

JUL 11 2 2004

at 10 o'clock and 17 min. 45  
WALTER A. Y. H. CHINN, CLERK

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

MERRILL LYNCH, PIERCE, FENNER )  
& SMITH INCORPORATED, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ARELMA, INC., et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

CASE NO. CV00-595-R  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This case came on for trial before this Court, sitting without a jury, February 23, 2004, and the Court, having heard and considered the evidence, both oral and documentary, any stipulations of the parties, and the argument of counsel, finds the facts and states the conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure as follows:

FINDINGS OF FACT

1. Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch) is a corporation organized under the laws of the State of Delaware with its principal place of business

in New York, New York.

2. Claimant Arelma S.A., named herein as Arelma, Inc. (Arelma) is a corporation organized under the laws of Panama in 1972 by Ferdinand E. Marcos, and at all times has been and is now a corporation in good standing under Panamanian law. No stock was issued in Arelma S.A. upon its formation. Ferdinand E. Marcos was the sole owner of Arelma S.A..

3. Claimant Philippine National Bank (PNB) is a commercial banking corporation organized under the laws of the Republic of the Philippines with its principal place of business in Metro Manila, Philippines and with a Hawaii-licensed foreign bank agency maintaining an office in Honolulu, Hawaii.

4. Claimant Mariano J. Pimentel (Pimentel) is a citizen of the Republic of the Philippines, residing in Honolulu, Hawaii, and is a member of the plaintiff class that obtained a judgment in the total sum of nearly two billion dollars on February 3, 1995 against the Estate of Ferdinand E. Marcos (Marcos Estate) in the legal action entitled "In Re Estate of Ferdinand E. Marcos, Human Rights Litigation," MDL No. 840 (the Human Rights Victims' Judgment). On May 26, 1995 in the same legal action a contempt order was entered against Imelda R. Marcos and Ferdinand R. Marcos, Jr., which included a fine in the amount of \$100,000 per day.

5. Defendant Estate of Roger Roxas (Roxas), whose personal representative is Felix Dacanay, a resident of Florida, and defendant Golden Budha Corporation (Golden Budha), a corporation organized under the laws of the State of Georgia, (collectively Roxas/Golden Budha) obtained a judgment, entered nunc pro tunc as of October 21, 1996, against Imelda Marcos, in her personal capacity to the extent of her interest in the Marcos Estate, in the sum of \$19,275,848.37, plus taxable costs of \$61,074.54 (the Roxas/Golden Budha Judgment).

6. All other named claimants have defaulted, have disclaimed any interest in the subject matter of this interpleader or have been dismissed by the Court, other than defendants ENC Corporation, John K. Burns and Frontier Risk Capital Management, LLC, each of whom filed Answers to the Complaint on file herein, but did not appear at trial. There is no evidence in support of any claim of those three defendants to the interpleaded assets.

7. Ferdinand E. Marcos served as president of the Philippines from 1965 until February 1986. (Jt. Pretrial Stip.) He was the de jure government of the Republic of the Philippines during his term in office.

8. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii on September 29, 1989. (Jt. Pretrial Stip.)

9. In 1972 Jean Louis Sunier, 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. (Ex. 2)

10. The creation of Arelma in September 1972 coincided with Ferdinand E. Marcos' declaration of martial law in the Philippines. (Ex. 40)

11. During martial law, Marcos increased his individual power so that he could personally govern and direct the operation of the entire government. (Ex. 33 and 40) By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. (Ex. 34 and 40) Thousands were subjected to hideous tortures. Thousands more were summarily executed and others simply "disappeared." (Ex. 35 and 40)

12. The Swiss banker recommended that the account be in the name of a Panamanian corporation called Arelma, Inc. which he caused to be formed in Panama in September 1972.

(Ex. 2)

13. A securities account No. 165-07312, was established at Merrill Lynch in New York by Arelma in 1972. (Jt. Pretrial Stip.) On the account opening form, Merrill Lynch listed the Arelma entity as a “holding company.” (Ex. 6)

14. The account of Merrill Lynch was funded by Arelma with a deposit of \$2,000,000 in 1972. (Jt. Pretrial Stip.; Ex. 8 and 9; Sunier Dep. 60) The source of those funds was Ferdinand E. Marcos.

15. The property which is the subject of this interpleader, is the assets which were held in a securities account No. 165-07312 at Merrill Lynch in the name of Arelma. (Jt. Pretrial Stip.)

16. Merrill Lynch deposited the entire assets in account No. 165-07312, approximately \$35 million, with the Clerk of the Court in Federal Court in Hawaii after Merrill Lynch filed this action in interpleader. (Jt. Pretrial Stip.; Ex. 32) Merrill Lynch makes no claim to ownership of Arelma assets.

