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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

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MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,	}	Civil No. CV00-00595MLR
	}	
Plaintiff,	}	
	}	
v.	}	Defendant Pimentel's
	}	First Amended
ARELMA, INC., et al.,	}	Pretrial Memorandum
	}	
Defendants.	}	
	}	
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Pursuant to the Court's Minute Order of December 5, 2001 and Hawaii Local Rule 16.6, defendant Pimentel submits his First Amended Pretrial Memorandum. Because discovery is not complete and certain parties are obstructing full and fair discovery, Pimentel reserves the right to supplement up to and during the trial of this action.

A. Party. This submission is made by defendant Mariano Pimentel on behalf of himself and the class of Filipino Judgment Creditors in MDL No. 840.

B. Jurisdiction and Venue. Jurisdiction is based on the Interpleader Act, 28 U.S.C. 1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. 1655 and the

doctrines of *quasi in rem* and *in rem* jurisdiction. Venue is based upon 28 U.S.C. 1397 since two of the claimants reside in Hawaii. Arelma Inc. has questioned the personal jurisdiction of this Court over it.

C. Substance of Action. This is an interpleader action filed by plaintiff Merrill Lynch which deposited the assets in its account No. 165-07312 with the Clerk of the Court because several claimants had asserted the right to the proceeds of the account. Arelma Inc. and Philippine National Bank assert defenses based upon the act of state doctrine and comity.

D. Undisputed Facts. It is believed that no one disputes the following facts:

1. In 1972 a Swiss banker recommended to Ferdinand E. Marcos, through Marcos' friend Jose Campos, that Marcos set up a securities trading account in the United States.

2. The Swiss banker recommended that the account be in the name of a Panamanian corporation which he caused to be formed in September 1972. The Panamanian Corporation was called Arelma Inc. Shares in Arelma Inc. were issued in blank, meaning no name was inserted on the share certificates.

3. The creation of Arelma coincided with the declaration of martial law in the Philippines and massive arrests ordered by Ferdinand E. Marcos which resulted in the torture, summary execution and disappearance of 9,539 Filipinos.

4. An account, No. 165-07312, was opened at Merrill Lynch in the United States in 1972 in the name of Arelma Inc.

5. Ferdinand E. Marcos caused \$2 million to be deposited in Merrill Lynch account No. 165-07312 in 1972.

6. Merrill Lynch deposited the entire proceeds of account No. 165-07312 with the Clerk of the Court on and after September 17, 2001.

7. Ferdinand E. Marcos died in Hawaii on September 29, 1989.

8. The class of Filipino Judgment Creditors in MDL No. 840 has a Final Judgment entered February 3, 1995 against the Estate of Ferdinand E. Marcos in the principal amount of \$1,964,005,859.90 which, with interest at the rate allowed by federal statute, had a value of \$3,140,919,267.09 as of January 1, 2002.

9. The above Final Judgment has not been satisfied.

10. The class of Filipino Judgment Creditors in MDL No. 840 has a contempt award against Imelda R. Marcos and Ferdinand R. Marcos, personally, in the amount of \$240,800,000 as of January 1, 2002, which has not been satisfied.

11. Arelma never had officers or directors until 1981, and then only on paper.

12. Arelma never issued stock certificates until 1981, and in 1981 it issued two bearer certificates.

13. Arelma never had any corporate by-laws.

14. Arelma never held annual shareholder meetings; and only held director meetings on two occasions over 28 years to change officers and directors.

15. Arelma never maintained minutes of director meetings prior to 2000.

16. Arelma never had any employees.

17. Arelma never had an accountant.

18. Arelma never had standard financial statements, such as a balance sheet or profit and loss statement.

19. Arelma never maintained an office or place of business, and used a Swiss address for mail.

20. Arelma never paid taxes to any taxing authority.

21. In 1999 or 2000 the Arelma bearer share certificates were seized by the Swiss government without the payment of any compensation.

22. Neither Golden Budha Corporation nor Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against the Estate of Ferdinand E. Marcos.

