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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

IN RE:	
ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION	**MDL NO. 840** **No. 86-390** **No. 86-330**
THIS DOCUMENT RELATES TO:	
Hilao et al v. Estate of Ferdinand E. Marcos, **and** **DeVera et al v. Estate of Ferdinand E. Marcos.**	

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF THE SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

STATE RULES

FEDERAL RULES

The Plaintiff Class, through its Class Counsel, has moved this Court to grant final approval of the Stipulation and Order (the "Settlement Agreement") dated January 17, 2019 which settles the New York interpleader litigation over artwork formerly in the collection of Imelda Marcos. By Order dated February 6, 2019, 2019 (ECF # 10722) this Court granted preliminary approval of the Settlement Agreement, approved the form and method of Class Notice, set a deadline for the submission of any objections to the Settlement, and scheduled a hearing to consider final approval for March 28, 2019.

BACKGROUND

In April 1986, a complaint was filed against Ferdinand E. Marcos in Hawaii Federal Court on behalf of a Class of 9,539 Philippine citizens (or their heirs) who had been tortured, summarily executed or disappeared during the Marcos rule between September 1972 and February 1986. The Estate of Ferdinand E. Marcos (the "Marcos Estate"), represented by Imelda Marcos and Ferdinand R. Marcos, was substituted as defendant upon Marcos's death in 1989. Following trials in 1992, 1994 and 1995, the Hawaii Federal Court entered judgment on February 3, 1995 in favor of the Class in the amount of $1,964,000,000. Class Counsel actively pursued collection of the 1995 Judgment, but were obstructed by the concealment of assets belonging to the Marcos Estate. The Marcos Estate and its representatives, Imelda R. Marcos and Ferdinand R. Marcos, were found in

contempt of court for their conduct. In January 2011, the Court entered a judgment on contempt against the Marcos Estate, Imelda R. Marcos and Ferdinand R. Marcos for $353,600,000 (the "Judgment"). The Class received a Judicial Assignment of numerous Marcos Swiss bank accounts on July 14, 1995. The Republic later appropriated those bank accounts to itself without notice to the Class which then owned the accounts.

THE LITIGATION IN NEW YORK[1]

In November 2012, the District Attorney for New York County unsealed an indictment against Vilma Bautista, a former personal secretary to Imelda Marcos. The indictment alleged that in September 2010 Bautista sold to an art gallery a valuable impressionist painting by Claude Monet titled *Le Bassin aux Nymphease* (the "Water Lily") once owned or in the collection of Imelda Marcos – but without the authority of Imelda Marcos – for $32,000,000. Within 10 days, Class Counsel filed a lawsuit against Bautista and the District Attorney for the County of New York (who had seized the proceeds from its sale and other property) in New York Supreme Court seeking the "Water Lily", other artwork allegedly purchased by Imelda Marcos, and the proceeds from the sale of the "Water Lily." Class Counsel learned that the art gallery resold the "Water Lily" to a foreign citizen. In June 2013, the Owner of the "Water Lily" painting agreed to pay US$10,000,000 to the

[1] The Declaration of Lead Counsel, Robert Swift, attests to many of the facts set forth herein. It is attached as Exhibit 5.

Class to avoid litigation. This Court approved that settlement, and in 2014 the funds from that settlement were distributed to all eligible Class members.

In that settlement, Class Counsel preserved the Class' right to pursue the proceeds from the sale of the "Water Lily" and other property once owned by Imelda Marcos. The Class sued over the property in State Court. In February 2014, the District Attorney filed in the United States District Court for the Southern District of New York an interpleader naming as defendants the Class, the Republic of the Philippines, Vilma Bautista, Imelda Marcos and others and seeking a ruling on ownership of more than 250 items of property seized from Bautista. *See District Attorney of New York County v. The Republic of the Philippines, et al.*, No. 14-890 (KFP). The District Attorney deposited the property with the Clerk of Court. The federal court stayed the State Court proceedings. The Class asserted claims against certain of the interpleaded property, limited to the proceeds from the sale of the "Water Lily" and two impressionist paintings: *L'Eglise et La Seine a Vetheuil* by Claude Monet ("L'Eglise") and *Langland Bay* by Alfred Sisley ("Langland Bay"). The Class also intervened in a related case known as *The Republic of the Philippines v. Gavino Abaya et al.*, No. 14-3829 (KFP) seeking damages against certain parties arising out of the sale of the "Water Lily." In that case, the Class asserted a claim-over against the Republic based on the Judicial Assignment.

