." Although a panel of this Court discussed *Pellegrino* with approval in *Lesnoi, Inc. v. United States*, 313 F.3d 1181, 1184 n.5 (9th Cir. 2002), the question of jurisdiction at issue here was not presented in *Lesnoi* because the panel *affirmed* the denial of intervention in that case.

consideration of the merits of the appeal from that order." *See also LULAC*, 131 F.2d at 1301 n.1 (endorsing the ruling in *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 n.3 (11th Cir. 1996), that "if it were concluded on appeal that the district court had erred in denying the intervention motion, and that the applicant was indeed entitled to intervene in the litigation, then the applicant would have standing to appeal the district court's judgment").

Other courts of appeals also agree that it is proper to review the merits immediately upon reversing a denial of intervention. *See, e.g.*, *Ross v. Marshall*, 426 F.3d 745, 761 (5th Cir. 2005) ("In sum, we hold that the district court erred in denying Allstate's motion to intervene as of right. Accordingly, we now turn to the merits of Allstate's appeal."); *Shults v. Champion Int'l. Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) ("a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted") (involved non-named class member); *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1480 & n.3 (11th Cir. 1993) ("retain[ing] jurisdiction and review[ing] the merits" because the determination that "the district court improperly denied intervention" meant that "the intervenors are now parties for purposes of appealing the district court's findings and the injunction").

B. This Court Has Mandamus Jurisdiction To Resolve The Extension Issue.

Alternatively, this Court could elect to review the extension issue by treating this appeal as a petition for a writ of mandamus. *See, e.g., In re Canter*, 299 F.3d 1150, 1153 (9th Cir. 2002) ("[W]e grant Appellants' alternative request to treat their appeal as a petition for a writ of mandamus, over which we have jurisdiction."); *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993) ("We have the discretion to treat an appeal as a petition for writ of mandamus when appropriate.").

When determining whether to issue a writ of mandamus, this Court "looks to five standards, known as the '*Bauman* guidelines'":

> "(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.)
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression."

Credit Suisse, 130 F.3d at 1345 (quoting *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)). "'None of these guidelines is determinative and all five guidelines need not be satisfied at once for a writ to issue.'" *In re Philippine Nat'l*

Bank, 397 F.3d at 774 (quoting *Credit Suisse,* 130 F.3d at 1345). "Rarely will all five 'guidelines point in the same direction' or even be relevant to the particular inquiry." *Id.* (quoting *Credit Suisse*, 130 F.3d at 1345).

In this case, *each* of the *Bauman* guidelines favors issuing a writ of mandamus.

First, if this Court does not review the "extension" issue pursuant to its appellate jurisdiction, Revelstoke would "have no other means of obtaining immediate review" of Judge Real's ruling on that issue. *Credit Suisse*, 130 F.3d at 1346.

Second, Revelstoke will be "damaged or prejudiced in a way not correctable on appeal" if this Court does not immediately resolve the extension issue. The Texas court will likely delay ruling on — and may deny — Revelstoke's pending dispositive motion based on Judge Real's purported extension of the Final Judgment. While the Texas litigation continues, Revelstoke's title to its real property in Texas will remain "in limbo" and its "beneficial use of the property" will continue to be impaired.[7] *In re Canter*, 299 F.3d at 1154. These factors satisfy the second *Bauman* guideline. *See id.*

---

[7] Plaintiffs have filed *lis pendens* in the Texas land records, which impairs the marketability of Revelstoke's land. *See Ryan Mortgage Investors v. Fleming-Wood*, 650 S.W.2d 928, 936 (Tex. App. 1983) (lis pendens rendered title "not marketable").

Third, as explained above, it is "clear" that the district court's purported extension of the Final Judgment is "erroneous as a matter of law." *In re Philippine Nat'l Bank*, 397 F.3d at 775.

Fourth, the district court's ruling is an "oft-repeated error" because it disregarded the Hawaii Supreme Court's ruling in *Wiig*. This Court recently reversed Judge Real for "declin[ing] to take the Hawaii Supreme Court's opinion into consideration" — *even though questions of state law had been certified to that court* — on the ground that "'I'm not a trial court of the Hawai'i courts of appeal.'" *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 373 (9th Cir. 2005). Judge Real's "extension" ruling is also an "oft-repeated error" because it is the latest in a series of clearly erroneous rulings in favor of plaintiffs in connection with the same Final Judgment at issue here. This Court has taken strong actions in response to these rulings:

- *In re Philippine Nat'l Bank*, 397 F.3d at 775 (issuing writ of mandamus and directing Judge Real "to refrain from any further action against the Philippine National Bank in this action or any other action involving" Marcos Estate assets that Philippine Supreme Court had held were forfeited to Philippine Republic).
- *In re Republic of the Philippines*, 309 F.3d at 1149, 1153 (reversing Judge Real's ruling that Philippine Republic "had no claim to" Marcos Estate assets sought by plaintiffs in "an interpleader action that has as its core purpose the resolution of all competing claims").
- *Credit Suisse*, 130 F.3d at 1348 (issuing writ of mandamus directing Judge Real "to dismiss [this] action," "further directing

> [him] to refrain from taking any further action in [this] action or any other case involving [Plaintiffs] and any assets of the Estate of Ferdinand E. Marcos held or claimed to be held by [two Swiss] Banks," and "retain[ing] jurisdiction over this case").

