No. _____

In the Supreme Court of the United States

JOSE DURAN, ON HIS BEHALF AND AS REPRESENTATIVE OF A CLASS OF JUDGMENT CREDITORS OF THE ESTATE OF FERDINAND E. MARCOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX

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Appendix A
[Filed: Oct. 27, 2025]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of August, two thousand twenty-five.

Before: John M. Walker, Jr.,
Richard C. Wesley,
Joseph F. Bianco,
Circuit Judges.

In Re: Enforcement Of Philippine Forfeiture Judgment Against All Assets Of Arelma, S.A., Formerly Held at Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Including, but not limited to, Account Number 16*

JUDGMENT

Docket Nos. 24-185(L), 24-186(Con)

The appeals in the above captioned cases from a judgment of the United States District Court for the Southern District of New York were argued on the District Court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the District Court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

24-185(L)
In re: Enforcement of Philippine Forfeiture Judgment

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM 2024

ARGUED: MARCH 11, 2025
DECIDED: AUGUST 18, 2025

Nos. 24-185(L), 24-186(Con)

IN RE: ENFORCEMENT OF PHILIPPINE FORFEITURE JUDGMENT AGAINST ALL ASSETS OF ARELMA, S.A., FORMERLY HELD AT MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, INCLUDING, BUT NOT LIMITED TO, ACCOUNT NUMBER 16[1]

Appeal from the United States District Court
for the Southern District of New York.

Before: WALKER, WESLEY, and BIANCO,
Circuit Judges.

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[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Ferdinand E. Marcos was a dictator and kleptocrat who ruled the Republic of the Philippines as its President from 1965 to 1986. Marcos stole billions of dollars from the Republic and its people and used networks of foreign financial accounts and shell corporations to hide stolen funds. These assets have been subject to competing legal claims by Marcos's victims, including the Republic itself, since the end of his presidency.

This case concerns a New York bank account at Merrill Lynch into which Marcos deposited roughly $2 million in 1972 that, over fifty years, has grown to over $40 million. After an interpleader action failed to determine the rightful owner, the Republic asked the United States Attorney General to commence federal proceedings on its behalf under 28 U.S.C. § 2467 to enforce a forfeiture judgment that a Philippine court had awarded to the Republic pertaining to the account. The Attorney General obliged by initiating the case now before us.

Two of Marcos's judgment creditors intervened: (1) a class of nearly 10,000 victims of Marcos's human rights abuses; and (2) Jeana Roxas, as personal representative of the estate of Roger Roxas, from whom Marcos had stolen treasure that had been left in the Philippines by Japanese forces during World

War II. Each asserted affirmative defenses to the Attorney General's enforcement proceeding. On summary judgment, the United States District Court for the Southern District of New York (Kaplan, *J.*) rejected the class's defenses, dismissed Roxas from the proceeding for lack of Article III standing, and entered judgment for the Government, thereby enabling the return of the assets to the Republic. It also denied Roxas leave to amend her answer to add additional affirmative defenses. The class and Roxas appealed.

We conclude that the class failed to create a genuine dispute of material fact as to its affirmative defenses. We also hold that Roxas lacked standing to participate as a respondent because she failed to create a genuine dispute as to her interest in the assets. We therefore AFFIRM the district court's judgment in favor of the Government.

CLAY ROBBINS III, Wisner Baum LLP, Los Angeles, CA (W. Crawford Appleby, Wisner Baum LLP, Los Angeles, CA; Daniel J. Brown, Brown Law Group, PLLC, New York, NY, *on the brief*), *for Respondent-Appellant Jeana Roxas, as Personal Representative of the Estate of Roger*

Roxas, and *Intervenor-Appellant Golden Budha Corporation*.

JOSHUA L. SOHN (Barbara Y. Levy, *on the brief*), United States Department of Justice, Washington, D.C., *for Interested Party-Appellee United States of America*.

ROBERT A. SWIFT, Kohn, Swift & Graf, P.C., Philadelphia, PA (Jeffrey E. Glen, Anderson Kill P.C., New York, NY, *on the brief*), *for Intervenor-Appellant Jose Duran, on his behalf and as representative of a Class of Judgment Creditors of the Estate of Ferdinand E. Marcos*.

JOHN M. WALKER, JR., *Circuit Judge*:

Ferdinand E. Marcos was a dictator and kleptocrat who ruled the Republic of the Philippines as its President from 1965 to 1986. Marcos stole billions of dollars from the Republic and its people and used networks of foreign financial accounts and shell corporations to hide stolen funds. These assets have been subject to competing legal claims by Marcos's victims, including the Republic itself, since the end of his presidency.

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We conclude that the class failed to create a genuine dispute of material fact as to its affirmative defenses. We also hold that Roxas lacked standing to participate as a respondent because she failed to create a genuine dispute as to her interest in the assets. We therefore AFFIRM the district court's judgment in favor of the Government.

BACKGROUND

This appeal is the latest chapter in a decades-long battle over certain assets of Ferdinand E. Marcos in a New York bank account. Marcos was President of the Republic of the Philippines (the "Republic") from 1965 until 1986. During his presidency, Marcos stole billions of dollars from the Republic and its citizens for his personal gain (committing human rights violations along the way). Much of Marcos's theft occurred after he declared martial law in 1972. Litigation over Marcos's stolen assets has percolated through American courts since 1986, when he left power and fled to Hawaii before his death in 1989. *See, e.g.*, *N.Y. Land Co. v. Republic of Philippines*, 634 F. Supp. 279 (S.D.N.Y. 1986).

In this particular case, the United States, acting on the Republic's behalf, seeks enforcement of a judgment issued by a Philippine court that ordered the New York account forfeited to the Republic.

Respondents-Appellants are other victims of Marcos and their successors in interest who hold money judgments against Marcos's estate. They entered the action to block the Government from enforcing the Philippine judgment.

I. The Arelma Assets

The New York bank account was opened in 1972, after Marcos and co-conspirator Jose Campos incorporated Arelma S.A. under Panamanian law to hold $2 million at Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") in New York. Arelma S.A. deposited $2 million into the account in November 1972, worth over $40 million today (the "Arelma Assets" or the "Assets"). In 2017, the Assets were transferred to the custody of the New York State Comptroller, where they remain today. The parties agree that Arelma S.A. was an alter ego of Marcos and that all of the Assets are proceeds of his criminal activity.

II. The Class

Intervenor-Appellant Jose Duran proceeds on behalf of himself and as representative of a class of 9,539 Filipino human rights victims and their successors in interest (the "Class"). Members of the Class or their families suffered abuse at the hands of the Marcos regime, including torture and summary

execution. *See generally Hilao v. Est. of Marcos*, 103 F.3d 767 (9th Cir. 1996). After suing the Marcos estate in 1986 in the United States District Court for the District of Hawaii, the Class won a judgment of approximately $2 billion. *Id.* at 772. Because the estate's assets were dissipated in violation of court orders, the Class could not collect on the judgment. *See generally In re Est. of Marcos Hum. Rts. Litig.*, 496 F. App'x 759 (9th Cir. 2012).

III. Roxas and the Golden Budha Corporation

Intervenor-Appellant Jeana Roxas proceeds on behalf of the estate of Roger Roxas, a treasure hunter and Marcos's judgment creditor.[1] Golden Budha Corporation ("GBC") is a company affiliated with Roxas and the two share counsel in this case.

Starting in 1970, Roger Roxas spent seven months digging near the Baguio General Hospital in the Northern Philippines. After uncovering a network of tunnels, he discovered a treasure trove that he believed to have been left behind by Japanese General Tomoyuki Yamashita during Japan's retreat from the Philippines in World War II (the "Yamashita

[1] We refer to both Roger Roxas, who is deceased, and Jeana Roxas, who proceeds on behalf of his estate, as "Roxas."

Treasure"). *Roxas v. Marcos*, 89 Haw. 91, 101 (1998).[2] Roxas took a large golden Buddha statue; uncut diamonds; samurai swords; and twenty-four gold bars, seven of which he sold. *Id.* at 101-02. On April 5, 1971, Marcos's police raided Roxas's home and stole the Buddha, diamonds, swords, and remaining seventeen gold bars. *Id.* at 102. In 1996, Roxas's estate won a multi-million-dollar judgment in Hawaii state court based on claims that Marcos had tortured him and stolen the treasure (the "Hawaii Tort Action"). *Id.* at 103-04, 113-14.

IV. Previous Lawsuits Relevant to this Action

Several prior suits involving the Republic, Appellants, and the Arelma Assets are relevant to resolving the appeal before us.

A. Federal Lawsuits Brought by the Republic in the 1980s

In the 1980s, the Republic filed three suits against Marcos in district courts in New York, Hawaii, and Texas that accused him of misappropriating the Republic's funds and hiding them in American accounts. *See Republic of Philippines v. Marcos*, No. 86-cv-2294 (S.D.N.Y. 1986);

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[2] Both the Government and Roxas rely on the facts affirmed by the Hawaii Supreme Court in *Roxas v. Marcos*, 89 Haw. 91 (1998). Gov. Br. 7 n.5; Roxas Br. 26 n.6.

Republic of Philippines v. Marcos, No. 86-cv-3859 (C.D. Cal. 1986); *Republic of Philippines v. Marcos*, No. 86-cv-1184 (S.D. Tex. 1986). The Republic voluntarily dismissed each action as to Marcos.

B. The Interpleader Action

After receiving competing demands for the Arelma Assets from Marcos's creditors, Merrill Lynch filed an interpleader action in the Hawaii district court in 2000 to determine the Assets' ownership (the "Interpleader Action"). The Class, Roxas, and the Republic were named as parties, but the Republic asserted sovereign immunity and was dismissed from the action. The Assets were awarded to the Class in 2004. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 860 (2008). The Supreme Court vacated the award in 2008, holding that the Assets could not be distributed without the Republic's participation due to its sovereign immunity and its status as an indispensable party. *Id.* at 865-66, 872.

C. The Philippine Judgment

In 1991, the Republic brought forfeiture proceedings in a Philippine anti-corruption court, the Sandiganbayan, seeking assets stolen by the Marcos regime. The Republic moved for summary judgment with respect to the Arelma Assets in 2004. On April 2, 2009, the Sandiganbayan granted the motion,

entering forfeiture in the Republic's favor (the "Philippine Judgment"). The court found that the Assets were based on around $2 million of criminally obtained property that Campos had deposited at Merrill Lynch in 1972. The Philippine Supreme Court affirmed in 2012 and subsequently denied reconsideration.

V. The Present Action

In January 2015, the Republic formally requested that the U.S. Attorney General enforce the Philippine Judgment against the Arelma Assets. On February 11, 2016, the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice certified that the Republic's request was in the interest of justice. On June 27, 2016, the Government brought this action by filing an enforcement application under 28 U.S.C. § 2467 in the United States District Court for the District of Columbia. The action was later transferred to the Southern District of New York.

Roxas and the Class intervened and, in their answers, asserted affirmative defenses to enforcement. GBC, represented by the same counsel as Roxas, unsuccessfully sought to intervene. Dist. Ct. Dkt. No. 96.

Appellants now seek review of three of the district court's orders, described below, that collectively extinguished their affirmative defenses and dismissed Roxas's defenses to the enforcement proceeding for lack of standing, resulting in a judgment in the Government's favor. GBC also challenges the denial of its motion to intervene.

First, in September and October 2019, the Class and the Government cross-moved for summary judgment on the Class's statute of limitations defense. On February 27, 2020, the district court, affirming the recommendation of a magistrate judge (Gorenstein, *M.J.*), held that the Government's suit was timely. *In re Enf't of Philippine Forfeiture Judgment* (*Arelma I*), 442 F. Supp. 3d 756 (S.D.N.Y. 2020).

Second, on February 7, 2023, the district court denied Roxas's motion for leave to amend her answer to add additional affirmative defenses, rejecting the magistrate judge's recommendation. *In re Arelma, S.A.* (*Arelma II*), No. 19-mc-412, 2023 WL 1796615 (S.D.N.Y. Feb. 7, 2023).

Finally, in September 2022, the Government moved for summary judgment against Roxas and the Class on their remaining defenses and separately sought summary judgment against Roxas for her lack of Article III standing. The Class cross-moved for summary judgment in its favor on its affirmative

defenses, requesting dismissal of the case. On January 11, 2024, the district court adopted the magistrate judge's recommendation to reject the Class's remaining defenses, dismiss Roxas's challenge to the enforcement proceeding for lack of standing, and deny the Class's cross-motion for summary judgment. *In re Arelma, S.A.* (*Arelma III*), No. 19-mc-412, 2023 WL 6449240 (S.D.N.Y. Oct. 3, 2023), *report and recommendation adopted sub nom. In re Enf't of Philippine Forfeiture Judgment Against All Assets of Arelma, S.A.*, No. 19-mc-412, 2024 WL 127023 (S.D.N.Y. Jan. 11, 2024).

DISCUSSION

On appeal, the Class argues that it created a genuine dispute of material fact as to its affirmative defenses and thus the district court erred in granting summary judgment to the Government. In the alternative, the Class asserts that enforcement of the Philippine Judgment should be limited as to the amount of assets and the custodian to which it pertains. Roxas, meanwhile, challenges the district court's grant of summary judgment based on her lack of Article III standing. She also reasserts her affirmative defenses that were mooted by the district court's standing decision and argues that it wrongly denied her leave to amend her answer to add additional defenses.

"We review de novo a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor." *Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc.*, 62 F.4th 748, 752 (2d Cir. 2023) (per curiam).[3] Decisions as to Article III standing are also reviewed de novo. *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 526 (2d Cir. 1999). We review for abuse of discretion a district court's denial of leave to amend, *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000), denial of intervention, *United States v. City of New York*, 198 F.3d 360, 364 (2d Cir. 1999), and rulings as to which materials are admissible for consideration on summary judgment, reversing only decisions that are based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence, or [that] render a decision that cannot be located within the range of permissible decisions," *Picard Tr. for SIPA Liquidation of Bernard L. Madoff Inv. Sec. LLC v. JABA Assocs. LP*, 49 F.4th 170, 181 (2d Cir. 2022). We may affirm a judgment, including one resulting from summary judgment, "on any ground that finds adequate support in the record." *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 52 F.4th 91, 95 (2d Cir. 2022).