Full discovery ensued in both cases, including the production of thousands of pages of documents and about 10 depositions. The Class and other parties moved for summary judgment. In a 93-page Opinion dated March 29, 2018, the federal court denied all the motions and later set a trial date. *District Attorney of New York County v. Republic of the Philippines*, 307 F.Supp.3d 171 (2018). Various efforts to settle the cases ensued. After two lengthy settlement conferences with the federal court judge, the parties reached the Settlement described below.

SUMMARY OF THE SETTLEMENT

Class counsel have concluded that it is in the best interests of the Class to settle almost all claims the Class has over the interpleaded property and the proceeds from the sale of the "Water Lily." Class Counsel engaged in arm's length settlement negotiations with counsel for the Republic, Vilma Bautista, Golden Budha Corporation and others before the parties concluded the Settlement. Of the approximately US$23 million of property at issue, US$13.75 million will go to the Class' Settlement Fund in the Hawaii Federal Court. In exchange for this payment, the Class and its members will give a special release to the other parties from any and all claims regarding the proceeds from the sale of the "Water Lily" and ownership of "L'Eglise" and "Langland Bay". The Class and its members will receive a similar release from the other parties. The Class retains the right to file a

summary judgment against one remaining defendant (Barbara Stone) who received US$1.9 million from the sale of the "Water Lily", as well as the ability to sue over other artwork once owned by the Marcoses.

The Class' recovery could be reduced based on a claim by the Sheriff of New York City. The Sheriff, which has not yet filed a formal claim, is seeking a statutory "poundage" fee of 5% of the Class' recovery, or $687,500, for levying on some of the interpleaded property. *See* N.Y. CPLR 8010. The Class intends to contest the fee.

NOTICE TO CLASS MEMBERS

Class Counsel furnished individual notice to each eligible Class member by mail. As set forth in the Declaration of Robert A. Swift, ECF # 10727, notices in English and Tagalog were sent to all Class members, as directed by this Court, by first class mail in the Philippines; and by first class mail in the United States and other countries. Class members had until March 15 to object to the Settlement. As of March 15, Class Counsel had received no objection to the Settlement from Class members. Class Counsel received several letters from Class members supporting the Settlement and the Motion for Counsel Fees.

Individual notice is presumptively adequate under Rule 23(c)(2) and satisfies all due process considerations.[2] The notice described the terms of the Settlement, the considerations of Plaintiffs' Counsel which led them to conclude that the Settlement was fair and adequate, the maximum counsel fees and incentive awards will not exceed 30% of the Settlement, the procedures for objecting, and the date, time and place of the Fairness Hearing.

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

A. The Standard of Decision

It is well settled under Rule 23 of the Federal Rules of Civil Procedure that no settlement binding on the Class should be approved unless the Court finds it to be "fair, adequate, and reasonable." *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir.2004); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

The Court of Appeals policy is to favor settlement of class actions. *Class Plaintiffs v. Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992). The Ninth Circuit maintains "a strong judicial policy" that favors class action settlements. *Allen v.*

[2] No notice of the proposed Settlement was required to be sent to the Justice Department or State Attorneys General since 28 U.S.C. § 1715(b) only requires that notice shall be served by "... each defendant that is participating in the proposed settlement ..." Here the defendant Estate and the Marcoses are not participating in the proposed Settlement. Moreover, less than 100 of the approximately 6600 eligible Class members reside in the United States.