In addition, the District court's ruling on the extension issue "'manifests a persistent disregard of the federal rules.'" *In re Philippine Nat'l Bank*, 397 F.3d at 774 (quoting *Credit Suisse*, 130 F.3d at 1345). This Court has reversed Judge Real in another case where, as here, he disregarded Rule 69(a) and declined to apply the law of the forum state in a proceeding to enforce the Final Judgment. *See Hilao*, 95 F.3d at 853-56 (Rule 69(a) required application of California law to proceeding to enforce the Final Judgment in the Central District of California and reversal of ruling by Judge Real that would have enabled plaintiffs to reach alleged Marcos Estate assets in violation of California law).

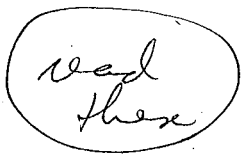
Fifth, and finally, the district court's purported extension of the Final Judgment "'raises new and important problems.'" *In re Philippine Nat'l Bank*, 397 F.3d at 774 (quoting *Credit Suisse,* 130 F.3d at 1345). In particular, Judge Real's ruling disregarded Tex. Civ. Prac. & Rem. Code § 16.066(a), which bars enforcement of a judgment that is no longer enforceable in the jurisdiction where it was rendered. If plaintiffs are allowed to proceed with their time-barred enforcement action in the Texas court based on Judge Real's ruling, Texas's policy of repose and deference to other states' limitations periods would be thwarted. A federal judge in Hawaii should not be allowed to override that policy.

In sum, the *Bauman* guidelines strongly support the issuance of a writ of mandamus if this Court declines to review the extension issue pursuant to its appellate jurisdiction.

C. Revelstoke Requests That A Different District Judge Resolve Any Issues To Be Determined On Remand.

If this Court declines to resolve the extension or other issues now, Revelstoke requests that a different district judge resolve any issue on remand. "There is no doubt as to [this Court's] authority to order a case reassigned," *Brown*, 815 at 576, and this Court has directed that Judge Real be replaced by a different judge in several prior cases:

- *Living Designs*, 431 F.3d at 361-73 (reversing several rulings by Judge Real and directing that a different judge be assigned on remand).



- *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 920 (9th Cir. 1998) (remanding case with direction that it be reassigned to a different judge because "Judge Real has twice granted summary judgment to [the plaintiffs] and has failed to articulate his reasons").

- *Brown*, 815 F.2d at 576 (issuing writ of mandamus to compel Judge Real – who "challenged the power and authority of this court to order [the] reassignment" of his cases – to comply with this Court's decision that he "be replaced by a judge randomly selected by the clerk of the district court").

- *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 781 (9th Cir. 1986) (concluding that "the appearance of justice and the orderly administration of this court's appellate docket would best be served by remand to another judge" where Judge Real repeatedly dismissed an indictment after this Court remanded the case to him with direction to reinstate it).

This Court should do likewise here with regard to any issues remanded to the district court.[8]

This Court exercises its supervisory power under 28 U.S.C. § 2106 to remand a case to a different judge when "reassignment is advisable to preserve the appearance of justice." *Living Designs*, 431 F.3d at 372. That standard is satisfied here.

As explained above, the purported extension of the Final Judgment is the latest in a series of clearly erroneous rulings by Judge Real in proceedings to enforce that judgment — all of which have favored plaintiffs. The situation here is more grave than in prior cases, however, because Judge Real refused to accord Revelstoke any chance to be heard, much less a fair hearing. The district court granted plaintiffs' extension motion *before* it considered Revelstoke's motion to intervene for the limited purpose of opposing that motion, then denied intervention on the ground that the extension issue "doesn't affect [Revelstoke] at all." (Tr. of Hr'g, at 12:10-11, ER 111.)

The next day, Judge Real entered a written order prepared by plaintiffs; as in *Living Designs*, Judge Real "engaged in the regrettable practice of adopting the

---

[8] This Court has also reassigned a case to a different judge for the limited purpose of resolving one issue. *United States v. Lloyd*, 125 F.3d 1263, 1271 (9th Cir. 1997) ("reassign[ing] the case to a different district judge solely for the purpose of making the dismissal determination").