17. The only share certificates in Arelma were issued in 1981 (9 years after its formation) when two bearer share certificates for 50 shares each were issued “in blank,” meaning no name was inserted on the share certificates. Jean Louis Sunier, an officer of Swiss Bank corporation until 1983 and an officer and director of Suntrust Investment Co. thereafter, maintained possession and custody of the share certificates in trust for Ferdinand E. Marcos from 1981 until he surrendered them to the Swiss government as directed by that government in 2000. (Jt. Pretrial Stip.; Sunier Dep. 67) No Swiss court determined the ownership of the share certificates.

18. Arelma had the same officers, Messrs Sunier and Barbey who were Swiss Bank Corporation employees, until 1981 when the Bank required its employees to resign as officers of

loss statement. (Sunier Dep. 90)

26. Arelma never had any assets except for the Merrill Lynch account and a small account at Swiss Bank Corporation. (Sunier Dep. 92)

27. Arelma never maintained an office or place of business, and used a Swiss address (Swiss Bank Corporation and later Suntrust) as an address for mail. (Ex. 10, 21)

28. Arelma never paid taxes to any taxing authority other than Panama, and that related solely to the fee for Arelma's continued incorporation. After 1983 these were paid by Suntrust for which it was reimbursed by transfers from Arelma's account at Merrill Lynch. (Ex. 25, 26, 30)

29. In 1987 a New York Federal court in the case of *Republic of the Philippines v. Ferdinand E. Marcos* froze the Arelma account at Merrill Lynch. (Ex. 23; Sunier Dep. 81) No claim of sovereign immunity was made in that case freezing the Arelma account.

30. The Swiss Federal Supreme Court has twice held that Ferdinand E. Marcos controlled Arelma and that Marcos had the power of disposition over Arelma. Arelma was a party in both proceedings and represented by legal counsel. (Ex. 47 at A14 and Ex.48 at C17)

31. In 1997 Imelda Marcos engaged John Burns, a banker, to try and recover the assets in the Merrill Lynch account on behalf of the Estate of Ferdinand E. Marcos. Imelda Marcos and Ferdinand R. Marcos, as executors of his Estate, executed powers of attorney to Burns for this purpose, and he made a demand on Merrill Lynch to release the assets. (Burns Dep. 21-23; Ex. 28 and 29)

32. Sunier's power of attorney expressly included the duty to appear and act on behalf of Arelma in legal proceedings. (Ex. 46) In 1997 Sunier acknowledged in a signed statement to

Swiss authorities that the formation of Arelma in September 1972 was part of a new relationship with Ferdinand Marcos. He acknowledged that he held the Arelma share certificates and was the only person in contact with the Marcos family. (Ex. 29)

33. Suntrust and Sunier have admitted that Arelma was incorporated to receive funds owned by Ferdinand Marcos, and that Marcos controlled Arelma during his lifetime. (Ex. 44; Sunier Dep. 46-47) Upon Marcos death that control passed to his Estate.

34. The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead. (Pimentel Dep. 84-85 and 93-94)

35. 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 plus interest at the rate allowed by 28 U.S.C. §1961 which has not been satisfied. (Jt. Pretrial Stip.)

36. 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 \$100,000 per day which had been running since June 30, 1995, and which has not been satisfied. (Jt. Pretrial Stip.)

37. 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. (Jt. Pretrial Stip.)

38. 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. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the class of Filipino Judgment Creditors in MDL No. 840.

39. 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. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840.

40. PNB, as an escrow agent, holds the two bearer share certificates owned by the Estate of Ferdinand E. Marcos, issued by Arelma pursuant to an Escrow Agreement dated August 14, 1995 between PNB and the PCGG. (Jt. Pretrial Stip.)

41. The two Arelma bearer share certificates owned by the Estate of Ferdinand E. Marcos were delivered to PNB by the PCGG which obtained them from the Swiss government. (Jt. Pretrial Stip.)

42. Suntrust Investment Co. has disclaimed any interest in the interpleaded assets. (Jt. Pretrial Stip.)

43. Pursuant to the Swiss Closing Order, the Arelma bearer share certificates were subsequently returned to the Philippines and since on or about July 28, 2000, have been in the possession of and held by PNB, as escrow holder, according to the Arelma Escrow Agreement.

44. On or about November 20, 2000, the Board of Directors of Arelma held a special meeting at which the Board of Directors granted a general power of attorney in favor of PNB to represent Arelma in seeking the transfer of the assets in the Arelma Account to PNB as escrow holder. (Trial Exhibits 125 and 136) There is no evidence that the Board of Directors was duly elected and acting for Arelma S.A. owned by Ferdinand Marcos.

#### CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. §2361 interpleader is a hybrid civil action in which there is no defendant upon whom liability can be claimed. There are only claimants invited, not summoned, to make a claim against the interpleaded fund.