Bedolla, 787 F.3d 1218, 1223 (9th Cir. 2015). Indeed, "there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976); *see also Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution[.]"); *Utility Reform Project v. Bonneville Power Admin.,* 869 F.2d 437, 443 (9th Cir. 1989).

A settlement represents an exercise of judgment by the negotiating parties, *Torrisi v. Tuscon Elec. Power,* 8 F.3d 1370, 1375 (9th Cir. 1993); *Hanlon,* 150 F.3d at 1026. As such, the Ninth Circuit has directed that:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice, 688 F.2d at 625.

When evaluating the fairness of a class action settlement, courts in the Ninth Circuit are instructed to balance the following factors:

- The strength of the plaintiffs' case;
- the risk, expense, complexity, and likely duration of further litigation;
- the risk of maintaining class action status throughout the trial;
- the amount offered in settlement;

- the extent of discovery completed and the stage of the proceedings;
- the experience and views of counsel;
- the presence of a governmental participant; and
- the reaction of the class.

Officers for Justice, 688 F.2d at 625. Each of these factors is discussed below except for two: (1) there is no risk of decertification since the certified Class is executing on a Judgment; and (2) no representative of the United States government participated in either the litigation or settlement.

B. The Strength of Plaintiffs' Case and the Risk, Expense, Complexity and Likely Duration of Further Litigation

Experienced counsel for the Class and the opposing parties engaged in arm's-length settlement negotiations and concluded that the Settlement is in the best interests of their respective clients. The proposed Settlement provides a $13.75 million cash payment to the Class in return for mutual releases. The Settlement was reached after full discovery and the denial of the Class' motion for summary judgment. *See District Attorney of New York County v. Republic of the Philippines*, *supra*. Settlement was only achieved after two lengthy conferences conducted by the Federal Judge handling the case. The Judge had authored a 93-page Opinion on summary judgment which considered the evidence of each party, so she was knowledgeable as to the strengths and weaknesses of each party's position. Lead Counsel's principal reason for entering into the Settlement is the

very substantial cash benefit provided for the Class weighed against the possibility that a smaller recovery – or, indeed, no recovery – might be achieved after trial and the likely appeals that would follow trial. The process could last years.

Other parties to the litigation raised substantial claims. Vilma Bautista produced a Deed of Assignment whereby Imelda Marcos gifted her the paintings at issue in 1983. The Deed of Assignment was filed with a court in the Philippines in 1983. Through an expert witness, the Class disputed the validity of the Deed of Assignment. The Republic claimed that the paintings were purchased with monies misappropriated from that government. The Golden Budha Corporation claimed that the paintings were purchased with proceeds from gold (allegedly) stolen by Ferdinand E. Marcos from Roger Roxas. Other parties who received part of the proceeds from the sale of the "Water Lily" had spent or dissipated most of the money they received. In addition, the Republic sought to revoke its waiver of sovereign immunity given in the interpleader. In 2014, the Republic filed a motion in a Philippine court to declare that the paintings were forfeited to it under Philippine law. In other litigation involving the Class and the Republic, the Republic has delayed or prevented the Class' recovery of Marcos property solely on procedural grounds. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008); *Swezey v. Merrill Lynch*, 19 N.Y.3d 543 (2012).

Taking all of the above factors into account, the $13.75 million recovery is an excellent result. Coupled with the 2013 recovery of $10 million from the purchaser of the "Water Lily", the Class' total recovery from the artwork litigation totals $23.75 million.

C. The Amount Offered in Settlement

In the prior 33 years of litigation against the Marcoses, Class Counsel has only recovered a total of $21.5 million. Under the proposed Settlement, $13.75 million will be deposited into the Class Settlement Fund. This represents almost $1 million more than the amount recommended by the Judge at the settlement conference. The Class Settlement Fund currently holds about $1.17 million. As discussed above, the risk, uncertainty and delay of litigation augurs well for the Settlement. The anticipated distribution of $1,500 to each eligible class member will have a direct and meaningful effect on the lives of most Class members, who are poor and live at -- or below -- the poverty line in a third-world country. Under the circumstances, the $13.75 million payment is a fair and reasonable amount and represents a substantial recovery for the Class.