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[3] Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, and citations are omitted.

I. 28 U.S.C. § 2467

This case centers on 28 U.S.C. § 2467, which allows the Attorney General to, "upon request of a foreign nation pursuant to a mutual forfeiture assistance treaty, . . . petition a United States court to enforce a foreign forfeiture judgment." *United States v. Federative Republic of Brazil*, 748 F.3d 86, 88 (2d Cir. 2014). Upon receiving a request, the Attorney General or his or her "designee" determines whether to certify it as "in the interest of justice," a decision immune from judicial review. 28 U.S.C. § 2467(b)(2). Only foreign judgments that are "final" may be enforced. *Id.* § 2467(a)(2).

If a request is certified, the Government may file an application in district court "on behalf of a foreign nation . . . seeking to enforce" the foreign judgment "as if [it] had been entered by a court in the United States." *Id.* § 2467(c)(1). Any entity "affected by the forfeiture or confiscation judgment" may intervene as a respondent. *Id.* § 2467(c)(2)(A). Respondents may block enforcement of the foreign judgment by proving any of five enumerated affirmative defenses: (1) that the foreign judgment was rendered via "tribunals or procedures incompatible with the requirements of due process of law"; (2) that "the foreign court lacked personal jurisdiction over the defendant"; (3) that "the foreign

court lacked jurisdiction over the subject matter"; (4) that the foreign nation failed to "take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property . . . sufficient time to enable him or her to defend"; and (5) that the foreign judgment "was obtained by fraud." *Id.* §§ 2467(d)(1)(A)-(E). If none apply, "[t]he district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation," *id.* § 2467(d)(1), but is "bound by the findings of fact" of the foreign judgment in so doing, *id.* § 2467(e). Section 2467 is unique in its role as a discretionary policy tool of international relations that courts apply within the otherwise routinized realm of asset forfeiture. This role informs our analysis of several issues of first impression raised by Appellants.

II. The Class's Affirmative Defenses

The Class asserts three affirmative defenses under § 2467(d)(1): (1) that "the foreign court lacked jurisdiction over the subject matter"; (2) that the Republic "did not take steps, in accordance with the principles of due process, to give notice of the [foreign] proceedings" to it "in sufficient time to enable [it] to defend"; and (3) that the "judgment was obtained by fraud." *Id.* §§ 2467(d)(1)(C)–(E). It also raises two generally applicable defenses: that the Government's application was (1) untimely; and (2) barred by

Federal Rule of Civil Procedure 41(a)(1)(B). We find that the Class failed to create a genuine dispute of material fact as to any of its defenses.

A. Statute of Limitations

The Class argues that the Government's application is timebarred under 28 U.S.C. § 2462. As a threshold matter, we agree with the parties and district court that § 2462 applies here. It provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. The Government's § 2467 application is indisputably "an action, suit or proceeding for the enforcement of a[] . . . forfeiture." *Id.*

The parties' agreements end there. They disagree about what the relevant "claim" is under § 2462 and when it accrued. The district court held that the operative claim is the enforcement application the Government filed in the district court under § 2467 on June 27, 2016, and that it accrued in January 2015, when the Republic asked the Attorney General to enforce the Philippine Judgment, making the application timely. *Arelma I*, 442 F. Supp. 3d at 758, 761-65. The Government defends this holding on appeal.

The Class argues that the limitations period should instead be measured with reference to the claim underlying the Philippine Judgment, which is the forfeiture claim the Republic brought in the Sandiganbayan. The Class argues that this claim accrued in 1972, when the Arelma Assets were deposited into the Merrill Lynch account; thus, this action, filed on June 27, 2016, is untimely.

1. "Claim" Defined

To locate the relevant claim, we must first examine the meaning of that term as used in § 2462. "Claim" can refer either to "the basis of a lawsuit or the lawsuit itself." *United States v. Ripa*, 323 F.3d 73, 82 n.10 (2d Cir. 2003). In the former sense, "claim" means the "factual situation that entitles one person to obtain a remedy." *Id*. In the latter, it is synonymous with "cause of action" and means "[a]n interest or remedy recognized at law; the means [to] obtain a privilege, possession, or enjoyment of a right or thing." *Claim*, *Black's Law Dictionary* (12th ed. 2024). Here, the term's location in § 2462, a statute of limitations, suggests that the "claim" could not proceed until the Attorney General certified the Republic's request to the Government to enforce the judgment it had obtained in Philippine court. *See King v. Burwell*, 576 U.S. 473, 486 (2015) ("[O]ftentimes the meaning . . . of certain words or phrases may only become evident

when placed in context."). "Claim" as used in statutes of limitations means that which accrues to start the limitations period, coming into existence "when the plaintiff has a complete and present cause of action." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

The Class argues that the Government's § 2467 application is not an independent claim because it is substantively identical to the Philippine Judgment it seeks to enforce: the Government has no claim of its own to the Assets but is simply acting on the Republic's behalf. But these are different causes of action brought by different parties that offer different remedies and implicate different sets of facts. While the Republic's forfeiture claim sought to establish its right to the Assets, the Government's § 2467 application offers a distinct "remedy" in its enforcement. *Claim*, *Black's Law Dictionary* (12th ed. 2024). Further, while courts in § 2467 actions are bound by the foreign judgment's findings of fact regarding its merits and scope, they must consider a different set of facts relating to its enforceability, including those relating to the foreign court's jurisdiction and procedural fairness. 28 U.S.C. §§ 2467(e), (d)(1)(A)-(E). Finally, the Class's argument ignores the independent policy interests the Government may (or may not) have in enforcement, which may only be sought on behalf of nations that are parties to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic

Substances or a "mutual forfeiture assistance" treaty or agreement, and only after a determination that enforcement serves the "interest of justice." *Id.* § 2467(a)(1), (b)(2); *see Federative Republic of Brazil*, 748 F.3d at 96 (the "interests of justice" requirement "ensures that the executive alone will weigh the foreign affairs implications of any enforcement action").

In an analogous context, courts widely view claims to enforce administrative penalties as distinct, for the purposes of § 2462, from the claims lodged to assess those penalties in the first place. *See FERC v. Vitol Inc.*, 79 F.4th 1059, 1064 (9th Cir. 2023) (joining First, Fourth, Sixth, Seventh, and Eighth Circuits in concluding that claims to enforce administrative penalties accrue under § 2462 "only *after* the agency has assessed such a penalty in an agency proceeding"); *but see United States v. Core Laboratories, Inc.*, 759 F.2d 480, 483 (5th Cir. 1985) (running § 2462 limitations period for enforcement action from the date of the underlying violation for which the penalty was assessed).[4]

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[4] "Outside of the Fifth Circuit [in *Core*], no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the penalty was administratively imposed." *Vitol Inc.*, 79 F.4th at 1066 (noting *Core*'s "limit[ation] to the particular

The Class prefers an analogy to 28 U.S.C. § 1963, which allows plaintiffs to register and enforce federal district court judgments in a different district. But it provides no authority suggesting that a § 1963 registration is not a claim in its own right. Instead, courts view § 1963 as "more than a mere procedural device for the collection of the foreign judgment." *Stanford v. Utley*, 341 F.2d 265, 268 (8th Cir. 1965). And § 2467 applications are more claim-like in any event because, unlike § 1963 registrations, they allow for fact-based affirmative defenses.

Finally, the Class suggests that a § 2467 action cannot constitute a standalone claim because it is initiated via "application" instead of complaint. 28 U.S.C. § 2467. But this argument is one of semantics, not substance. Several types of filings with different names can be used to bring claims in federal court, such as "petitions," "complaints," and "applications." *See, e.g.*, 28 U.S.C. § 2254 (federal courts "shall entertain an application for a writ of habeas corpus").

2. Accrual

The Class next argues that even if the operative claim under § 2462 is the Government's enforcement

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statute at issue"); *see United States v. Meyer*, 808 F.2d 912, 915 (1st Cir. 1987) (criticizing *Core*'s reliance on legislative history).

application, it accrued more than five years before the Government initiated this action on June 27, 2016. "[T]he standard rule is that a claim accrues when the plaintiff has a complete and present cause of action." *Gabelli*, 568 U.S. at 448. Section 2467 makes clear that the Government can only certify a request and apply for enforcement after the foreign judgment exists and is final and the foreign nation requests enforcement. 28 U.S.C. §§ 2467(a)(2), (b)(1). The satisfaction of these conditions gives the Government a "complete and present cause of action" and therefore marks accrual. *Gabelli*, 568 U.S. at 448.

The Class suggests instead that the claim accrued in 1972, when the Arelma Assets were deposited into the Merrill Lynch account. It relies on *Gabelli*, which fixed the accrual of certain SEC enforcement actions to "when a defendant's allegedly fraudulent conduct occurs." *Id.* But the statute in *Gabelli* empowered the SEC to seek penalties as soon as the underlying fraud occurred, not after a separate proceeding to show wrongdoing. *See id.* at 445 (citing 15 U.S.C. § 80b-9). *Gabelli*'s holding, that the limitations period in § 2462 begins to run "when a defendant's allegedly fraudulent conduct occurs" instead of when it is discovered, *id.* at 448, is confined to circumstances in which Congress allows an agency "to prosecute a violation by filing suit in federal court in the first instance," *Vitol Inc.*, 79 F.4th at 1064 (discussing *Gabelli*, 568 U.S. at 445-46). Here, by

contrast, the Government cannot seek enforcement under § 2467 until a final foreign judgment exists. 28 U.S.C. § 2467(b)(1)(C); *see United States v. Meyer*, 808 F.2d 912, 914-15 (1st Cir. 1987) (holding that the term "enforcement" in § 2462 "presupposes the existence of an actual penalty to be enforced" and that an enforcement claim cannot accrue until liability has been assessed).

The Class warns that our holding would enable foreign nations to wait long periods before requesting enforcement. But while a foreign government may decide when to request enforcement, it cannot decide whether or when an enforcement application is actually brought. Only the Attorney General or their designee can do so after deciding whether a nation's request is "in the interest of justice." 28 U.S.C. § 2467(b)(2). A country that waits decades to request enforcement risks denial.

Finally, the Class argues that even if claims accrue from the date of the foreign country's enforcement request, the Government's application is still untimely because the Republic first requested enforcement in January 2010, six years before the Government brought this action. The letter to which the Class refers requested "the assistance of the appropriate authorities of the United States of America" to "assist in the return of the Arelma assets to the Republic, *should the Sandiganbayan judgment*

be affirmed by the Philippine Supreme Court." Duran App'x 35, 39 (emphasis added). This request was, therefore, conditioned on the Sandiganbayan judgment being "affirmed by the Philippine Supreme Court"; because this condition was not met at the time of the January 2010 letter, the request was not perfected. Duran App'x 39. Further, the request did not enable the Government to file a § 2467 application because the foreign judgment was not yet "final"; it therefore cannot mark accrual. 28 U.S.C. § 2467(a)(2) (allowing enforcement of "a final order of a foreign nation").

B. Federal Rule of Civil Procedure 41(a)(1)(B)

The Class next argues that the Government's application is barred under Rule 41(a)(1)(B) because of earlier lawsuits the Republic brought against Marcos and later dismissed. Rule 41(a)(1)(B) provides that a unilateral notice of voluntary dismissal "operates as an adjudication on the merits"—that is, a dismissal with prejudice—when "the plaintiff previously dismissed any federal- or state-court action based on or including the same claim." Fed. R. Civ. P. 41(a)(1)(B). This provision, known as the "two-dismissal rule," functions similarly to claim preclusion, blocking later-filed suits based on the same claim. *Jian Yang Lin v. Shanghai City Corp*, 950 F.3d 46, 50 (2d Cir. 2020) (per curiam). A subsequent

action is "based on or includ[es] the same claim" as the first when "it arises from the same transaction or occurrence." *Id.*

The Class argues that this action is based on the same claim as the Republic's lawsuits against Marcos from the 1980s that the Republic voluntarily dismissed. It asserts that the Philippine forfeiture action and the Republic's 1980s suits each sought an accounting of Marcos's ill-gotten wealth, and that the Government's § 2467 application shares this commonality because it is identical to the Philippine forfeiture claim. But the § 2467 claim does not "arise[] from the same transaction or occurrence" as the Philippine Judgment because, as discussed earlier, it seeks to enforce a pre-existing judgment and does not go to the merits of the underlying forfeiture action. *Id.*

The rationale behind the two-dismissal rule of Rule 41(a)(1)(B) likewise does not cover this case. Where the rule's "purpose . . . would not appear to be served by its literal application, and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly." *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir. 1976). The rule's purpose, to prevent "abuse" and harassment stemming from the "unreasonable use of the plaintiff's unilateral right to dismiss an action,"

does not apply here. *Id.* Its application cannot be said to protect the Class, the party invoking it, from abuse, as the Class was not a defendant to the Republic's 1980s suits. The repeat litigation at issue here arises from the complexity inherent in international disputes over the assets of an ousted dictator, not a campaign of harassment on the part of the Republic.

C. Subject Matter Jurisdiction

A § 2467 respondent can prevent enforcement of a foreign judgment by showing that "the foreign court lacked jurisdiction over the subject matter." 28 U.S.C. § 2467(d)(1)(C). The district court rejected the Class's defense because the Class failed to show that the Philippine court lacked subject matter jurisdiction. It relied on the Sandiganbayan's holding, affirmed by the Philippine Supreme Court, that the Sandiganbayan had jurisdiction over the Arelma Assets after the Class declined to furnish evidence under Philippine law disputing that conclusion. *Arelma III*, 2023 WL 6449240, at *18.

1. Choice of Law

The Class challenges the district court's use of Philippine instead of American law to determine

whether the Sandiganbayan had jurisdiction.[5] We hold that the district court properly applied Philippine law. It is dubious that an American court could practically apply American principles of subject matter jurisdiction, such as diversity and federal question jurisdiction, to foreign judgments. And the American jurisdictional principles that the Class asks us to apply here would undermine § 2467's purpose as a discretionary tool of international comity. The Class argues that the Sandiganbayan lacked in rem jurisdiction because it did not control the res at issue—the Arelma Assets—which were located in the United States and in custody of the Hawaii district court. But if a foreign court cannot have jurisdiction to forfeit property located in the United States, then § 2467 could almost never be invoked. Its application would be limited to circumstances in which the disputed property is located within the foreign country at the time of the foreign forfeiture judgment before being subsequently moved to the United States, or where the foreign nation otherwise legally

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[5] While no circuit court has weighed in on this question, district courts have uniformly assumed that foreign law applies. *See In re One Prinz Yacht Named Eclipse*, No. 12-MC-162, 2022 WL 4119773, at *6 (D.D.C. Sept. 9, 2022) (using Spanish law to determine Spanish court's jurisdiction); *In re Enf't of Restraining Ord. by Ninth Fed. Ct., Fifth Jud. Subsection in Campinas, SP*, No. MC 15-783, 2024 WL 4854037, at *9 (D.D.C. Nov. 21, 2024) (Brazilian law); *In re Enf't of Restraining Ord. by Republic of India*, No. 22-MC-106, 2024 WL 5375481, at *3 (D.D.C. Nov. 18, 2024) ("[I]t is generally presumed that foreign courts have subject matter jurisdiction over the disputes they adjudicate.").

controlled the assets under preexisting seizure or attachment orders.

Our conclusion is further supported by the presumption against extraterritorial application, which teaches that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). "This presumption serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* Here, there is no indication that § 2467(d)(1)(C) seeks to extend the American law of subject matter jurisdiction to foreign adjudications.

The Class's preferred holding would do so indirectly by denying foreign nations the ability to recover assets located on American soil unless their jurisdictional principles aligned with those of the United States.

2. Analysis under Philippine Law

The district court did not err in accepting the Sandiganbayan's conclusion as to its own jurisdiction under Philippine law. The Class argues that a U.S. court need not accept a foreign court's legal conclusions because this would render the jurisdictional defense contained in § 2467(d)(1)(C)

null. But a mandate to apply foreign law does not require U.S. courts to take a foreign court's jurisdictional holding at face value. The Class was free to furnish evidence that the Sandiganbayan lacked jurisdiction under Philippine law, as Roxas did, but chose not to do so. *Arelma III*, 2023 WL 6449240, at *18 & n.13. The district court therefore had no choice but to accept the Philippine courts' holdings in rejecting the Class's subject matter jurisdiction defense.

D. Notice

A § 2467 respondent can prevent enforcement by showing that "the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend." 28 U.S.C. § 2467(d)(1)(D). The district court rejected the Class's defense on these grounds because it held that the Class was not an interested party that was owed notice at the time the Philippine Judgment was issued. [6] It reasoned that the Supreme Court's decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), destroyed the Class's interest in the Assets before the Sandiganbayan issued its judgment,

[6] The Class does not argue that it was entitled to notice based on any interest it acquired in the Arelma Assets after the Sandiganbayan's April 2009 judgment.

meaning that it could not have been injured by any lack of notice. *Arelma III*, 2023 WL 6449240, at *11-15. We agree.

1. Relevant Background of the Interpleader Action

Before analyzing the Class's notice defense, we must first examine aspects of the timeline of the Interpleader Action which bear on the question of notice. In 2004, the Hawaii district court in the Interpleader Action awarded the Arelma Assets to the Class, in partial satisfaction of a $2 billion judgment the Class had previously won against Marcos's estate. *Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc.*, No. CV00-595, 2004 WL 5326929, at *7 (D. Haw. July 12, 2004). The parties agree that this judgment gave the Class an interest in the Assets. The Republic appealed to the Ninth Circuit, arguing that it was an indispensable party to the Interpleader Action and that the Assets could not be awarded without its participation. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 890 (9th Cir. 2006). The Ninth Circuit rejected this argument and affirmed the Assets' award to the Class. *Id.* at 894.

The Supreme Court reversed in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). *Pimentel* held that the Republic was a required party to the Interpleader Action and that its sovereign immunity

meant that it was prejudiced by the action's proceeding without its participation under Federal Rule of Civil Procedure 19. *Id.* at 864-67. Accordingly, it held that the Interpleader Action must be dismissed, thereby voiding the district court's award of the Assets to the Class. *Id.* at 873. Its mandate, which directed the Ninth Circuit to "order the United States District Court of the District of Hawaii to dismiss the interpleader action," issued on July 14, 2008. Dkt. July 17, 2008, Case No. 04-16401 (9th Cir.).

On remand from *Pimentel*, the Ninth Circuit ordered the Hawaii district court "to dismiss the interpleader action." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 535 F.3d 1010 (9th Cir. 2008). Before dismissing the Interpleader Action, however, the district court performed an "accounting" of the Arelma Assets in the fall of 2008, during which it held that the Class was entitled to certain interest accrued on the Assets. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc.*, 587 F.3d 922, 924-25 (9th Cir. 2009). This determination was swiftly reversed by the Ninth Circuit on November 13, 2009, which made clear that all of the Assets, including any accrued interest, were required to be returned to Merrill Lynch. *Id.* at 925. With this delay, the Assets were not returned until February 2010.

2. Whether the Class Was Owed Notice

The question here is whether the Class was owed notice of the Sandiganbayan proceedings to defend its interest in the Arelma Assets, awarded to it in the Interpleader Action, even though the Supreme Court's holding in *Pimentel* reversed that award before the Sandiganbayan handed down its judgment.

The Class argues that it only needed an interest in the Arelma Assets at the time the Republic moved for summary judgment in the Sandiganbayan against the Assets in order to be owed notice, because § 2467(d)(1)(D)'s purpose is to give parties "sufficient time to enable [them] to defend" their interest. Duran Br. 33-34 (quoting 28 U.S.C. § 2467(d)(1)(D)). But § 2467(d)(1)(D) is backward-looking—it asks courts to evaluate in hindsight whether the interested party was given an opportunity to participate in the foreign proceeding and, on this ground, to deny the enforcement of a judgment for which this opportunity was deprived. A party with no interest in the contested property at the time of the foreign judgment cannot be said to have been deprived of anything. Even though the Class had an interest in the Assets at the outset of the Philippine proceedings, *Pimentel* destroyed this interest before the Sandiganbayan issued its judgment, thereby rendering the Class's ability to defend that interest meaningless. The Class analogizes to Article III standing, under which a

plaintiff's stake in the outcome of litigation is measured as of the suit's outset. *Doe v. McDonald*, 128 F.4th 379, 385 (2d Cir. 2025). But that stake must be maintained throughout all stages of litigation in order for the case not to be moot. *Id.* Similar logic applies here: a party who loses its interest in the forfeited property before the foreign forfeiture judgment is issued no longer has a need to defend itself in the foreign proceeding and, accordingly, its entitlement to notice is rendered effectively moot.

Having decided that the Class needed an interest in the Assets when the Sandiganbayan ordered their forfeiture on April 2, 2009 in order to be owed notice under § 2467(d)(1)(D), we now examine whether it had an interest on that date. It did not. Although the district court in the Interpleader Action initially awarded the Class the Assets in 2004, the Supreme Court in *Pimentel* reversed this judgment and destroyed the Class's interest once its mandate issued on July 14, 2008, eight months before the Philippine Judgment. The Class therefore had no interest in the Assets deriving from this award at the time of the Philippine Judgment.

The Class argues that its interest in the Assets persisted after *Pimentel* because the district court, on remand from *Pimentel*, did not return the Assets to Merrill Lynch until February 2010—after the Philippine Judgment issued in April 2009. We

disagree that this delay in actualizing *Pimentel*'s mandate prolonged the Class's interest in the Assets. Any ownership the Class had over interest accrued on the Assets awarded by the Hawaii district court was rendered void *ab initio* by the Ninth Circuit's decision reversing that award in *Merrill Lynch*, 587 F.3d at 924-25. "It has long been well established that the reversal of a lower court's decision sets aside that decision . . . and requires that it be treated thereafter as though it never existed." *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008) (citing *Butler v. Eaton*, 141 U.S. 240, 244 (1891)); *see Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 625 F.3d 15, 19 (1st Cir. 2010) ("Reversing an . . . injunction often warrants treating the injunction thereafter as if it did not exist in the period before the vacation."). Even though the Ninth Circuit did not act until after the Philippine Judgment issued, the Class's interest was void from the beginning.

E. Fraud

Section 2467(d)(1)(E) allows a party to prevent enforcement of a foreign forfeiture judgment by showing that the judgment "was obtained by fraud." 28 U.S.C. § 2467(d)(1)(E). The Class argues that the Republic secured the Philippine Judgment by fraud because it concealed certain obligations it had involving the Arelma Assets that arose from an earlier settlement with a Marcos associate.

1. Type of Fraud Contemplated by § 2467(d)(1)(E)

We must first determine which type of fraud is contemplated by § 2467(d)(1)(E), another question of first impression. The district court adopted the standard applicable to collateral actions to set aside a judgment on the basis of "fraud on the court" under Federal Rule of Civil Procedure 60(d)(3). *Arelma III*, 2023 WL 6449240, at *15. The parties do not contest this interpretation and we agree that a modified Rule 60(d)(3) standard is appropriate here. Rule 60(d)(3) is analogous to § 2467(d)(1)(E) because both allow parties to attack a judgment collaterally, and § 2467(d)(1)(E)'s reference to judgments "obtained by fraud" connotes misconduct directed at a court instead of an adverse party.

Fraud on the court under Rule 60(d)(3) embraces a narrow and extreme set of conduct "which . . . defile[s] the court itself so that the judicial machinery can not perform in the usual manner." *Mazzei v. The Money Store*, 62 F.4th 88, 93 (2d Cir. 2023). It requires showing that (1) "the defendant interfered with the judicial system's ability to adjudicate impartially"; and (2) "the acts of the defendant must have been of such a nature as to have prevented the plaintiff from fully and fairly presenting a case or defense." *Id.* at 93-94. The second

element is inapplicable here because the Class was not a party to the foreign proceeding.

2. Whether the Philippine Judgment Was Obtained by Fraud

The Class's theory of fraud centers on a 1986 settlement between the Republic and Jose Campos, a Marcos associate who established shell companies to hold Marcos's stolen assets. In May 1986, the Republic settled claims against Campos, recovering assets worth $115 million (the "1986 Settlement"). The Class argues that this settlement fully satisfied the Republic's only claim to the Arelma Assets: that they were the product of a conspiracy by Marcos and Campos to steal and hide the Republic's funds. It also maintains that a 1989 Philippine Supreme Court decision required that the Campos settlement be applied as a credit toward future damages assessed against Marcos as a joint tortfeasor in that scheme. The Class argues that these obligations made it fraudulent for the Republic to move for summary judgment before the Sandiganbayan without informing it of (1) the 1986 Settlement or (2) the credit against Marcos's liability, thereby seeking double recovery for the Assets.

The Class fails to create a genuine dispute that these allegations are true, let alone that they

constitute "fraud which . . . attempts to defile the court." *Id*. First, the Republic did inform the Sandiganbayan of the 1986 Settlement. The Class acknowledges that the Republic attached a letter detailing the settlement and its "main points" to its 1991 forfeiture petition. Duran Br. 47; Duran App'x 363-64. And the Philippine Judgment acknowledged that the forfeiture proceedings concern "[p]roperties surrendered to the [Republic] by Marcos crony Jose Y. Campos." Duran Sp. App'x 143 n.25. The Class is right that the bounds of fraud on the court are "characterized by flexibility which enables it to meet new situations," and this is certainly a unique situation. *Leber-Krebs, Inc. v. Capitol Recs.*, 779 F.2d 895, 899 (2d Cir. 1985). But the Republic could not have defrauded the Sandiganbayan by withholding information that the Sandiganbayan already knew.

Finally, the Class's argument regarding the "credit" Marcos was owed by the Campos settlement is unpersuasive. The Class finds fault in the Republic's "permit[ing] [the Sandiganbayan] to assume that the Arelma funds were somehow not to be credited against the joint liability of Campos and Marcos," thereby preventing it "from applying the accepted law of crediting payments by one joint tortfeasor against the remaining obligations of non-settling tortfeasors." Duran Reply Br. 13. As noted above, the Republic did not hide the settlement's existence or terms. What remains is an accusation

that the Sandiganbayan legally erred in failing to apply principles of joint and several liability, not an accusation that the Republic "interfered with" its "ability to adjudicate impartially." *Mazzei*, 62 F.4th at 94. The Class's notice defense therefore fails.

III. The Class's Requests to Limit Enforcement

In addition to its affirmative defenses, the Class also argues that the Philippine Judgment, if enforced, should be limited as to the amount of the Assets and custodians to which it pertains. While the Class styles these arguments as affirmative defenses, they are not found in §§ 2467(d)(1)(A)-(E). Section 2467(d)(1) instructs that, if no affirmative defenses apply, the court "shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation." 28 U.S.C. § 2467(d)(1). We agree with the district court that the Class's arguments are better understood as requests to define the scope of the orders that are "necessary to enforce the judgment." *Id.* § 2467(d)(1); *Arelma III*, 2023 WL 6449240, at *20.

A. Limitation as to Amount

The Class first argues that the district court erred in refusing to limit enforcement of the Philippine Judgment to $3,369,975, the amount in the

Merrill Lynch account as of 1983. The Sandiganbayan's 2009 judgment ordered the forfeiture of "all the assets, investments, securities, properties, shares, interests, and funds of Arelma, Inc., presently under management and/or in an account at the Meryll [sic] Lynch Asset Management, New York, U.S.A., in the estimated aggregate amount of US$3,369,975.00 as of 1983, plus all interests and all other income that accrued thereon." Duran Sp. App'x 168. The Philippine Supreme Court's affirmance contains nearly identical language as to the estimated amount.

Section 2467(a)(2) allows for the enforcement of two types of forfeiture judgments: those compelling a person or entity (A) "to pay a sum of money representing the proceeds of" certain crimes; and (B) "to forfeit property involved in or traceable to the[ir] commission." 28 U.S.C. §§ 2467(a)(2)(A)-(B). In other words, the Government can enforce a judgment denoted in terms of an amount of currency or a specific piece of property.

The Class insists that "property" as used in the statute can only refer to tangible goods and not assets of an undefined value, such as the contents of a bank account. We see no reason why a bank account cannot qualify as "property" under § 2467 as it can in other forfeiture contexts. *See, e.g.*, *United States v. Watts*, 786 F.3d 152, 174-76 (2d Cir. 2015) (bank accounts

considered "property" under 21 U.S.C. § 853); *United States v. Technodyne LLC*, 753 F.3d 368, 373 (2d Cir. 2014) (19 bank accounts forfeited as "property . . . traceable to" criminal acts under 18 U.S.C. § 981(a)(1)).

The Class argues that forfeiting a bank account as property would render § 2467(a)(2)(B)'s separate reference to "a sum of money" superfluous. But § 2467(a)(2)'s structure replicates the long-established distinction between forfeiture of property and money judgments, such as in Federal Rule of Criminal Procedure 32.2. Fed. R. Crim. P. 32.2 advisory committee's note to 2000 adoption (noting that Rule 32.2(b)(1) "recognizes that there are different kinds of forfeiture judgments in criminal cases," those "for a sum of money" and those for "a specific asset"). Here, the Sandiganbayan's judgment falls under § 2467(a)(2)(B) because it references "[a]ll assets, properties, and funds belonging to Arelma, S.A." Duran Sp. App'x 183; *see* Duran Sp. App'x 168. Its reference to the amount of money in the account as of 1983 serves only to identify the account; it does not transform the judgment into a money judgment.

The Class next suggests that the Philippine judgment must be expressed in terms of a "sum certain" under New York law in order to be enforceable. Its winding path to this position is as follows: § 2467(d)(2) states that the "[p]rocess to

enforce a judgment under this section shall be in accordance with [Federal Rule of Civil Procedure] 69(a)," 28 U.S.C. § 2467(d)(2), and Rule 69(a) states that "[a] money judgment is enforced by a writ of execution," and that that procedure "must accord with the procedure of the state where the court is located," Fed. R. Civ. P. 69(a). Section 5302(a)(1) of the New York Civil Practice Law and Rules, in turn, supplies the procedure for writs of execution in New York, allowing the execution of "a foreign country judgment . . . of a sum of money." N.Y. C.P.L.R. § 5302(a). The Class suggests that this reference to "a sum of money" requires that the foreign judgment be denoted in terms of a "sum certain" in order to be enforceable via § 2467.

This argument confuses the means by which the Government may obtain a judgment under § 2467 and those by which it can execute said judgment on U.S.-based property. Even if the process for executing a pre-existing federal judgment under § 2467 on New York property is governed by C.P.L.R. § 5302, New York law has nothing to do with the substantive standard for obtaining § 2467 relief—which itself enforces a foreign judgment—in the first place. That standard is supplied by § 2467 itself. *See* 28 U.S.C. § 2467(d).

B. Limitation as to Custodian

The Class next attempts to exploit a clerical error in the Sandiganbayan's judgment to nullify the Government's application. Because the Sandiganbayan's decretal judgment refers to "an account at Meryll [sic] Lynch Asset Management," it argues, the judgment should be limited to funds that were held at that institution. Duran Br. 14; Duran Sp. App'x 168. The Sandiganbayan's reference to "Meryll [sic] Lynch Asset Management" is an apparent clerical error, as the Assets were actually held by Merrill Lynch, Pierce, Fenner & Smith, Inc., a different entity, before being transferred to New York State in 2017. Duran Sp. App'x 168. This error was corrected by the Philippine Supreme Court, which eliminated the Sandiganbayan's reference to a specific custodian in its 2012 affirmance. Duran Sp. App'x 183.

The Class only hints at this argument in its opening brief, providing the relevant factual background in its "Statement of the Case" section, before explicitly arguing the point for the first time in its reply. Federal Rule of Appellate Procedure 28(a)(8) requires appellants to state their contentions in their opening brief. Fed. R. App. P. 28(a)(8)(A). "[A]rguments not raised in an appellant's opening brief, but only in his reply brief, are not properly before an appellate court." *McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005) (also observing that "[t]o the extent that an unexpressed challenge . . . may have

been hidden between the lines of petitioner's brief, it is not our obligation to ferret out a party's arguments"). This argument is abandoned; we decline to entertain it.

VI. Roxas's Standing

Roxas challenges the district court's grant of summary judgment against her on the grounds that she lacked Article III standing to contest the enforcement of the Philippine Judgment. The district court held that while Roxas had a cognizable interest in the proceeds of the Yamashita Treasure, she failed to show that this interest translated to one in the Arelma Assets. *Arelma III*, 2023 WL 6449240, at *11. We agree with the district court.

A. Applicable Law

Article III of the Constitution limits federal court jurisdiction to "Cases and Controversies." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). Standing gives teeth to this limitation: it "help[s] ensure" that the party bringing suit "has such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction." *Murthy v. Missouri*, 603 U.S. 43, 57 (2024). An intervenor as of right like Roxas "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester*

v. Laroe Ests., Inc., 581 U.S. 433, 440 (2017). On summary judgment, a party must establish standing "by affidavit or other evidence specific facts" demonstrating "a genuine issue regarding standing." *Lugo v. City of Troy*, 114 F.4th 80, 88 (2d Cir. 2024).

The standing inquiry for forfeiture claimants is two pronged. "The nature of a claimant's asserted property interest is defined by the law of the State– or . . . nation– in which the interest arose," while "federal law determines the effect of that interest on the claimant's right to bring a claim." *United States v. All Assets Held at Bank Julius*, 480 F. Supp. 3d 1, 13 (D.D.C. 2020) (collecting cases); *United States v. U.S. Currency, $81,000.00*, 189 F.3d 28, 33 (1st Cir. 1999) (holding same). While "an owner of property seized in a forfeiture action will normally have standing," as will parties who possess the property or have a "financial stake" in it, the ultimate question is whether this interest is such that the property's forfeiture would create "an injury that can be redressed at least in part by" its return. *Cambio Exacto*, 166 F.3d at 527-28. Because forfeiture claimants do not invoke federal jurisdiction in the same way as a traditional civil plaintiff, but merely "ensure that the government is put to its proof" regarding its claim, we have characterized the applicable standing inquiry as "truly threshold only," requiring only a "facially colorable interest" in the proceedings. *United States v. $557,933.89, More or*

Less, in U.S. Funds, 287 F.3d 66, 78-79 (2d Cir. 2002) (explaining that claimants need not "ultimately prove[] the existence of" their claimed interest). That reasoning applies equally here, where the Government seeks to enforce a foreign forfeiture judgment under § 2467, and Roxas has intervened as a respondent only to oppose enforcement. *See* 28 U.S.C. § 2467(c)(2)(A) ("the defendant or another person or entity affected by the forfeiture . . . shall be the respondent" in § 2467 actions).

We proceed to identify Roxas's interest in the Assets under state law and assess whether this interest is sufficient for standing under the above-stated principles of federal common law.

B. Roxas's Interest in the Assets under New York Law

Roxas asserts an interest in the Arelma Assets by way of Roger Roxas's former ownership of portions of the Yamashita Treasure that were stolen by Marcos.[7] She contends that Roger Roxas had a continued ownership interest in the proceeds of the treasure under New York and Philippine law and that these proceeds formed part of Marcos's $2 million Arelma deposit in 1972. The Government does not

[7] Roxas acknowledges that she cannot establish a sufficient interest in the Arelma Assets solely based on her judgment against the Marcoses for the theft of the treasure.

dispute Roxas's ownership of proceeds of the portion of the treasure stolen from Roger Roxas by Marcos. Instead, the parties contest whether those proceeds are traceable to Marcos's 1972 deposit, and therefore the Arelma Assets, such that Roxas has an interest in them as well. Roxas claims an interest in the Assets under both New York and Philippine law.[8] We disregard Roxas's argument under Philippine law, which does not allege any link to the Assets, and instead examine her claim that she has an interest under New York law via a constructive trust.

Under New York law, "when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978). More generally, a "constructive trust is an equitable remedy" employed to "prevent unjust enrichment." *Homapour v. Harounian*, 182 A.D.3d 426, 427 (1st Dep't 2020). Beneficiaries of a constructive trust have Article III standing to contest forfeiture of the trust property. *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158-60 (2d Cir. 1994). "[B]efore a constructive trust may be imposed, a claimant to a wrongdoer's property must trace his own property into a product in the hands of the

[8] The Government does not respond to Roxas's argument that either Philippine or New York law could govern Roxas's interest in the Arelma Assets.

wrongdoer." *United States v. Benitez*, 779 F.2d 135, 140 (2d Cir. 1985). The New York Court of Appeals has held that the "inability to trace plaintiff's equitable rights precisely should not require that they not be recognized, much as in the instance of damages difficult to prove," *Simonds*, 45 N.Y.2d at 240, and so courts should "relax the tracing requirement in exceptional circumstances," *Rogers v. Rogers*, 63 N.Y.2d 582, 587 (1984); it has not, however, explained which circumstances qualify as exceptional.

Despite the lack of guidance from New York courts, the circumstances here are "exceptional" by any reasonable measure. *Id.* The Assets have passed through several people, corporations, countries, and decades, and are undoubtedly the proceeds of malfeasance. We therefore opt to relax, but not eliminate, the tracing requirement. The same conclusion was reached by a district court in an interpleader action over other property purchased with funds misappropriated by the Marcoses, in which Roxas and the Republic participated. *Dist. Att'y of N.Y. Cnty. v. Republic of the Philippines* (*DANY*), 307 F. Supp 3d 171, 208-09 (S.D.N.Y. 2018). *DANY* denied the Republic summary judgment on Roxas's attempt to recover the property under a theory of constructive trust under New York law. *Id.* at 205-06, 208-09. Given Marcos's efforts to hide his crimes and the decades that had elapsed, it found "exceptional circumstances" warranting relaxed tracing. *Id.* at 208-

09 (citing *Rogers*, 63 N.Y.2d at 587). Though not binding, we find the *DANY* court's reasoning persuasive and proceed to evaluate Roxas's evidence on summary judgment under relaxed tracing.

1. Roxas's Evidence

To show tracing, Roxas relies on two pieces of evidence and the facts affirmed by the Hawaii Supreme Court in the Hawaii Tort Action, *Roxas v. Marcos*, 89 Haw. 91 (1998). Both parties assume the veracity of the facts affirmed in that case. Roxas primarily relies on deposition testimony from John Buckley, a now-deceased forensic accountant, taken during the Interpleader Action. Buckley had examined Marcos's tax returns, documents found in the Philippine presidential palace, and other financial records. Roxas Br. 30; Roxas App'x 2555. He testified that the funds constituting the Arelma deposit had been wired to a Swiss shell foundation under Marcos's pseudonym before being "transferred to Panama" and "deposited with Merrill Lynch." Roxas App'x at 2556. Buckley could not remember, however, whether he had "traced the source of the two million dollars" before their arrival in Switzerland. *Id.* at 2568.

Buckley stated that "the most probable source" for those funds originally was "the treasure that was uncovered in the Philippines." *Id.* at 2565-66, 2568. He reasoned that because Marcos's tax returns did not

reflect comparable legitimate wealth, and because he "doubt[ed] that [Marcos] would have generated that much through legitimate activity," the source of the deposit must have been illegitimate. *Id.* at 2566. Buckley was "not sure" whether there could have been an illegitimate source other than the treasure. *Id.* at 2568. He named as other options "reparations that the Philippines received from Japan" and "various aid money that the U.S. sent to the Philippines," but cautioned that these sources would be "more closely scrutinized by the Philippine government" and "small in comparison to the treasure." *Id.* Buckley noted, however, that he "was not asked to investigate the Japanese treasure" and had not "seen sufficient documentation" to "reliably conclude that the source of the two million dollars" was illicit. *Id.* at 2569-70.

Roxas also points to the opening statement of Gerry Spence, an attorney for Marcos's widow Imelda Marcos, during a 1990 trial in New York. Spence claimed that a witness would testify "that part of [Marcos's] wealth came from the discovery of what is called the Yamashita gold hoard." Roxas App'x 2242.

2. Admissibility

The parties contest the admissibility of the Buckley testimony and Spence's statements. The district court found the Buckley testimony inadmissible and, in any event, unpersuasive as to

Roxas's interest in the Assets. *Arelma III*, 2023 WL 6449240, at *8-9. It declined to rule on the admissibility of the Spence statements, holding that they were unpersuasive regardless. *Id.* at *9. We agree with the district court that Spence's statement is unpersuasive. The statement echoes Buckley's assertions that Marcos took and sold gold, including from the treasure, but provides no details as to specific gold sales or their timing, nor does it cast doubt on other potential sources of the Assets. We therefore review only the admissibility of the Buckley testimony.

"[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment, and a district court deciding a summary judgment motion has broad discretion in choosing whether to admit evidence." *Picard*, 49 F.4th at 181. The district court found the Buckley testimony inadmissible on three independent grounds: it (1) did not qualify under the exception to the hearsay rule provided by Federal Rule of Civil Procedure 32(a)(8); (2) was expert testimony that Roxas failed to disclose; and (3) was speculative. *Arelma III*, 2023 WL 6449240, at *8-9. We conclude that the district court's exclusion of the testimony was justified by its speculative nature and need not address its other grounds for exclusion.