2. This Court has jurisdiction pursuant to 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. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of the Court.

3. Venue is based upon 28 U.S.C. §1397 since two of the claimants, Pimentel and PNB reside in Hawaii.

4. Arelma was properly served pursuant to FRCP Rule 4(k)(1)(C) which provides for nationwide service of process: "Service of summons is effective to establish jurisdiction over the person of a defendant [claimant] ... who is subject to the Federal interpleader jurisdiction under 28 U.S.C. §1335..." See *Rubinbaum v. Related Corporate Partners V*, 154 F.Supp.2d 481, 486 (SDNY 2001).

5. Minimum jurisdiction contacts are satisfied for purposes of personal jurisdiction over



Arelma, Inc. since it had a multi-million dollar trading account at Merrill Lynch in New York between 1972 and 2000. See *SIPC v. Vigman*, 764 F.2d 1309, 1315-16 (9<sup>th</sup> Cir. 1985).

6. 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 (9<sup>th</sup> Cir. 1989). In this case, New York has the most significant contacts to the interpleaded assets.

7. It would be contrary to the public policy of the United States to apply the law of Panama when, based on Arelma's contention, Panamanian law precludes use of the *alter ego* doctrine among private parties. See *First National City Bank v. Banco Para el Comercio Exterior*, 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result." [citations and footnotes omitted]); *Itel Containers International Corp. v. Atlanttrafik Express Service Ltd.*, 1988 U.S. Dist. LEXIS 7051 at 12 (S.D.N.Y. 1988); *Marlowe v. Argentine Naval Commission*, 604 F.Supp 703, 705 (D.D.C. 1985); *Edwards v. Schillinger*, 245 Ill. 231, 91 N.E. 1048, 1053

(1910) (term “internal affairs” does not extend to cheating creditors, but must be confined to relations affecting only stockholders and corporation among themselves).

8. 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1996). The law of New York is similar to Federal law on this subject. See *Goya Foods, Inc. v. Unanue*, 233 F.3d 38, 43 (1<sup>st</sup> Cir. 2000) (applying New York law). New York law, like Federal law, permits “reverse piercing” of the corporate veil. *Id.*

9. PNB, as escrow agent for the parties claiming ownership of the Arelma share certificates, lacks standing to seek ownership of the proceeds of the Merrill Lynch account which was maintained in the name of Arelma, Inc. See *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of ownership of shares, does not own the corporation’s assets...). Moreover, Arelma itself is a party actively seeking control of the assets at issue.

10. Arelma and PNB are collaterally estopped from denying or opposing the findings of

the Swiss Federal Supreme Court that Ferdinand Marcos controlled Arelma. (Lebrecht Dep. 27-31)

11. The Marcoses had a highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods, including aliases and shell corporations. See *Hilao v. Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9<sup>th</sup> Cir. 1994); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9<sup>th</sup> Cir. 1988); and *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2<sup>nd</sup> Cir. 1986).

12. The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos.

13. Arelma was controlled by Ferdinand E. Marcos or his representatives during his lifetime.

14. Arelma served no legitimate purpose other than to hide the assets of Ferdinand E. Marcos.

15. There was complete disregard of Arelma's corporate identity by everyone who dealt with Arelma's business.

16. The sole deposit of \$2 million into Arelma's Merrill Lynch account in November 1972 coincided with Marcos' declaration of martial law and the inception of massive *jus cogens* human rights abuses for which Marcos was responsible.

17. A Class of 9,539 human rights victims (or their heirs) have a final judgment against the Estate of Ferdinand E. Marcos for almost \$2 billion, plus interest.

18. It would be unjust to prevent the Class of persons tortured, summarily executed and

disappeared from receiving the proceeds of the Arelma account at Merrill Lynch to partially satisfy their judgment.

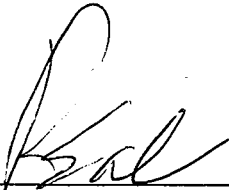
19. Golden Budha and Estate of Roxas have not proved that the assets in the Merrill Lynch account derived from assets allegedly stolen from them.

20. The judgments of Golden Budha and Estate of Roxas are against Imelda Marcos, not Ferdinand E. Marcos or his Estate.

21. Arelma cannot recover the proceeds of the account at Merrill Lynch since it was the *alter ego* and instrumentality of Ferdinand E. Marcos, and its claim is subordinate to the claim of the Class as judgment creditors of the Estate of Marcos.

22. Pimentel and the Class of Human Rights victims are entitled to the entirety of the interpleaded assets, and the Clerk of the Court is directed to transfer those assets to the account in the Clerk's Office established in MDL No. 840 pursuant to paragraph 10 of the Final Judgment of February 3, 1995 in that action.

DATED: July 12, 2004.

  
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MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE