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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 (1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, (2) PRELIMINARY APPROVAL OF FORM OF PROPOSED FINAL JUDGMENT, (3) APPROVAL OF THE FORM OF CLASS NOTICE, AND (4) SCHEDULING A HEARING ON FINAL APPROVAL OF THE SETTLEMENT

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On July 3, 2013 Class Counsel and a Class Representative entered into a Settlement Agreement (the "Settlement") settling all claims that the Class has against the owner of a valuable painting previously owned by Imelda R. Marcos. The Settlement has been filed under seal with this Court. Consistent with that Settlement, Class Counsel has moved this Court for an Order (1) preliminarily approving a class action settlement, (2) preliminarily approving a proposed form of final judgment, (3) approving the form of class notice, and (4) scheduling a hearing on final approval of the settlement. A copy of the proposed order for preliminary approval is attached as Exhibit 1. A copy of the proposed form of final judgment is attached as Exhibit 2. A copy of the proposed form of class notice is attached as Exhibit 3.

BACKGROUND

In April 1986 a proceeding was commenced 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") 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 hindered 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 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 a valuable impressionist painting (the "Painting") owned by Imelda Marcos to an unknown art gallery – 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 Painting and proceeds from its sale) in New York Supreme Court seeking the Painting, other artwork owned by Imelda Marcos, and the proceeds from the sale of the Painting. Class Counsel learned that the art gallery resold the Painting to a foreign citizen. As Class Counsel were preparing to file a second lawsuit against others involved in the sale of the Painting, discussions ensued between Class Counsel and the purchaser/owner (the "Owner") of the Painting. In June 2013, the Owner of the Painting agreed to pay

[1] The Declaration of Lead Counsel, Robert Swift, attests to many of the facts set forth herein. It is attached as Exhibit 4.

US$10,000,000 to the Class to avoid litigation. Shortly, the money will be deposited with the Clerk of Court in Hawaii.

SUMMARY OF THE SETTLEMENT

Class counsel have concluded that it is in the best interests of the Class to settle any claim the Class may have against the Owner. Class Counsel engaged in arm's length settlement negotiations with counsel for the Owner before the parties concluded a Settlement Agreement pursuant to which $10,000,000 will be deposited into the Class' Settlement Fund in the Hawaii Federal Court. In exchange for this payment, the Class and its members will release the Owner from any and all claims regarding the Painting. The Settlement Agreement also provides that the Class and its members will not commence a lawsuit against the art gallery which sold the Painting to the Owner. If this Settlement is not approved by the Court, the $10 million will be returned to the Owner.

The Settlement Agreement further provides that the Class may sue all other persons involved in the illegal sale of the Painting, and Class Counsel is doing that. The New York District Attorney has seized from Bautista $15 million of the $32 million proceeds as well as two other valuable paintings owned by Imelda Marcos. Class Counsel have levied on that property in accordance with New York law in order to establish priority in execution. Contemporaneously, Class Counsel are filing a second lawsuit in New York Supreme Court against all individuals

involved in the sale of the Painting other than the Owner and art gallery. By stipulation among the parties to the initial lawsuit, the litigation filed by Class Counsel in the New York Supreme Court will be stayed pending the trial of the criminal case against Bautista scheduled for October 2013.

The Settlement Agreement has been filed under seal with the Court in accordance with the terms of the Settlement. All material provisions of the Settlement Agreement are disclosed in the proposed class notice.

I. PRELIMINARY SETTLEMENT APPROVAL

A. The Standards For Preliminary Approval Of A Class Action Settlement

Rule 23(e) of the Federal Rules of Civil Procedure governs settlements of class action lawsuits. It provides that a "class may be settled, voluntarily dismissed, or compromised only with the court's approval." See Fed. R. Civ. P. 23(e). Although the procedure for approval of a class action settlement is not delineated in Rule 23, a two-step procedure is set forth in the Federal Judicial Center's Manual for Complex Litigation § 21.632 (4th ed. 2004). This procedure is carefully followed by district courts within the Ninth Circuit when considering preliminary approval of class action settlements. *See Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 658-59 (E.D. Cal. 2008); *Nat'l Rural Telecomms. Coop. v. DIRECTV,*

Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556 (W.D.Wash. 2004).

The Court of Appeals policy is to favor settlement of class actions. *Class Plaintiffs v. Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992). 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 Utility Reform Project v. Bonneville Power Admin.,* 869 F.2d 437, 443 (9th Cir. 1989).

The approval of a class action settlement is a matter within the sound discretion of the district court. *See Class Plaintiffs,* 955 F.2d at 1276; *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir. 1982). The strong policy favoring settlement of class actions suggests the Court's discretion should be exercised to approve an arm's-length settlement that significantly benefits the Class. *Class Plaintiffs,* 955 F.2d at 1276; *Officers for Justice,* 688 F.2d at 625. The district court's "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions and proof." *In re: Mego Financial Corp. Sec. Litig.,* 213 F.3d 454, 458 (9th Cir. 2000) (quoting *Hanlon v. Chrysler Corp,* 150 F.3d 1011, 1026 (9th Cir. 1998)).