"An expert's opinions that are without factual basis and are based on speculation or conjecture are . . . inappropriate material for consideration on a motion for summary judgment." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008); *see Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (per curiam) ("expert testimony should be excluded if it is speculative or conjectural"). [9] While Buckley examined transfers of the $2 million between shell corporations and bank accounts prior to its deposit in New York, he could not remember whether he had traced it before its arrival in a Swiss bank account. Roxas App'x at 2568. When asked specifically whether he believed that the Arelma Assets were "stolen from others," Buckley replied "I don't know that . . . . I think there's a presumption that that money came from other sources, and the most probable source is the treasure." *Id.* at 2565. Crucially, Buckley admitted that he "was not asked to trace gold or the treasure," *id.* at 2568; instead, his conclusion as to the Assets' likely source was based on (1) the lack of legitimate income reflected on Marcos's tax documents; and (2) the relative difficulty that Buckley presumed that Marcos would face in stealing other large sums, such

[9] Roxas argues that she sought to use Buckley as a fact witness instead of as an expert. Even assuming that Buckley could be considered a fact witness in relation to the financial documents he personally reviewed, he admitted that his conclusions as to the Assets' likely source was not based on this review.

as foreign aid and reparations. *Id.* at 2565-68. At best, Buckley's conclusion was a negative inference based on educated speculation. The district court did not abuse its discretion in finding it conjectural.

3. Analysis of Roxas's Remaining Evidence

Roxas's remaining evidence fails, even under a relaxed tracing standard, to create a genuine dispute as to whether the Assets are traceable to the portion of the treasure that was stolen from Roger Roxas. Roxas points out that the 1971 raid in which Marcos stole the treasure was the first judicially confirmed incident of Marcos seizing property from a citizen, and that the deposit occurred shortly after Marcos first declared martial law, making it less likely that the deposit included different ill-gotten funds. She also points to the gap of some eighteen months between the treasure's theft and the Arelma deposit. But given the scale of Marcos's thefts, the general timing of his criminal activity alone, without any evidence casting doubt on alternative potential sources for the deposit, is not enough to show that the Arelma deposit stemmed from any specific incident.

* * *

Because we hold that Roxas lacked standing to assert any affirmative defenses, we need not address

whether the district court properly denied her motion to amend her answer to add further defenses.

V. GBC's Motion to Intervene

The district court rejected GBC's request to intervene on January 14, 2020. To be granted intervention under Federal Rule of Civil Procedure 24, an applicant must, among other things, "show that the[ir] interest is not protected adequately by the parties to the action." *Floyd v. City of New York,* 770 F.3d 1051, 1057 (2d Cir. 2014) (per curiam). The district court denied GBC intervention on multiple grounds, including that its interests would be adequately represented by Roxas, as they share counsel and are otherwise affiliated.

The district court did not abuse its discretion. A prospective intervenor's burden in demonstrating that their interest is not adequately protected is "minimal," but becomes more burdensome "where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). GBC and Roxas have the same objective here: to prevent enforcement of the Philippine Judgment. Roxas argues that this common interest did not exist at the time the district court weighed GBC's intervention request because Roxas had not yet been granted intervention as a named party. But the district court

ruled on GBC's motion only after granting Roxas respondent status, which it made retroactive to 2016. Roxas Sp. App'x 88-89. And Roxas does not explain how GBC's exclusion substantively impacts its interests. Finally, even though Roxas is no longer in the case for lack of standing and therefore may not be said to advance a shared objective, the district court also found that GBC lacked Article III standing for the same reason as Roxas—its inability to connect any claim it had to the treasure with one to the Assets. We agree with the district court.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Appendix B
[Filed: Oct. 16, 2025]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of October, two thousand twenty-five.

In Re: Enforcement Of Philippine Forfeiture Judgment Against All Assets Of Arelma, S.A., Formerly Held at Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Including, but not limited to, Account Number 16*	**ORDER** Docket No: 24-185(L) 24-186(Con)

Appellant Jose Duran filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

Appendix C
[Filed: Feb. 27, 2020]

In re Enforcement of Philippine Forfeiture Judgment Against All Assets of Arelma, S.A.

United States District Court for the Southern District of New York
February 27, 2020, Decided; February 27, 2020, Filed
19-mc-412 (LAK)

Reporter
442 F. Supp. 3d 756 *; 2020 U.S. Dist. LEXIS 38043 **

IN RE: ENFORCEMENT OF PHILIPPINE FORFEITURE JUDGMENT AGAINST ALL ASSETS OF ARELMA, S.A. etc

Prior History: *Enforcement of Philippine Forfeiture Judgment v. All Assets of Arelma, S.A., 2020 U.S. Dist. LEXIS 12087 (S.D.N.Y., Jan. 24, 2020)*

Counsel: [1]** For Philippine National Bank, Respondent: Michael Orth Ware, LEAD ATTORNEY, MAYER BROWN LLP, New York, NY; Andrew Jonathan Calica, Mayer Brown LLP (NY), New York, NY.

For Jeana Roxas as Personal Representative of the Estate of Roger Roxas, Respondent: Daniel J. Brown, LEAD ATTORNEY, Feuerstein Kulick LLP, New York, NY.

For United States of America, Interested Party: Daniel Hocker Claman, Joshua Lee Sohn, LEAD ATTORNEYS, U.S. DEPARTMENT OF JUSTICE, Fraud Section, Criminal Division, Washington, DC.

For Jose Duran, on his behalf and as representatie of a Class of Judgment Creditors of the Estate of Ferdinand E. Marcos, Intervenor: Daniel John Healy, Rhonda D. Orin, LEAD ATTORNEYS, Anderson Kill L.L.P. (DC), Washington, DC; Robert Alan Swift, LEAD ATTORNEY, Kohn, Swift, & Graf, P.C., PA, Philadelphia, PA; Jeffrey E Glen, Anderson Kill P.C. (N.Y.), New York, NY; Robert A. Swift, PRO HAC VICE, KOHN, SWIFT & GRAF, P.C., Philadelphia, PA.

For Golden Budha Corporation, Intervenor: Daniel J. Brown, LEAD ATTORNEY, Feuerstein Kulick LLP, New York, NY.

Judges: Lewis A. Kaplan, United States District Judge.

Opinion by: Lewis A. Kaplan

Opinion

[*757] ORDER

LEWIS A. KAPLAN, *District Judge*.

The motion of respondent/intervener Jose Duran to strike **[**2]** the Answer filed by respondent Phillippines National Bank ("PNB") (DI75) is granted substantially for the reasons stated in the Report and Recommendation of Magistrate Judge Gabriel W. Gorenstein to which no objections have been filed.

The Clerk is therefore directed to strike document number 68 from the docket but retain the summary docket text for the record.

As a result, PNB is dismissed as a respondent for the reasons explained in the Report and Recommendation.

SO ORDERED.

Dated: February 27, 2020

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

[Filed: Jan. 30, 2020]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ENFORCEMENT OF PHILIPPINE FORFEITURE JUDGMENT AGAINST ALL ASSETS OF ARELMA, S.A. etc.	REPORT AND RECOMMENDATION 19 Misc. 412 (LAK) (GWG)

GABRIEL W. GORENSTEIN, United States Magistrate Judge

The United States brought this action under 28 U.S.C. § 2467 on behalf of the Republic of the Philippines to enforce a Philippine forfeiture judgment against an asset held in the United States. Jose Duran, who purports to represent a class of judgment creditors, is a respondent. Both Duran and the Government have moved for summary judgment on the issue of whether this action is barred by the applicable statute of limitations, 28 U.S.C. § 2462.[1]

[1] See Motion for Summary Judgment, filed Sept. 18, 2019 (Docket # 37); Memorandum in Support of Summary Judgment, filed Sept. 18, 2019 (Docket # 38) ("Duran Mem."); Rule 56.1 Statement of Material Facts, filed Sept. 18, 2019 (Docket # 39); Declaration of Robert A. Swift in Support of Motion for Summary Judgment, filed Sept. 18, 2019 (Docket # 40); Affirmation of

For the reasons stated below, Duran's motion for summary judgment should be denied and the Government's cross-motion for summary judgment should be granted.

I. BACKGROUND

A. Factual Background

The assets that are the subject of this action belonged to an entity called Arelma S.A., as described in previous litigation regarding these assets. See Republic of Philippines v. Pimentel, 553 U.S. 851 (2008); Swezey v. Merrill Lynch, Pierce, Fenner & Smith Inc., 19 N.Y.3d 543 (2012). In brief, Ferdinand Marcos was the President of the Republic of the Philippines from 1965 to 1986. Swezey, 19 N.Y.3d at 546-47. Marcos committed human rights violations and transferred public assets to his personal control — amassing a fortune worth billions of dollars. Id. at 547. In 1972, Marcos arranged to incorporate Arelma, S.A. under Panamanian law and Arelma in turn

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Federico R. Agcaoili in Support of Motion for Summary Judgment, filed Sept. 18, 2019 (Docket # 41); Cross-Motion for Summary Judgment, filed Oct. 2, 2019 (Docket # 46); Memorandum in Support of United States' Opposition and Cross-Motion for Summary Judgment on Statute of Limitations, filed Oct. 2, 2019 (Docket # 46-1) ("US Mem."); Reply Memorandum of Law in Support of Motion for Summary Judgment, filed Oct. 9, 2019 (Docket # 54) ("Duran Reply"); Reply Memorandum of Law in Support of Cross-Motion for Summary Judgment, filed Oct. 16, 2019 (Docket # 57) ("US Reply").

opened a brokerage account with Merrill Lynch, Pierce, Fenner & Smith, Inc. in New York. Pimentel, 553 U.S. at 857. Arelma deposited $2 million into the Merrill Lynch account, id., and the assets are now worth over $40 million, Registration and Enforcement of Foreign Forfeiture Judgment, filed June 27, 2016 (Docket # 1) ("Application") ¶ 1.

Marcos was forced out of office and fled the Philippines to Hawaii in 1986. See Swezey, 19 N.Y.3d at 547. The Philippine Presidential Commission on Good Governance (the "PCCG") was then created to recover property he wrongfully acquired. Pimentel, 553 U.S. at 858; see also Swezey, 19 N.Y.3d at 547. Because Marcos had moved assets to Switzerland, the PCCG "almost immediately" sought help from the Swiss government in recovering and freezing assets that included shares in Arelma. Pimentel, 553 U.S. at 858. In 1991, the PCCG asked the Sandiganbayan, a court in the Philippines with special jurisdiction over corruption cases, to "declare forfeited to the Republic any property Marcos has obtained through misuse of his office." Id.

Nearly two decades later, in April 2009, the Sandiganbayan entered a judgment forfeiting the Arelma account "in the estimated aggregate amount of US $3,369,975.00 as of 1983, plus all interests and all other income that accrued thereon, until the time or specific day that all money or monies are released and/or transferred to the possession of the Republic."

Application, Exhibit 1 at *4-57.[2] That judgment was appealed and on April 25, 2012, the Philippine Supreme Court affirmed the judgment. Id. at *61-94. It denied a motion for reconsideration on March 12, 2014. Id. at *98-103. On March 31, 2014, the Philippine Supreme Court Clerk entered judgment stating the forfeiture judgment was "final and executory and . . . recorded in the Book of Entries of Judgments." Id. at *105-106.

B. Procedural History

In January 2015, the Philippines submitted a request for the United States to enforce the Sandiganbayan forfeiture judgment. See Application, Exhibit 4 (Affidavit of Leila M. De Lima); see also Reply, Exhibit 4 ¶ 3. The request outlined the Sandiganbayan decision and indicated that the Marcos estate and heirs were notified of the proceedings, and that some challenged the Sandiganbayan decision on appeal. Id. ¶ 4. It further stated:

> The Supreme Court has issued an Entry of Judgment, pursuant to which the Sandiganbayan has issued a Writ of

[2] "*__" indicates a page number assigned by the Court's ECF system.

> Execution. These issuances are not subject to further review or appeal.

Id. ¶ 5.

Per the procedure stated in 28 U.S.C. § 2467(b), the request was certified by the Assistant Attorney General for the Criminal Division on February 11, 2016. See Application, Exhibit 1 at *2. The United States in turn filed the instant case as an "Application to Register and Enforce a Foreign Forfeiture Judgment Pursuant to 28 U.S.C. § 2467" in the United States District Court for the District of Columbia on June 27, 2016.

II. GOVERNING LAW

A. Standard for Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure states that summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Beard v. Banks, 548 U.S. 521, 529 (2006) (quoting Celotex Corp. v. Catrett, 447 U.S. 317, 323 (1986)); Celotex, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(c)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 248 (1986). "[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997) (citations omitted); see also Fed. R. Civ. P. 56(c)(4) (parties shall "set out facts that would be admissible in evidence"). In this case, there are no disputes about material facts.

B. Enforcement of a Foreign Judgment

The Government filed its application to enforce the Philippines' forfeiture judgment pursuant to 28 U.S.C. § 2467, a statute entitled "Enforcement of a foreign judgment." To have a forfeiture judgment registered and enforced by an United States district court under section 2467, a foreign nation must first submit a request to the Attorney General that includes

> (A) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation judgment;
>
> (B) [a] certified copy of the forfeiture or confiscation judgment;
>
> (C) an affidavit or sworn declaration establishing that the foreign nation took steps, in accordance with the principles

> of due process, to give notice of the proceedings to all persons with an interest in the property in sufficient time to enable such persons to defend against the charges and that the judgment rendered is in force and is not subject to appeal; and
>
> (D) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.

28 U.S.C. § 2467(b)(1).[3] If, "in the interest of justice," the Attorney General certifies the request, "such decision shall be final and not subject to either judicial review or review under . . . the Administrative Procedure Act." Id. § 2467(b)(2) (internal quotation marks and parentheses omitted).

Once the request is certified by the Attorney General, the Government "may file an application on behalf of a foreign nation in district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States." Id. § 2467(c)(1). The Government becomes "the applicant and the defendant or another person or entity affected

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[3] The Attorney General is allowed to designate his authority with regard to 28 U.S.C. § 2467. See 28 U.S.C. § 2467(b)(1).

by the forfeiture or confiscation judgment shall be the respondent." Id. § 2467(c)(2)(A). Section 2467 defines "forfeiture or confiscation judgment" as

> a final order of a foreign nation compelling a person or entity —
>
> (A) to pay a sum of money representing . . . any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under Federal law if the offense were committed in the United States, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or
>
> (B) to forfeit property involved in or traceable to the commission of such offense.