D. The Extent of Discovery Completed and the Stage of the Proceedings

Class Counsel reached a settlement after six years of litigation and full discovery including 10 depositions and the review of thousands of pages of

documents. Three depositions were taken in the Philippines. The deposition of Vilma Bautista continued for five days.

The Court held approximately 10 hearings during the six years and ruled on numerous motions. The Class and other parties moved for summary judgment. The other parties asserted substantial claims to the interpleaded property. Bautista produced a written Deed of Assignment dated 1983 from Imelda Marcos gifting her the paintings. The Republic claimed that all the paintings had been purchased with monies stolen from the Republic. Golden Budha Corporation claimed that all the paintings had been purchased with gold stolen from its assignor, Roger Roxas.

In a 93-page Opinion dated March 29, 2018, 307 F.Supp. 3d 171, the federal court denied all the summary judgment motions and scheduled trial to begin April 29, 2019. Various efforts to settle the cases ensued for many months. On August 7, 2018, the federal court judge conducted an all-day settlement conference at which a tentative settlement was reached. However, that settlement fell apart when the parties disagreed on various terms. The Court attempted in December 2018 to settle the litigation, and that effort was successful. The result was a Stipulation signed by the parties which the New York Court so-ordered on January 17, 2019. Of the approximately $23 million of interpleaded property, the Class will receive the lion's share, or $13.75 million. The other parties, including the Republic, will

divide less than $10 million. The Class' share will be paid in cash despite not all of the property being liquidated.

Thus, Class Counsel believe they have full and reliable information on which to evaluate the Settlement.

E. Experienced Class Counsel Believe the Settlement Is in the Best Interest of the Class Members

Experienced class counsel are better positioned than a court to produce a settlement that fairly reflects each party's expected outcome in litigation. *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). The recommendations of class counsel should be given a presumption of reasonableness. *See Rodriguez v. West Publishing Corp.,* 563 F.3d 948, 965 (9th Cir. 2009) ("[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action.); *Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.")

Messrs. Swift and Raible, who negotiated the Settlement with counsel for the other parties, together have more than 60 years of litigation experience. Mr. Swift initiated the Marcos litigation in 1986 and has directed both the main case and all satellite litigation on three continents for 33 years. He is also a veteran of settlement negotiations with the Marcoses and the Philippine government. He

presented two prior settlements to this Court, each of which received final approval. During settlement negotiations, Swift regularly discussed the terms with co-counsel Broder, Domingo and Fruto.

As set forth in his Declaration, Swift believes the Settlement is fair and reasonable since it gives the Class, in cash, the lion's share of the interpleaded property. The advantages of the Settlement far outweigh the disadvantages. Even if the choice of pursuing lengthy and difficult litigation were a close question, which it is not, the opportunity to distribute another $1,500 to each Class member at this time would tip the scales in favor of Settlement. The Settlement leaves the Class free to pursue other Marcos property, including artwork.

F. A Single Objection Has Been Received from SELDA

Class Notice solicited comments from any Class members who oppose the Settlement. Only one substantive objection was received.[3] That objection was from the Philippine human rights group SELDA -- a constant critic of Class Counsel -- and signed by ten (10) Class members.[4] The fact that no other Class

[3] An objection was received from Class member Edgardo Dytiapco, but he states no substantive objection.

[4] There are more than a dozen human rights groups in the Philippines of which SELDA is one. Class counsel ceased communicating with SELDA in 1993 after Class counsel learned that it was requiring claimants to sign agreements to give SELDA 15% of any recovery they received. At the instance of Class counsel, the Hawaii court entered an Order protecting the Class members from unscrupulous demands for payment. In 1999, SELDA objected to an overall settlement of the MDL action, and its objection was overruled. In 2010, SELDA

members have objected to the Settlement is indicative that the vast number of them are pleased with it. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., supra.* at 529 ("The small percentage of opt-outs and objectors strongly supports the fairness of the settlement.") Indeed, a number of Class members praised the Settlement in e-mails to Class counsel.