Recognizing that 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, 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.

In the context of the preliminary approval of a settlement, the sole issue before the Court is whether the settlement is within the range of what could be found to be fair, adequate and reasonable, so that notice may be given to the proposed class and a hearing for final approval can be scheduled. *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 42074, at *29 (E.D. Cal. June 13, 2006). As stated by the Court in *Young v. Polo Retail, LLC*, 2006 U.S. Dist. LEXIS 81077, at *12-13 (N.D. Cal. Oct. 25, 2006), the Court should grant preliminary approval:

> [i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing.

(*citing Manual for Complex Litigation,* Second § 30.44 (1985)); *see also West*, 2006 U.S. Dist. LEXIS 42074, at *34. In assessing a settlement proposal for its

fairness, adequacy, and reasonableness, the Court is required to balance a number of facts:

(1) the strength of the plaintiffs' case;

(2) the risk, expense, complexity, and likely duration of further litigation;

(3) the risk of maintaining class action status throughout the trial;

(4) the amount offered in settlement;

(5) the extent of discovery completed and the stage of the proceedings;

(6) the experience and views of counsel;

(7) the presence of a governmental participant; and

(8) the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026; *In re: Mego*, 213 F.3d at 458; *Yeagley*, 2008 U.S. Dist. LEXIS 5040, at *7-8. [2] Given that some of these factors cannot be fully assessed until the court conducts the fairness hearing, "a full fairness analysis is unnecessary at this [preliminary approval] stage..." *West*, 2006 U.S. Dist. LEXIS 42074, at *29. Instead, at this preliminary approval stage, the Court need only "determine whether the proposed settlement is within the range of possible approval." *Alberto v. GMRI, Inc.*, 2008 U.S. Dist. LEXIS 50418, at *31 (E.D. Cal. June 23, 2008). Further, the Court needs only to consider "whether the proposed settlement

[2] Lead Counsel has provided the Court with a brief description of the pertinent factors. *See* Declaration of Robert Swift. A fuller description of each of these factors will be provided in the memorandum in support of final approval of the Settlement.

discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys ...." *West*, 2006 U.S. Dist. LEXIS 42074, at *34. As demonstrated herein, the Settlement satisfies the criteria for preliminary approval.

B. The Settlement Should Be Preliminarily Approved Because The Proposed Settlement Falls Within The Range Of What Could Be Found To Be Fair, Reasonable and Adequate

1. The Strength Of Plaintiffs' Case And The Risk, Expense, Complexity And Likely Duration Of Further Litigation

Experienced counsel for the Class and the Owner of the Painting 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 $10 million cash payment to the Class in return for a release of the Owner and a covenant not to sue the art gallery which sold the Painting to him. The Settlement was reached after a demand was made on the Owner but prior to Class Counsel filing suit. 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 commencing suit, discovery, trial, and likely appeals that would follow trial. The process could last years.

Based on the facts available to Class Counsel, it appears that the Owner is a good faith purchaser for value of the Painting. The Owner is a foreign citizen, and the precise location of the Painting is not known. New York law permits a judgment holder to assert the rights of the judgment debtor to property in the possession of a third party. N.Y. C.P.L.R. § 5201. Under New York law, the Class' remedy against the Owner is to demand return of the Painting or compensation for its conversion. *Richard S. Ravenal, Inc. v. Gross*, 90 A.D.2d 760 (N.Y.A.D. 1st Dept. 1982) (conversion is appropriate cause of action for art theft); *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (N.Y. 1991) ("New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value."). However, the law in other jurisdictions would recognize the right of a good faith purchaser for value to possess the property over that of the original owner. Which jurisdiction's law will apply to the dispute would be contested, and the outcome could be dispositive. A major advantage to the Class is that it retains the right – and is pursuing the right – to recovery the $32 million proceeds from the sale of the Painting from the persons who participated in the illegal sale. The Class has levied on $15 million of those proceeds in the custody of the New York District Attorney. In addition, Class Counsel understand that the Republic of the Philippines has also made a claim to the Painting even though it

has no judgment against Imelda Marcos and cannot levy on the Painting or the proceeds from the sale. However, 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).

World-class artwork, especially a painting by a well known impressionist artist, is not easy to value. If the sale price of the Painting from Bautista to the art gallery -- $32 million -- is deemed its fair market value, there is a real chance the Class may recover the full sale price. Taking all of the above factors into account, the $10 million recovery from the Owner is an excellent partial recovery. It guarantees the Class a substantial amount while providing an opportunity for a greater recovery.

2. The Amount Offered In Settlement

In the prior 27 years of litigation against the Marcoses, Class Counsel has only recovered a total of $11.5 million. Under the proposed Settlement, $10 million is being deposited in the Class Settlement Fund. As discussed above, the risk, uncertainty and delay of litigation as regards the Owner augurs well for the Settlement. Furthermore, the anticipated distribution of $1,000 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 $10 million payment is a reasonable and fair amount and represents a substantial recovery for the Class.

3. Risk Of Maintaining Class Action Status

The Class was certified pursuant to Rule 23 in 1991, so there is no risk of non-certification.

4. The Extent Of Discovery Completed And The Stage Of The Proceedings

Class Counsel obtained much of their information through the 21-page indictment unsealed by the New York District Attorney in November 2012. No litigation was commenced against the Owner, so no discovery was taken. However, counsel for the Owner have satisfactorily answered all questions posed by Class Counsel regarding the sale of the Painting. In addition, the Settlement Agreement provides that the Owner will provide information and testimony as needed to assist Class Counsel in its lawsuits against persons involved in the sale of the Painting.

Therefore, although no litigation has been commenced or discovery taken, Class Counsel believe they have reliable information on which to base the Settlement.

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

Class Counsel have two decades of experience in the prosecution and settlement of claims against the Marcoses and the search for their property. The proposed Settlement is the product of arm's-length negotiations over more than a month, including face-to-face meetings with counsel for the Owner. Based on their familiarity with the factual and legal issues, the parties were able to negotiate a fair settlement, taking into account the costs and risks of litigation.

II. THE PROPOSED CLASS NOTICE

Notice of a proposed settlement to the class must be given in the most practicable manner under the circumstances, describing "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980); *see also* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). The Notice, attached hereto as Exhibit 3, fully complies with the requirements of Rule 23. Although the Settlement itself is filed under seal, the Notice describes all material terms of the proposed Settlement, the attorneys' fees, expenses and incentive award sought. Since this is a non-optout Class of judgment creditors, optout is not an issue.

Class Counsel do not anticipate that any Class member will object to the Settlement. Rather, all Class members will wish to know how soon distribution can be made. The Class Notice advises Class members that the Court has not decided how much Class members will receive or when distribution will be made. As the Court is aware, the first distribution of $1,000 lasted 8 months and was a Herculean effort in 3 phases in 16 cities in the Philippines. Counsel prefer to wait to see if other settlements in the New York litigation can be achieved before requesting a second distribution. Not only could Class Counsel avoid back-to-back distributions in the event of another recovery, but the amount to each Class member might be larger.

Class notice will only be sent to eligible Class members. Not all of the original Class members are eligible to receive payment. The Court required Class members in both 1993 and 1999 to submit Claim Forms. Ineligible Class members have no interest in this Settlement.[3]

Class Counsel has previously sent class notice on eight occasions over a 22 year period. Class Counsel maintains a database of class members' names and addresses for the Court which was updated with information obtained during the 2011 distribution. As before, the class notice will be translated into Tagalog and

[3] Mailing class notice to ineligible Class members creates a false hope on their part that they can receive a distribution. Lead Counsel receives many inquiries from ineligible Class members, all of which have to be answered.

mailed in both English and Tagalog. Mailings to addresses in the Philippines will be sent via the Philippine mail system by first class mail or a comparable rate. Mailings to addresses outside the Philippines will be made from the United States. There is no need for publication of the class notice since all eligible class members will receive individual notice consistent with FRCP 23(c)(2)(B).

III. PROPOSED SCHEDULE

Attached as Exhibit 1 is the proposed Preliminary Approval Order. Class Counsel propose that the Settlement Hearing be held at the Honolulu, Hawaii Courthouse in the first half of September, 2013.

As set forth in the proposed Preliminary Approval Order, Class Counsel propose the following schedule:

Event	Time for Compliance
Deadline for Mailing of Notice	July 31, 2013
Deadline for filing Motion for Attorneys Fees and Expenses; and for a Request for Incentive Award	August 5, 2013
Deadline for the Receipt of Objections to the Settlement	August 30, 2013
Deadline for filing Motion for Final Approval	7 days before the Fairness Hearing
Date of Settlement Fairness Hearing	

IV. CONCLUSION

For all the foregoing reasons, Class Counsel request that the Court enter the proposed Preliminary Approval Order attached as Exhibit 1, which grants (i) preliminary approval of the proposed Settlement, (ii) approval of the form and mode of Class Notice, (iii) approval of the form of final approval of the Settlement, and (iv) a date for the Settlement Fairness Hearing.

Dated: July 10, 2013

Respectfully Submitted,

Robert A. Swift
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Lead and Liaison Counsel for the Class