28 U.S.C. § 2467(a)(2).

Once an application is made,

> The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that —

> (A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;
>
> (B) the foreign court lacked personal jurisdiction over the defendant;
>
> (C) the foreign court lacked jurisdiction over the subject matter;
>
> (D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property in sufficient time to enable him or her to defend; or
>
> (E) the judgment was obtained by fraud.

Id. § 2467(d)(1) (apparent typographical error corrected).

C. Statute of Limitations

The parties agree that 28 U.S.C. § 2462 is the statute of limitations applicable to section 2467. That statute provides:

> [A]n action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

III. DISCUSSION

While the parties agree that enforcement of a foreign judgment under section 2467 is governed by the five-year statute of limitations contained in section 2462, the parties disagree on when the "claim first accrued" for purposes of section 2467. Duran argues that the claim accrued "no later than November 1972 when the $2 million was deposited into a Marcos controlled account at Merrill Lynch," though he argues in the alternative that it accrued "no later than February 1986 when Marcos fled the Philippines and the Republic learned of the Arelma account." Duran Mem. at 9, 12. The Government argues that the claim did not accrue "until the Philippine judgment became ripe for enforcement under section 2467," which the Government argues

was at the "earliest" 2014, the year when "all appeals in the underlying Philippine action were exhausted and a writ of execution issued." US Mem. at 1. In a footnote, the Government states that "[t]here is a strong argument that the U.S. Government's cause of action did not accrue until 2015, when the Philippines formally requested that the U.S. Government enforce the Philippine judgment." Id. at 5 n.1.

To answer the question of when the "claim" in this case "accrued," we begin our discussion with the text inasmuch as "[e]very exercise in statutory construction must begin with the words of the text." Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003) (citations omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citations omitted). "Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." United States v. Kozeny, 541 F.3d 166, 171 (2d Cir. 2008) (internal quotation marks omitted) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) and citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)); accord Greenery Rehab. Grp. v. Hammon, 150 F.3d 226, 231 (2d Cir. 1998) (citing Rubin v. United States, 449 U.S. 424, 430 (1981)). We look to the legislative history and other tools of statutory construction only if the statutory terms are

ambiguous. Greenery, 150 F.3d at 231 (quoting Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1073 (2d Cir. 1993)); accord United States v. Dauray, 215 F.3d 257, 260, 264 (2d Cir. 2000).

We first examine the word "claim" and then turn to the question of when the claim in this case "accrued."

A. What is the "claim"?

A court may use a dictionary to determine the "ordinary, common-sense meaning of the words." United States v. Rowland, 826 F.3d 100, 108 (2d Cir. 2016) (quoting Dauray, 215 F.3d at 260). The relevant law dictionary definition defines "claim" as "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing." Black's Law Dictionary 301-02 (10th ed. 2009); accord In re Bridge Const. Servs. of Fla., Inc., 140 F. Supp. 3d 324, 334 n.6 (S.D.N.Y. 2015). Of course, the word "claim" cannot be read in isolation but rather must be read in the context of sections 2462 and 2467. See King v. Burwell, 135 S.Ct. 2480, 2483 (2015) ("oftentimes the meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words 'in their context and with a view to their place in the overall statutory

scheme.'" (quoting Federal Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))).

Section 2462 states "an action, suit or other proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. Thus, the claim referenced in section 2462 is the claim that gives rise to the "action, suit or other proceeding for the enforcement of [a] civil fine, penalty, or forfeiture." Id. (emphasis added). In other words, the word "claim" in section 2462, when viewed in the context of section 2467, refers to the enforcement action authorized by section 2467, not to the foreign forfeiture action that is the basis for the U.S. enforcement action.

Duran argues, however, that when a section 2467 enforcement proceeding is at issue, the word "claim" is not the claim that gives rise to the enforcement proceeding but rather is "identical [to the] claim asserted in the foreign forfeiture action," Duran Mem. at 13; see also Duran Reply at 3, and thus the "claim" in section 2462 refers to the Philippine government's claim to Marcos's wealth, which arose in 1972, see Duran Mem. at 9. Duran contends that the language in section 2467 providing that a section 2467 enforcement proceeding is brought "on behalf of a foreign nation" and that the "United States court is bound by the findings of fact of the foreign forfeiture judgment" shows that the "US Attorney General possesses no independent 'claim' to

the funds." Duran Mem. at 13; see also Duran Reply at 3 ("The claim never becomes a claim of the United States."); Duran Reply at 5 ("[T]he Attorney General's decision to file an application cannot sua sponte transfer ownership of the claim to the Department."). Essentially, Duran's argument is that the United States in a section 2467 action is pursuing the very same "claim" that was pursued by the foreign government, and that as a result the word "claim" in section 2462 refers to the foreign government's right to make a claim on the funds at issue — not to the United States' right to bring the enforcement action.

While this argument has some surface appeal, we reject its premise that the "claim" being brought in a section 2467 action is in fact the same "claim" that the foreign government had when it instituted the foreign forfeiture for purposes of section 2462. Certainly, the United States court is bound by the findings of fact of the foreign enforcement proceeding, as expressed in section 2467(e), but the claim the Government makes is of an entirely different character. The foreign claim is a claim seeking to forfeit property. The section 2467 claim is a separate action to enforce an existing foreign forfeiture judgment.

This is evident from the structure of section 2467. Section 2467 provides for a process to enforce a foreign judgment in a district court once the Attorney General certifies the foreign government's request. While section 2467 directs the court to refuse to

enforce a foreign judgment if it was procedurally unfair, see 28 U.S.C. § 2467(d)(1), the section 2467 proceeding does not revisit the merits of the foreign judgment. It is of no moment that, as Duran points out, Duran Mem. at 13; Duran Reply at 3-4, 11, section 2467 denominates the United States as an "applicant" rather than a "plaintiff" and that the judgment ultimately entered is for the benefit of the foreign government. It remains the fact that the section 2467 proceeding is a separate enforcement proceeding. It is not the same "claim" that was pursued by the foreign government in its courts.

Apart from the logic of this analysis, we find support in cases interpreting section 2462 in situations where the Government follows an administrative process, such as an administrative sanctions process, before it institutes a domestic forfeiture suit. The vast majority of courts have recognized the five-year period set forth in section 2462 does not begin to run on the date the initial wrongful act took place but rather on the date the administrative process is completed. See, e.g., United States v. Worldwide Indus. Enters., Inc., 220 F. Supp. 3d 335, 342-43 (E.D.N.Y. 2016) (citing cases); accord United States v. Godbout-Bandal, 232 F.3d 637, 639-40 (8th Cir. 2000); United States v. Meyer, 808 F.2d 912, 915 (1st Cir. 1987).

Furthermore, section 2467 was needed to create a new claim for relief because, if section 2467 did not exist, a foreign government could not enforce

its forfeiture judgment in the United States. See United States v. Federative Republic of Brazil, 748 F.3d 86, 95-96 (2d Cir. 2014). Thus, in order to make foreign forfeiture judgments enforceable in the United States, Congress needed to create a new proceeding by which such judgments could be enforced in a court. Congress chose to do so by enacting section 2467. Because a section 2467 action to enforce a foreign forfeiture judgment is the only "claim" that can be brought with respect to a foreign forfeiture judgment in the United States court system, the word "claim" in section 2462, which governs suits in United States courts, refers exclusively the ability to pursue the section 2467 action in the United States court, not the foreign government's ability to pursue the underlying forfeiture in a foreign court.

Accordingly, we find in this case that the "claim" at issue in section 2462 refers to the enforcement proceeding instituted under section 2467 against the Arelma account — not to the claim pursued by the Philippines in the Sandiganbayan.

B. When did the claim "accrue[]"?

The Supreme Court addressed the meaning of the term "accrue" in section 2462 in Gabelli v.SEC, 568 U.S. 442, 448-49 (2013). As Gabelli stated, "a right accrues when it comes into existence." Id. at 448 (alteration omitted) (quoting United States v. Lindsay, 346 U.S. 568, 569 (1954)). Another phrasing

approved by Gabelli is that "an action accrues when the plaintiff has a right to commence it." Id. (quoting 1 A. Burrill, A Law Dictionary and Glossary 17 (1850)). In a similar formulation, the Supreme Court has stated that "a statute of limitations begins to run when the cause of action 'accrues' — that is, when 'the plaintiff can file suit and obtain relief." Heimeshoff v. Hartford Life & Acc. Ins. Co., 571 U.S. 99, 105 (2013) (emphasis added) (quoting Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)). In other words, "[a] claim first accrues at the time that a suit could have been brought." Barden Corp. v. United States, 36 Ct. Int'l Trade 934, 941 (2012).

That standard is easily applied here because there are only two possible dates that the section 2467 action could have been brought and both dates are within the limitations period: the date on which the Philippines first could have requested the Attorney General to bring the section 2467 action, or the date on which the Philippines actually requested that the Attorney General file suit.

Of these two, the date on which the Philippines actually requested that the Attorney General commence the enforcement action is the more likely candidate for the accrual date because the request of the foreign government is the event that triggers the ability of the United States to bring suit under section 2467. In other words, the ability of the U.S. Government to bring suit "accrued" to the U.S.

Government upon the Philippines' request that the enforcement action be filed. Our conclusion, as stated in the previous section, that the "claim" referenced in section 2462 is the enforcement action under 2467, essentially mandates this conclusion. Indeed, Duran himself concedes that if, as we have found, the "claim" under section 2462 is the U.S. enforcement action, then the statute of limitations runs at the earliest from the date of the Philippine government request — if not from the even later date that the Attorney General certifies the request, see Duran Mem. at 13 ("If Section 2467 applications did create new 'claims,' . . . Section 2462 would not run until the Attorney General exercises his discretion"). Duran argues, however, that this effectively means that enforcement actions are "not subject to any statute of limitations," id., because a foreign government might wait indefinitely to pursue its request to obtain foreign enforcement of a judgment. In Duran's view, this could not have been Congress's intent. See id. at 13-14.

We agree that this reading of the statutes does not place a time limitation on the foreign government's ability to request that the enforcement action be brought. At the same time, we do not find it strange that Congress might have pretermitted imposing such a limitation given that section 2467 specifically charges the Attorney General to act "in the interest of justice" in deciding whether to pursue the foreign government's request. 28 U.S.C. § 2467(b)(2).

Congress could rationally have expected that the Attorney General might choose to decline to bring an enforcement proceeding if the foreign government had engaged in inordinate delay in making its request (or, indeed, in pursuing the forfeiture judgment in the first place). Additionally, Congressional intent to not begin the start of the limitation clock until a request is made is supported by the fact it is common in the United States to allow lengthy time periods — typically twenty years — for a party with a judgment to take steps to enforce that judgment.[4]

For these reasons, we reject Duran's suggestion that Congress could not have intended to run the limitations period from the date the foreign government actually requested enforcement.

In any event, the concern regarding the ability of a foreign government engineering an unnecessary delay in making a request would be eliminated if the limitation is measured from the date the request for an enforcement action could have first been submitted to the United States Government, and even that date is within the limitations period here.

Duran argues, however, that the date the Philippines could have requested that the enforcement action be filed was not in fact 2014, when the appeal of the forfeiture judgment finally

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[4] See, e.g., Ala. Code § 6-2-32 (2019); Fla. Stat. § 55.081 (2019); Ind. Code § 34-11-2- 12 (2019); N.J. Stat. Ann § 2A:14-5 (West 2019); N.Y. C.P.L.R. 211 (McKinney 2019); Va Code Ann. § 8.01-251 (2019).

concluded, but rather was the date of the original judgment in the Sandiganbayan, or April 2009. Duran Mem. at 5, 14-15.

Once again, we reject Duran's argument. While Duran focuses on the fact that section 2467(a)(2) defines a "forfeiture . . . judgment" as a "final order," and argues that the Sandiganbayan judgment was "final" in 2009, see Duran Mem. at 14-15, section 2467 also provides that a foreign government cannot make a request that an enforcement action be initiated unless it can certify that the judgment at issue "is not subject to appeal." 28 U.S.C. § 2467(b)(1)(c); see also In re Trade and Commerce Bank, 890 F.3d 301, 304 (D.C. Cir. 2018) ("an action for enforcement of a foreign judgment cannot be filed until that judgment 'is not subject to appeal'"); In re Seizure of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency, et al., 903 F. Supp. 2d 19, 28 (D.D.C. 2012) ("[a]lthough the [foreign] courts entered judgments of convictions and forfeiture against these individuals, the convictions and forfeitures are not final because appeals are pending" (emphasis in original)). For purposes of determining when the ability to bring the forfeiture "accrued," the accrual date cannot be any earlier than the date on which the Philippines could have made a lawful request to the U.S. Government. As a result, the date must be on or after the date the judgment is no longer "subject to appeal." Case law applying section 2462 in instances where administrative proceedings must be completed

before the Government may bring a domestic forfeiture suit judges the finality of an administrative order in exactly this fashion. See, e.g., SEC v. Mohn, 465 F.3d 647, 654 (6th Cir. 2006) (while initial administrative order was "final," "the administrative proceeding against Defendant was not final [under section 2462] until he either exhausted or ceased to pursue his administrative appeals"); SEC v. Pinchas, 421 F. Supp. 2d 781, 784 (S.D.N.Y. 2006) (order denying reconsideration was the "final order" that began the section 2462 statute of limitations).

Duran's scattered other arguments fare no better. Duran makes frequent reference to the Gabelli decision, arguing that it favors his interpretation of section 2462. See Duran Mem. at 6- 7, 9-11; Duran Reply at 6-8. The holding of Gabelli is irrelevant to this case, however. Gabelli addressed whether a cause of action for fraud subject to section 2462 accrues on the date the fraud occurred or the date the fraud was discovered. 568 U.S. at 444-45. Gabelli is irrelevant because, as already discussed, the "claim" at issue here is the United States' application for enforcement of the foreign judgment — not any "fraud" that might have triggered the foreign government's pursuit of the underlying forfeiture action. Moreover, in Gabelli, there was a "complete and present cause of action" for the Government to act upon at the time of the fraudulent conduct, see 568 U.S. at 448 (citation omitted). Here, by contrast, the Government could take no action until the Philippines submitted its

request — a request that could not be made until the forfeiture judgment was no longer subject to appeal.