23. Golden Budha Corporation has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of \$13,275,848.37 as of October 21, 1996.

24. Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of \$6 million as of October 21, 1996.

E. Disputed Factual Issues. It is believed that the following facts are disputed:

1. Whether the source of the money deposited in account No. 165-07312 was assets owned by Ferdinand E. Marcos or stolen by Ferdinand E. Marcos.

2. Whether the purpose of having the Merrill Lynch account in the name of a Panamanian corporation was to conceal the assets of Ferdinand E. Marcos.

3. Whether Arelma Inc. was an *alter ego* or instrumentality of Ferdinand E. Marcos and never functioned as a legitimate corporation.

4. Whether the Arelma stock certificates were ever the property of the Philippine government?

5. Whether the seizure of the Arelma stock certificates from Suntrust was a confiscation without compensation and precludes a transferee from being deemed a legitimate owner?

6. Whether Arelma is acting under authority of a legitimate owner of the share certificates?

F. Relief Prayed. Pimentel requests that the entire proceeds deposited by Merrill Lynch with the Clerk of Court be awarded to the class of Filipino Judgment creditors in MDL No. 840.

G. Points of Law.

1. Pimentel contends that as a Judgment creditor of the Estate of Ferdinand E. Marcos the class is entitled to the entire proceeds of the Merrill Lynch account. Alternatively, Pimentel contends the Class is entitled to the entire proceeds of the account based on their contempt award against Imelda R. Marcos and Ferdinand R. Marcos.

2. This Court should take judicial notice of the finding in Hilao v. Estate of Ferdinand Marcos, MDL No.840 (D.Haw. 11/20/91) that “[t]he Marcoses had a very highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods,” which was affirmed by the Ninth Circuit at 25 F.3d 1467 (1994). This Court should also take judicial notice of decisions in the Ninth and Second Circuit Courts which affirmed findings of “... a pattern and practice by the Marcoses of secreting their assets through foreign bank accounts by the use of aliases and shell corporations.” *Id.* 25 F.3d at 1480; Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988); and Republic of the Philippines v. Marcos, 806 F.2d 344 (2nd Cir. 1986). This Court should take judicial notice that the February 3, 1995 Judgment in Hilao v. Estate of Ferdinand E. Marcos was affirmed by the Ninth Circuit in an opinion reported at 103

F.3d 767 (1996); and the contempt citation and award was affirmed by the Ninth Circuit in an opinion reported at 103 F.3d 762 (1996).

3. Because this Court has federal subject matter jurisdiction based on the Federal Interpleader Statute, 28 U.S.C. 1335, and in rem jurisdiction under 28 U.S.C. 1655, federal substantive law applies, although a federal court may look to state law for guidance. Board of Trustees v. Valley Cabinet & Mfg. Co., 877 F.2d 769, 772 (9th Cir. 1989).

4. Under federal common law, a corporation's veil may be pierced based upon three factors:

- a) the amount of respect given to the separate identity of the corporation by its shareholders;
- b) the degree of injustice visited upon the litigants by recognition of the corporate entity; and
- c) the fraudulent intent of the incorporators.

Board of Trustees v. Valley Cabinet & Mfg. Co., *supra*. For a party to prevail, he must satisfy the first prong and either the second or third prong. UA Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1475 (9th Cir.), cert. denied, 133 L.Ed.2d 203 (1995). Piercing of the corporate veil is an equitable remedy addressed to the discretion of the court. McClaran v. Plastic Industries, Inc., 97 F.3d 347 (9th Cir. 1996).

H. Previous Motions.

1. Motion of Estate of Roxas and Golden Budha to Compel Discovery from Merrill Lynch – Denied.

2. Motion of the Republic and PCGG to recuse, dismiss, transfer or stay – the motion to recuse was denied (per Judge Kay); the motion to stay was denied; the motion to dismiss or transfer was denied as moot.