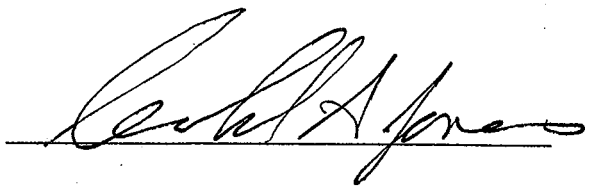
findings drafted by the prevailing party wholesale." 431 F.3d at 373 (internal quotation marks omitted). Then Judge Real immediately and summarily denied Revelstoke's new motion to intervene for purpose of appealing the purported extension on the ground that "[t]his matter rests in the jurisdiction of the Texas litigation." (Order of July 3, 2006, ER 125); *compare In re Canter*, 299 F.3d at 1152.

For these reasons, to preserve the appearance of justice this Court should assign a different judge to consider any issues on remand.

CONCLUSION

This Court should summarily reverse Judge Real's denial of Revelstoke's motions to intervene. It should also summarily reverse his purported extension of the Final Judgment.

Respectfully submitted,



July 18, 2006

Thomas Benedict
GOODSILL ANDERSON QUINN & STIFEL, LLP
Alii Place, Suite 1800
1099 Alakea Street
Honolulu, Hawaii 96813
(808) 547-5600

Richard A. Jones
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
(415) 591-7065

Eugene D. Gulland
Peter D. Trooboff
Neil K. Roman
Joshua D. Greenberg
Jason M. Knott
COVINGTON & BURLING LLP
1201 Penn. Ave., NW
Washington, DC 20004
(202) 662-5846

Attorneys for Revelstoke Investment Corporation, Inc.

CERTIFICATION OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionally spaced and has a typeface of 14 points. According to the word processing software used to prepare the brief (Microsoft Word 2000), the brief – including both text and footnotes, and excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Certificate of Service – contains 9,460 words.

RICHARD A. JONES

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), Revelstoke states that this case may be deemed related to the following cases: *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 448 F.3d 1072 (9th Cir. 2006); *In re Philippine Nat'l Bank*, 397 F.3d 768 (9th Cir. 2005); *Hilao v. Estate of Marcos*, 393 F.3d 987 (9th Cir. 2004); *In re Republic of the Philippines*, 309 F.3d 1143 (9th Cir. 2002); *Republic of the Philippines v. U.S. Dist. Ct.*, No. 01-70757; *Merrill Lynch Pierce Fenner & Smith Inc. v. Arelma Inc.*, No. 01-16024; *Credit Suisse v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 130 F.3d 1342 (9th Cir. 1997); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Hilao v. Estate of Marcos*, 103 F.3d 762 (9th Cir. 1996); *Hilao v. Estate of Marcos*, 95 F.3d 848 (9th Cir. 1996); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539 (9th Cir. 1996); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994).

?!

RICHARD A. JONES

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Appellant on the Merits and for Summary Reversal were served this 18th day of July, 2006, by Federal Express, next business day delivery on the following counsel of record:

Robert A. Swift, Esq.
KOHN, SWIFT & GRAF, P.C.
1 South Broad Street, Suite 2100
Philadelphia, PA 19107

Sherry P. Broder, Esq.
Attorney at Law – A Law Corporation
Davies Pacific Center
841 Bishop Street, Suite 800
Honolulu, HI 96813

Bert T. Kobayashi, Jr., Esq.
Lex R. Smith, Esq.
KOBAYASHI SUGITA & GODA
First Hawaiian Center
999 Bishop Street Suite 2600
Honolulu, HI 96813-3889

John Bartko, Esq.
BARTKO, ZANKEL, TARRANT & MILLER
900 Front Street, Suite 300
San Francisco, CA 94111-1427

James P. Linn, Esq.
JAMES P. LINN LAW FIRM PLLC
1601 NW Expressway St., # 1710
Oklahoma City, OK 73118-1427

Paul Hoffman, Esq.
SCHONBRUN, DE SIMONE, SEPLOW, HARRIS & HOFFMAN
723 Oceanfront Walk, Suite 100
Venice, CA 90291

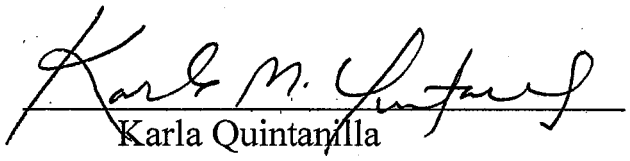
Randall Scarlett, Esq.
THE SCARLETT LAW GROUP
536 Pacific Avenue
San Francisco, CA 94133

Stephen V. Bomse, Esq.
Richard Cashman, Esq.
Rachel M. Jones, Esq.
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94111

Carol A. Eblen, Esq.
ceblen@goodsill.com
GOODSILL ANDERSON QUINN & STIFEL LLP
1099 Alakea Street, Suite 1800
Honolulu, HI 96813

Jay R. Ziegler, Esq.
BUCHALTER NEMER
1000 Wilshire Blvd, 15th Floor
Los Angeles, CA 90017

Matthew J. Viola, Esq.
LAW OFFICE OF MATTHEW VIOLA
707 Richards Street, Suite 516
Honolulu, HI 96813



Karla Quintanilla