Duran argues that the ability of the Government to seek a restraining order separate from any filing of an enforcement action as provided in 28 U.S.C. § 2467(d)(3), somehow bears on the interpretation of section 2462. See Duran Reply at 7 ("If the Republic could obtain a restraining order from a federal court in 1987, it surely had a full and complete claim at that time."); see also id. at 9-10. The ability to obtain a restraining order, however, which by statute is temporary, see 28 U.S.C. § 2462(d)(3)(A)(ii)(I) (incorporating 18 U.S.C. § 983(j)(2)), is a process entirely separate from the process for bringing an application to enforce a "final . . . order." Thus, the restraining order provision has no relevance to our construction of section 2467.

Duran makes various policy and other arguments, which we do not address because they do not grapple with the structure and the language of the relevant statutes. It is enough to say that under any rational construction of section 2467, the instant application was timely filed.

IV. CONCLUSION

For the foregoing reasons, Duran's motion for summary judgment (Docket # 37) should be denied and the United States' cross-motion for summary judgment (Docket # 46) should be granted.

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court, with copies sent to the Hon. Lewis A. Kaplan at 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections or responses must be directed to Judge Kaplan. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: January 30, 2020
New York, New York

/s/ Gabriel W. Gorenstein
GABRIEL W. GORENSTEIN
United States Magistrate Judge

Appendix D
[Filed: Jan. 12, 2024]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IN RE ENFORCEMENT OF PHILIPPINE FORFEITURE JUDGMENT AGAINST ALL ASSETS OF ARELMA, S.A. etc

----------X

19 **MISC** 412 (LAK)(GWG)

JUDGMENT

It is, **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated January 11, 2024, the government's motion to dismiss the Estate of Roger Roxas as a respondent (Dkt 188) is granted. The government's motion for summary judgment dismissing all pled affirmative defenses in this case, and for summary judgment enforcing the Philippine forfeiture judgment and ending this case (Dkt 193) is granted. Pursuant to 28 U.S.C. §§ 2467(c)(l) and (d)(l), the Philippine forfeiture judgment against the Arelma Assets (Dkt. 1-1, Ex. 1) is ENFORCED "as if the judgment had been entered by a court of the United States." 28 U.S.C. § 2467(c)(l). Duran's cross-motion

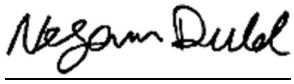
for summary judgment (Dkt 222) is denied; accordingly, the case is closed.

Dated: New York, New York
January 12, 2024

RUBY J. KRAJICK

Clerk of Court

BY:



Deputy Clerk

[Filed: Jan. 11, 2024]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X IN RE: ENFORCEMENT OF PHILIPPINE FORFEITURE JUDGMENT AGAINST ALL ASSETS OF ARELMA, S.A. etc. ----------X	USDCSDNY DOCUMENT ELECTRONICALLY FILED DOC #_____ DATE FILED 1/11/24 19-mc-412 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge.*

In a thorough report and recommendation dated October 3, 2023 (the "R&R"), Magistrate Judge Gabriel W. Gorenstein recommended that (1) the government's motions to dismiss Roxas as a respondent on the ground that he lacks standing and for partial summary judgment dismissing the defenses pled by Roxas and Duran all be granted, and (2) Duran's cross motion for summary judgment dismissing the application be denied. Roxas and Duran object to the recommendation that the government's motions be granted.

a. Roxas' objections to the R&R's recommendation that he be dismissed as a respondent for lack of standing (Dkt 263) are overruled, substantially on the grounds set out by the government at pages 3 through 12 of its response (Dkt 266).

b. Roxas' objections to so much of the R&R as recommended that the Court grant partial summary judgment dismissing certain defenses asserted by Roxas (Dkt 263) are overruled as moot in light of his lack of standing. Duran's objections to the recommendation that certain of his defenses be dismissed (Dkt 265) are overruled largely for the reasons articulated by the government. The Court, however, finds it unnecessary to resolve the question whether U.S. or Philippines due process principles apply for purposes of 28 U.S.C. *§* 2467(d)(l)(C) because the result here would be the same even if U.S. principles governed. That is so for the reasons stated by the government in its response to the objections (Dkt 267) at pages 3-6.

c. The objections of both Roxas and Duran to the recommendation that the government's motion for partial summary judgment be granted are overruled.

Accordingly,

1. The government's motion to dismiss the Estate of Roger Roxas as a respondent (Dkt 188) is granted.

2. The government's motion for summary judgment dismissing all pied affirmative defenses in this case, and for summary judgment enforcing the Philippine forfeiture judgment and ending this case (Dkt 193) is granted. Pursuant to 28 U.S.C. §§ 2467(c)(l) and (d)(l), the Philippine forfeiture judgment against the Arelma Assets (Dkt. 1-1, Ex. 1) is ENFORCED "as if the judgment had been entered by a court of the United States." 28 U.S.C. § 2467(c)(l). The Clerk shall close the case.

3. Duran's cross-motion for summary judgment (Dkt 222) is denied.

SO ORDERED.

Dated: January 11, 2024

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

Appendix E
[Filed: Oct. 3, 2023]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ENFORCEMENT OF PHILIPPINE FORFEITURE JUDGMENT AGAINST ALL ASSETS OF ARELMA, S.A., FORMERLY HELD AT MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., INCLUDING BUT NOT LIMITED TO ACCOUNT NO. 16	:	19 Misc. 412 (LAK) (GWG) REPORT & RECOMMENDATION

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

The United States of America brought this application to register a foreign forfeiture judgment pursuant to 28 U.S.C. § 2467. See Application, filed June 27, 2016 (Docket # 1). Respondents Jose Duran and the Estate of Roger Roxas ("Roxas") oppose the application. The Government now moves to dismiss Roxas as a respondent on the ground that Roxas lacks

standing to challenge the application.[1] The Government also seeks summary judgment on the defenses pled by both Roxas and Duran.[2] Duran has cross-moved for summary judgment on his defenses requesting dismissal of the application.[3] For the

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[1] Notice of Motion, filed Sept. 8, 2022 (Docket # 188); Memorandum in Support, filed Sept. 9, 2022 (Docket # 199) ("Gov't Standing Mem."); Rule 56.1 Statement, filed Sept. 9, 2022 (Docket # 200) ("Gov't Standing R. 56.1 Statement"); Memorandum in Opposition, filed Oct. 27, 2022 (Docket # 215) ("Roxas Standing Opp."); Response, filed Oct. 27, 2022 (Docket # 216) ("Roxas Standing R. 56.1 Response"); Declaration of Clay Robbins III, filed Oct. 27, 2022 (Docket # 218) ("Second Robbins Decl."); Reply, filed Feb. 9, 2023 (Docket # 252) ("Gov't Standing Reply").

[2] Notice of Motion, filed Sept. 8, 2022 (Docket # 193); Memorandum in Support, filed Sept. 9, 2022 (Docket # 203) ("Gov't SJ Mem."); Rule 56.1 Statement, filed Sept. 9, 2022 (Docket # 204) ("Gov't SJ R. 56.1 Statement"); Declaration of Joshua L. Sohn, filed Sept. 9, 2022 (Docket # 205) ("Sohn Decl."); Declaration of Joshua L. Sohn, filed Sept. 9, 2022 (Docket # 206) ("Second Sohn Decl."); Memorandum in Opposition, filed Oct. 27, 2022 (Docket # 208) ("Roxas SJ Opp."); Response, filed Oct. 27, 2022 (Docket # 209) ("Roxas SJ R. 56.1 Response"); Declaration of Clay Robbins III, filed Oct. 27, 2022 (Docket # 211) ("Robbins Decl."); Memorandum in Opposition, filed Oct. 28, 2022 (Docket # 228) ("Duran Opp."); Response, filed Oct. 28, 2022 (Docket # 230) ("Duran R. 56.1 Response"); Reply and Opposition, filed Nov. 14, 2022 (Docket # 236) ("Gov't SJ Reply").

[3] Notice of Cross-Motion, filed Oct. 28, 2022 (Docket # 222) ("Cross-Mot."); Memorandum in Support, filed Nov. 4, 2022 (Docket # 232) ("Duran Cross-Mot. Mem."); Rule 56.1 Statement, filed Nov. 11, 2022 (Docket # 233) ("Duran R. 56.1 Statement"); Declaration of Robert A. Swift, filed Nov. 4, 2022 (Docket # 234) ("Swift Decl."); Response, filed Nov. 14, 2022 (Docket # 237)

reasons that follow, the Government's motion on standing should be granted, the Government's summary judgment motion should be granted, and Duran's cross-motion should be denied.

I. BACKGROUND

The facts that gave rise to the instant action have been set out in prior related litigation, see, e.g., Republic of Philippines v. Pimentel, 553 U.S. 851 (2008); Dist. Att'y of New York Cnty. v. Republic of Philippines, 307 F. Supp. 3d 171, 180-88 (S.D.N.Y. 2018) ("District Attorney"); Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 19 N.Y.3d 543 (2012), and in a decision issued earlier in this case, see In re Arelma, S.A., 2019 WL 3084706 (D.D.C. July 15, 2019). We describe below only the factual and procedural history necessary to provide background for the instant motions.

A. The Arelma Account

Ferdinand Marcos was the President of the Republic of the Philippines (the "Republic" or the "Philippines") from 1965 to 1986. Swezey, 19 N.Y.3d at 546-47. Marcos committed human rights violations and also transferred public assets to his personal

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("Gov't R. 56.1 Response"); Gov't SJ Reply; Reply, filed Feb. 9, 2023 (Docket # 250) ("Duran Cross-Mot. Reply").

control — amassing a fortune worth billions of dollars. Id. at 547. In 1972, a man named Jose Campos facilitated the creation of a Panamanian corporation named Arelma, S.A. ("Arelma") on behalf of Marcos. Duran R. 56.1 Statement ¶ 3. Campos then created an investment account for Arelma (the "Arelma Account") at Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch"), which was funded by a $2 million transfer from a Swiss bank account. Id. ¶¶ 4-5. That deposit was the sole source of the funds in the Arelma Account (the "Arelma Assets"). Id. ¶ 6.

In 1986, Marcos was forced out of office and fled the Philippines to Hawaii. See Swezey, 19 N.Y.3d at 547. The Philippine Presidential Commission on Good Government (the "PCGG") was then created to recover property he wrongfully acquired. Pimentel, 553 U.S. at 858; see also Swezey, 19 N.Y.3d at 547. In 1991, the PCGG asked the Sandiganbayan, a court in the Philippines with special jurisdiction over corruption cases, to "declare forfeited to the Republic any property Marcos has obtained through misuse of his office." Id. As described further below, the PCGG eventually sought to forfeit the Arelma Account specifically.

B. Roxas

In January 1971, Roger Roxas discovered in the Philippines a stockpile of gold and gems, along with a statue of a golden Buddha, which he believed to be

treasure left behind after the Japanese occupation during the Second World War (the "Yamashita Treasure" or "Treasure"). See Roxas v. Marcos, 89 Haw. 91, 101 (1998). From the initial excavation, Roxas recovered "twenty-four bars of gold, . . . some samurai swords, bayonets, and other artifacts," and Roxas later discovered "more than two [handfuls]" of diamonds inside the Buddha statue. Id. at 101-02. The "vast majority" of the Yamashita Treasure had not been recovered from the stockpile by 1972. Gov't Standing R. 56.1 Statement ¶ 2; Roxas Standing R. 56.1 Response ¶ 2. In April 1971, government agents, supposedly under orders from Marcos, "took the [B]uddha, the diamonds, . . . seventeen bars of gold, the samurai swords, a piggy bank belonging to Roxas's children, and his wife's coin collection." Roxas v. Marcos, 89 Haw. at 102. Roxas and a group of investors, the Golden Budha Corporation [sic] ("Golden Budha"), brought suit in Hawaii state court against Marcos and Imelda Marcos, Ferdinand Marcos's wife, for conversion of the Treasure. Id. at 109. Roxas succeeded in proving his conversion claim and was awarded $13,275,848.37 in damages. See Est. of Roxas v. Marcos, 2001 WL 36284628 (Haw. Cir. Ct. Sept. 6, 2001), aff'd, 109 Haw. 83 (Nov. 29, 2005).[4]

C. Duran

[4] We will occasionally refer to Roxas, the Estate of Roxas, and Golden Budha collectively as "Roxas."

Victims of human rights abuses sued Marcos in the United States District Court in Hawaii, were certified as a class, and ultimately obtained a nearly $2 billion judgment against the Marcos estate (represented by Imelda Marcos and Marcos's son) in 1995 based on Marcos's perpetration of human rights violations. Pimentel, 553 U.S. at 857-59 (citing Hilao v. Est. of Marcos, 103 F.3d 767 (9th Cir. 1996) ("Hilao II")); see In re Est. of Marcos Human Rights Litigation, 910 F. Supp. 1460 (D. Haw. 1995). These plaintiffs, formerly known as the "Pimentel Class" are now known as the "Duran Class." See In re Arelma, S.A., 2019 WL 3084706, at *2. In this case, Duran has been granted the right to intervene as a representative of the Duran Class without opposition from the Government. Id. at *1, 3.

D. Litigation History

There are three main court actions that have a bearing on the case before us: (1) the case brought by Duran against Marcos for human rights violations; (2) the interpleader action brought by Merrill Lynch to determine ownership of the Arelma Account; and (3) the proceeding in the Sandiganbayan brought by the PCGG to forfeit the Marcos assets. We briefly discuss each of these court actions next.