SELDA's objection raises four contentions but does not argue that the $13.75 million settlement amount is inadequate. First, it contends the time for comment is too short. However, the Notice Period and deadlines were set by the Court consistent with time periods in this and other class actions. Class Counsel sent individualized notice on February 11 to each eligible Class member in the Philippines in two languages by first class mail. If a Class member intended to object, he or she would have done so immediately. Class members have received individualized Class Notice on nine (9) prior occasions and understand the process.

The second contention is that Class Counsel did not first consult with all Class members before signing the Settlement and did not mail copies of the Settlement to all Class members. SELDA fails to understand that Class Notice is the means whereby Class members are consulted about the Settlement. The Class Notice sets forth the principal terms of the Settlement so that the document does

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objected to the $10 million settlement in *Del Prado v. B.N. Development Co., Inc.* (N.D.TX). The Texas court overruled its objection. In 2013, SELDA objected to the $10 million settlement with the buyer of the Monet "Water Lily" painting.

not have to be sent to all Class members. Here, the Class representative, Jose Duran, was involved in the prosecution of the case and approved the Settlement. The New York Judge who handled the litigation approved the Settlement. Then this Court reviewed both the Settlement and Class Notice before Notice was sent. All Class members could access the actual settlement through the internet.[5] In addition, Swift was interviewed on national television in the Philippines on January 17, 2019 for 30 minutes during which he discussed the settlement and the rationale supporting it. *See* "Early Edition: Some martial law victims to receive settlement of $1500 each says Swift" https://www.youtube.com/watch?v=F-OGxt2OsQc

The third contention argues that this Court should extend eligibility to original Class members who failed to furnish proof of claim forms in 1999. SELDA incorrectly contends that this group of about 2,000 "were arbitrarily delisted at the instance of Class Counsel." Br. at 9. The Court has previously ruled that only Class members who submitted claim forms in both 1993 and 1999 are eligible to receive compensation.

Finally, SELDA contends that Class Counsel did not properly detail their attorneys fees and expenses and, in any event, there should be a 5% cap on fees

[5] Class Counsel tested the website and it is working.

and expenses.[6] However, the complete Fee Petition, including its 15 exhibits, was available online for Class members to review. The Fee petition detailed time and expenses since the last Fee Petition was filed in 2013. The time and expenses of Class counsel since 1986 are detailed in more than 1,000 pages of accounting records which are on file with the Clerk's Office and available through ECF. SELDA does not explain the source or basis for its proposed 5% cap. It suffices to say that the Court of Appeals in this Circuit has set a benchmark fee of 25%. That benchmark was developed as the norm in cases where a class settlement is reached prior to trial. The *Marcos Human Rights Litigation* went through trial and appeal and has continued in collection mode an additional 24 years. Therefore, fees of 30% of this Settlement are well justified and constitute only a small percentage of the actual unpaid lodestar in the Litigation.

Accordingly, SELDA's objection should be overruled.

G. The Settlement Resulted From Arm's-Length Negotiations And Is Not The Product Of Collusion

As set forth in the Declaration of Robert A. Swift, the Settlement is the product of arm's-length negotiations over more than a year, including face-to-face meetings with all counsel and the Court. Based on counsel's familiarity with the

[6] SELDA gratuitously claims that the bulk of the work in the case was done by the human rights groups. Obj. at 9. This is so preposterous that no response is necessary.

factual and legal issues, the parties were able to negotiate a fair settlement, taking into account the costs and risks of litigation as well as delays.

CONCLUSION

For all the foregoing reasons, Class Counsel request that the Court approve the Settlement as fair, adequate and reasonable and enter the proposed Final Approval Order attached to the Motion as Exhibit 2.

Dated: March 18, 2019

Respectfully Submitted,

/s/ Robert A. Swift
Robert A. Swift
Sherry P. Broder
Lead and Liaison Counsel for the Class