3. Motion of Pimentel for Expedited Discovery – Granted.
4. Motion of ENC to set aside default – Granted.
5. Motion of Pimentel to Join Philippine National Bank as a Party Defendant – Granted.
6. Motion of Estate of Roxas and Golden Budha to file a cross-complaint against Republic – Denied.
7. Motion to Serve remaining defendants by alternative means – Granted.
8. Motion for Stay Pending Appeal – Denied as moot.
9. Pimentel’s Motion for Class Certification – Granted.
10. Pimentel’s Motion to Strike Affidavits of Daniel, Kurer, Tejeiro and Espino – Granted.
11. Motion of Republic and PCGG to dismiss for Sovereign Immunity – Denied as moot.
12. Motion of Arelma and Philippine National Bank to Dismiss – Denied.
13. Pimentel’s Motion to Compel Discovery from Republic and PCGG – Denied as moot.
14. Suntrust Motion to Dismiss - Denied.
15. Suntrust Motion for Protective Order - Denied.
16. Motion of Pimentel to Compel Sunier Deposition in Hawaii - Granted.
17. Arelma Motion for Protective order - Denied.
18. Pimentel Motion to Compel Depositions of Espina and Tejeira - Granted.
19. Suntrust, PNB and Arelma oral motions for interlocutory appeal - Denied.
20. Suntrust Motion for Summary Judgment - Stayed
21. Pimentel Motion to Compel Execution of Waiver by PNB and Arelma - Granted.
22. Suntrust Renewed Motion to Dismiss - Continued.
23. Merrill Lynch Motion for Discharge - Granted.

24. Merrill Lynch Motion for Default against certain parties - pending.

I. Witnesses To Be Called.

1. Mariano Pimentel
2. Paul Wachendorfer (per excerpts of deposition transcript)
3. John Burns (per excerpts of deposition transcript)
4. Witnesses to identify and/or authenticate documents to be placed in evidence.

J. Exhibits, Schedules and Summaries. Pimentel has not yet finalized his list of exhibits to be offered at trial, but anticipates introducing the following, reserving the right to supplement prior to or during trial:

1. Letter from Swiss Bank Corp. (Geneva) to Swiss Bank Corp. (Panama) dated 9/20/72
2. Letter Sunier to Campos dated September 21, 1972.
3. Merrill Lynch form defining Arelma as a Panamanian holding company 9/25/72 (ML-3)
4. Letter from Swiss Bank Corp. (Panama) to Swiss Bank Corp. (Geneva) dated 10/4/72
5. Letter from Swiss Bank Corp. (Geneva) to Swiss Bank Corp. (Panama) dated 10/26/72
6. Merrill Lynch New Account Holding Form 11/9/72 (ML-1)
7. Merrill Lynch First Account Statement 11/9/72 (ML-2)
8. Letter Campos to Swiss Bank Corporation dated November 14, 1972.
9. Check to Merrill Lynch funding account with \$2 million dated 11/20/72 (ML-4)
10. Merrill Lynch Hypothecation Card dated 1/73 (ML-7)
11. Merrill Lynch Transmittal Form dated 1/3/73 (ML-5)
12. Merrill Lynch Transmittal Form dated 1//14/75 (ML-6)
13. Letter Sunier to Benedicto dated 5/16/75 (ML-2412 to ML-2422)

14. Letter Sunier to Benedicto dated 5/27/77 (ML-2406 to ML-2411)
15. Copy of Panamanian document attesting to change in Arelma's Board of Directors dated 2/16/83 (ML-12 to ML-16)
16. Merrill Lynch account statement for Acct. 165-07312 for period 3/26/83 to 4/29/83 (ML-1359 to ML-1361)
17. Merrill Lynch Corporate Authorization to Trade dated 4/29/83 (ML-10)
18. Letter Amadruez to Wachendorfer dated May 3, 1983 (ML-8 to ML-9 and Suntrust doc.)
19. Letter Sunier to Ferdinand E. Marcos dated May 19, 1983 with attachments.
20. Letter Swiss Bank Corp. to Ferdinand E. Marcos dated May 19, 1983
21. Merrill Lynch Address Change for Arelma dated 6/8/84 (ML-19)
22. Tax Exemption Certificate for Arelma 7/31/84 (ML-17)
23. Letter from Wachendorfer to Arelma Inc. dated 10/21/87 (ML-1721)
24. Fax from Wachendorfer to Suntrust dated 5/17/93 with notation 8/93 (ML-1724)
25. Communication from Suntrust to Wachendorfer dated 9/16/94 (ML-2435)
26. Tax Exemption Certificate for Arelma dated 12/28/94 (ML-20)
27. Imelda Marcos Power of Attorney to Burns dated July 25, 1997 (Burns Ex.6).
28. Ferdinand R. Marcos Power of Attorney to Burns dated August 19, 1997 (Burns Ex. 7)
29. Memorandum from Sunier to Cosandey and Wicki dated November 3, 1997.
30. Tax Exemption Certificate for Arelma dated 12/23/97 (ML-21)
31. Imelda Marcos Power of Attorney to Burns dated December 9, 1999 (Burns Ex.29).
32. Merrill Lynch account statement for Acct. 165-07312 for July 2000 (ML-1337 to ML-1356).

33. Summary of accounts of Ferdinand E. Marcos with Swiss Banks 1968 to 1991.
34. Account opening statement at Swiss Bank Corporation dated March 21, 1968 signed by Ferdinand E. Marcos.
35. Judgment in Hilao v. Estate of Ferdinand E. Marcos entered February 3, 1995.
36. Contempt Order in Hilao v. Estate of Ferdinand E. Marcos entered May 26, 1995.

K. Further Discovery or Motions.

1. Pimentel has serious discovery disputes with Suntrust, Arelma and Philippine National Bank which have resulted in motions to compel and/or for sanctions. Because Arelma has refused to sign a waiver of Swiss banking privilege in favor of Jean Louis Sunier, an executive of Suntrust, he is refusing to testify. Arelma and Philippine National Bank are surrogates for the Republic and PCGG. Arelma and its board are controlled by the Republic and PCGG; Philippine National Bank is 16% owned by the Republic. Arelma and Philippine National Bank have refused to produce witnesses to authenticate documents they intend to rely upon. Pimentel intends to move to preclude Arelma from adducing any evidence in support of its claim to the Merrill Lynch assets due to its refusal to cooperate in the taking of relevant testimony.

2. Suntrust has moved to be dismissed as a party.

3. Arelma has moved for summary judgment.

L. Stipulations. It is expected that the parties will stipulate to the authenticity of documents and business records of non-contested documents. In addition, Pimentel reserves the right to introduce particular responses to discovery furnished by other defendants or Merrill Lynch.

M. Amendments, Dismissals. Prior to trial it is expected that the Court will discharge Merrill Lynch and dismiss any parties not claiming the Merrill Lynch account.

- N. Settlement Discussion.** There have been no settlement discussions among counsel.
- O. Agreed Statement.** A presentation of the dispute upon an agreed set of facts is not feasible.
- P. Bifurcation, Separate Trial of Issues.** Pimentel believes all issues can be tried together in a single proceeding.
- Q. Reference to Master or Magistrate Judge.** Pimentel believes that there is no need to refer the issues to a special master or magistrate judge.
- R. Appointment and Limitation of Experts.** At this point only Philippine National Bank and Arelma have identified an expert witness, Simon Tejeiro, to testify at trial. Pimentel expects to move to preclude or limit his testimony at trial.
- S. Trial.** Pimentel requests a trial date in July 2002, which will enable the parties to complete discovery.
- T. Estimate of Trial Time.** Trial is expected to last 2 days.
- U. Claims of Privilege or Work Product.** Certain documents from Merrill Lynch and Suntrust have been produced under stipulations of confidentiality which also protect the use of the documents at trial.
- V. Miscellaneous.** Pimentel may request the Court to hold a Rule 104(a) hearing regarding the admissibility of certain foreign documents relied upon by Arelma and Philippine National Bank.

Dated: March 8, 2002

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