1. Suit Brought by Class Against the Marcos in Hawaii

As noted, a class of victims of human rights violations brought a case against Marcos in federal court in Hawaii in 1986. See Hilao II, 103 F.3d at 771. In 1991, the Hawaii court certified the case as a class action. Id. The class was at one time called the "Pimentel Class," but Duran eventually became the representative of this class. See Pimentel, 553 U.S. at 857; In re Arelma, 2019 WL 3084706, at *2. The Hawaii court issued a judgment in 1995 in favor the Pimentel Class against the Marcos Estate in the amount of $1.966 billion. See Hilao II, 103 F.3d at 772. It later issued a supplemental judgment deriving from contempt sanctions in the amount of $353.6 million, which was affirmed in 2012. In re Est. of Marcos Human Rights Litig., 496 F. App'x 759, 759-60 (9th Cir. 2012).

While the Hawaii case was pending, the district court in 1991 issued a preliminary injunction prohibiting the Marcoses (that is, the Estate and its representatives) from disposing of any of their assets. See Hilao v. Est. of Marcos, 103 F.3d 762, 763 (9th Cir. 1996) ("Hilao I"). That preliminary injunction became a permanent injunction on February 3, 1995. Id. That permanent injunction "expired" in 2005 "pursuant to Hawaii's ten-year statute of limitations for civil judgments." In re Estate of Marcos Human Rights

Litig., 496 F. App'x at 759 n.1 (citing Haw. Rev. Stat. § 657-5).

2. Interpleader Action Brought by Merrill Lynch

In 2000, Merrill Lynch brought an interpleader action in the District of Hawaii (the "Interpleader Case") seeking to determine the ownership of the Arelma Assets. Pimentel, 553 U.S. at 859; Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp., 464 F.3d 885, 889 (9th Cir. 2006) (subsequent history omitted). As part of this action, Merrill Lynch deposited the entirety of the Arelma Account, approximately $35 million, with the Clerk of the Court in Federal Court in Hawaii. Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc., 2004 WL 5326929, at *2 (D. Haw. July 12, 2004). Roxas and the Pimentel Class were parties, but the Republic was not due to its sovereign immunity. See generally ENC Corp., 464 F.3d at 889-90.

On July 12, 2004, the district court issued an order decreeing that all of the assets in the Arelma Account were awarded to the Pimentel Class. See id. at *7 (subsequent history omitted). In 2008, the Supreme Court of the United States vacated this order on the ground that the ownership of the Arelma Assets could not be decided in the absence of the Republic. Pimentel, 553 U.S. at 872-73. The Supreme Court's mandate was issued on June 12, 2008, and the

Ninth Circuit issued its own Order directing the district court to dismiss the Interpleader Case on August 4, 2008. See Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp., 535 F.3d 1010, 1010 (9th Cir. 2008). The District of Hawaii ordered an accounting of the assets in the court's account and eventually issued a series of orders arranging for the interpleaded assets to be returned to Merrill Lynch. See Order for Return of Interpleaded Assets, filed Feb. 18, 2009 in Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc., No. 00-cv-595 (D. Haw.) (Docket # 441) (district court "orders the return of the assets to the stakeholder"); Judgment, dated Feb. 19, 2009 in Merrill Lynch (Docket # 443). The accounting process was prolonged, and as ultimately determined by the Ninth Circuit in an appeal, improperly handled. See Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Arelma, Inc., 587 F.3d 922, 924 (9th Cir. 2009). During this period, the funds were in the "clerk of court's custody." Id. This return of the funds to Merrill Lynch was completed by February 10, 2010. See Notice That All Funds Have Been Returned, dated Feb. 19, 2010 in Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc., No. 00-cv-595 (D. Haw.) (Docket # 514).

In October 2008 and November 2012, the Duran Class registered its judgments from the Hawaii action against Marcos and Imelda Marcos in New York. See Duran 56.1 Statement ¶ 67. Seeking to enforce these judgments, the Class levied on the Arelma Assets by having the Sheriff of New York

County serve a Notice of Levy and Restraining Order on Merrill Lynch and the New York City Department of Finance on November 30, 2009, December 10, 2012, January 3, 2013, and July 16, 2013. See id. ¶ 68. On April 4, 2009, and June 18, 2013, the Duran class filed separate turnover proceedings under NYCPLR 5225(b) against Merrill Lynch in the Supreme Court of New York, New York County, seeking the Arelma Assets. See id. ¶ 69; Order, annexed as Ex. 21 to Swift Decl. (Docket # 234-21) ("Swezey Order") (showing filings in Swezey v. Merrill Lynch, No. 104734/2009 (N.Y. Sup. Ct.); Swezey v. Merrill Lynch, No. 155600/2013 (N.Y. Sup. Ct.)); see also Swezey v. Merrill Lynch, 19 N.Y.3d at 549-50.

On January 28, 2010, the judge in the turnover proceeding issued an order directing that the Arelma Assets were to be deposited with the Commissioner of Finance of the City of New York, and that the Arelma Assets would be considered to be "in custodia legis" from that time forward. See Consent Order, dated Jan. 28, 2010 (Docket # 24-2), at 2. Merrill Lynch made the deposit of the Arelma Assets with the New York Commissioner of Finance in February 2010. See Swezey Order. The parties agree that the New York City Department of Finance held the funds from 2010 until 2017, when they were transferred to the New York State Office of the State Comptroller, Office of Unclaimed Funds, see In re Arelma, 2019 WL 3084706 at *2, on the ground that the funds were

abandoned property, see Declaration of Michael Sullivan, filed Feb. 1, 2018 (Docket # 24-4), ¶¶ 2-3.

3. Philippine Proceeding to Forfeit the Arelma Account

The third main action is the proceeding in the Sandiganbayan. This action was a petition for "Forfeiture" under Philippine law brought in 1991 in the Sandiganbayan by the Philippine government in an effort to recover the Marcos assets and is referred to as "Case No. 141." See Petition, dated Dec. 17, 1991, annexed as Ex. 42 to Swift Decl. (Docket # 234-42); Affidavit of Leila M. De Lima, dated Nov. 21, 2019, annexed as Ex. 23 to Swift Decl. (Docket # 234-23) ("Second De Lima Decl."), ¶ 6. Case No. 141 seemingly ended with a judgment issued more than 20 years later, in 2003, that awarded the Philippine government a forfeiture judgment as to assets held in Swiss bank accounts purportedly funded by Marcos. See Second De Lima Decl. ¶ 4.

The case lived on, however. On July 16, 2004, the Philippine government filed a "Motion for Partial Summary Judgment" in Case No. 141 that sought to specifically forfeit the assets in the Arelma Account. Motion for Partial Summary Judgment, dated July 16, 2004, annexed as Ex. B to Sohn Decl. (Docket # 205-2). Notice of this motion was given only to the parties to the case, who were Marcos, Imelda Marcos, and Marcos's children. See id. at 10-11 (listing recipients

of notice). Indeed, according to the uncontested opinion of plaintiff's expert, because the Duran Class (or Pimentel Class at that time) were not parties to Case No. 141, they "could not have been given" notice. See Expert Report of Herbert Paul J. Francisco, annexed as Ex. 24 to Swift Decl. (Docket # 234-24) ("Francisco Report"), ¶ 24.

Almost five years later, on April 2, 2009, the Sandiganbayan entered a judgment forfeiting the Arelma Account to the Republic "in the estimated aggregate amount of US $3,369,975.00 as of 1983, plus all interests and all other income that accrued thereon, until the time or specific day that all money or monies are released and/or transferred to the possession of the Republic." Republic of Phil. v. Marcos, annexed as Ex. A to Application (Docket # 1-1) ("Sandiganbayan Judgment"), at *4-57. That judgment was appealed and on April 25, 2012, the Philippine Supreme Court affirmed the judgment. See Romualdez-Marcos v. Republic of Phil., annexed as Ex. A to Application (Docket # 1-1), at *61-94. The Sandiganbayan issued a Writ of Execution on August 18, 2014. Writ of Execution, annexed as Ex. A to Application (Docket # 1-1), at *108-09.

E. The Instant Case

In January 2015, the Republic submitted a request for the United States to enforce the Sandiganbayan forfeiture judgment. See Affidavit of

Leila M. De Lima, annexed as Ex. D to Application (Docket # 1-4) ("First De Lima Decl."). Per the procedure stated in 28 U.S.C. § 2467(b), the request was certified by the Assistant Attorney General for the Criminal Division on February 11, 2016. See Assistant Attorney General Decision, annexed as Ex. A to Application (Docket # 1-1), at *2. The United States in turn filed the instant case as an "Application to Register and Enforce a Foreign Forfeiture Judgment Pursuant to 28 U.S.C. § 2467" in the United States District Court for the District of Columbia on June 27, 2016. See Application. On August 14, 2019, the application was transferred to this District. See Order, dated Aug. 14, 2019 (Docket # 33). Duran was joined to the case as a respondent, see Order, dated July 15, 2019 (Docket # 31), and Jeana Roxas, as the representative of the Estate of Roger Roxas, was later joined as well, see Order, dated Jan. 15, 2020 (Docket # 96).

On July 29, 2022, Roxas moved to amend its answer to include four affirmative defenses. See Notice of Motion, filed July 29, 2022 (Docket # 184). On February 7, 2023, that motion was denied. See Memorandum and Order, filed Feb. 7, 2023 (Docket # 247).

The instant motions followed.

II. GOVERNING LAW

A. Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure states that summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Beard v. Banks, 548 U.S. 521, 529 (2006) (citing Celotex Corp. v. Catrett, 447 U.S. 317, 323 (1986)); Celotex, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(c)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997) (citations omitted); see also Fed. R. Civ. P. 56(c)(4) (parties shall "set out facts that would be admissible in evidence").

In determining whether a genuine issue of material fact exists, "[t]he evidence of the non-movant is to be believed" and the court must draw "all justifiable inferences" in favor of the nonmoving party. Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)). Once the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial,'" Matsushita Elec.

Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Fed. R. Civ. P. 56(e)), and "may not rely on conclusory allegations or unsubstantiated speculation," Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998). In other words, the nonmovant must offer "concrete evidence from which a reasonable juror could return a verdict in his favor," Anderson, 477 U.S. at 256, and "[a] party opposing summary judgment does not show the existence of a genuine issue of fact to be tried merely by making assertions that are conclusory," Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008). "Where it is clear that no rational finder of fact 'could find in favor of the nonmoving party because the evidence to support its case is so slight,' summary judgment should be granted." FDIC v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (quoting Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994)).

B. Section 2467

This case proceeds under 28 U.S.C. § 2467, which provides the procedure for registration and enforcement of a foreign forfeiture judgment. See 28 U.S.C. § 2467. First, to have a foreign forfeiture judgment registered and enforced by a United States district court under section 2467, the foreign nation must submit a request to the Attorney General. 28 U.S.C. § 2467(b)(1). If the request is certified by the

Attorney General or his designee, the Government "may file an application on behalf of a foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States." Id. § 2467(c)(1). The Government becomes "the applicant and the defendant or another person or entity affected by the forfeiture or confiscation judgment shall be the respondent." Id. § 2467(c)(2)(A).

Once an application is made, the statute provides that:

> [t]he district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that — (A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law; (B) the foreign court lacked personal jurisdiction over the defendant; (C) the foreign court lacked jurisdiction over the subject matter; (D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property . . . in sufficient time to enable

> him or her to defend; or (E) the judgment was obtained by fraud.

Id. § 2467(d)(1) (emphasis added) (apparent typographical error omitted). The mandatory language in section 2467 means that "the court must grant the application unless one of the five narrow exceptions applies." In re One Prinz Yacht Named Eclipse, 2022 WL 4119773, at *4 (D.D.C. Sept. 9, 2022) ("Eclipse") (citation omitted). When determining whether one of the exceptions applies, "the court shall be bound by the findings of fact to the extent that they are stated in the foreign forfeiture or confiscation judgment." 28 U.S.C. § 2467(e).

III. DISCUSSION

A. Roxas's Standing

The Government first moves for summary judgment on the question of Roxas's standing, alleging that Roxas cannot demonstrate an injury-in-fact that would result from the registration of the forfeiture judgment. Gov't Standing Mem. at 3. Roxas argues that it will suffer injury if the Philippine forfeiture judgment is registered because the assets or a portion of the assets held in the Arelma Account derived from

the Yamashita Treasure. E.g., Roxas Standing Opp. at 5-7.[5]

"Whether a claimant has standing is 'the threshold question in every federal case, determining the power of the court to entertain the suit.'" In re Gucci, 126 F.3d 380, 387-88 (2d Cir. 1997) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." Cent. States S.E. & S.W. Areas Health & Welfare Fund. v. Merck-Medco Managed Care, LLC, 433 F.3d 181, 198 (2d Cir. 2005). "To establish Article III standing, a [party] must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157-58 (2014) (punctuation omitted). "[T]he party invoking federal jurisdiction[] bears the burden of establishing these elements." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).

"[T]he injury-in-fact requirement . . . helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." Susan B. Anthony List,

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[5] Because we conclude the Estate of Roxas lacks standing for other reasons, as stated below, we do not address the Government's argument that only Golden Budha has any rights to collect on the judgment against the Marcoses, that Golden Budha is not a party to this forfeiture action, and thus that the Estate of Roxas has not suffered any Article III injury. See Gov't Standing Mem. at 7-8.

573 U.S. at 158 (punctuation omitted). "To demonstrate injury in fact, a plaintiff must show the invasion of a [1] legally protected interest that is [2] concrete and [3] particularized and [4] actual or imminent, not conjectural or hypothetical." Strubel v. Comenity Bank, 842 F.3d 181, 188 (2d Cir. 2016) (punctuation omitted).

> In a proceeding under section 2467,
>
> > determining whether a claimant has an interest that satisfies constitutional standing requires a two-part inquiry. First, a court must determine the nature of the claimant's interest by looking at the law of the nation in which the interest arose. Then, a court must look to federal law to "determine[ ] the effect of that interest on the claimant's right to bring a claim."

United States v. All Assets Held at Bank Julius Baer & Co., Ltd., 2020 WL 7640213, at *7 (D.D.C. Dec. 23, 2020) ("Baer VIII") (quoting United States v. All Assets Held at Bank Julius Baer & Co., Ltd., 480 F. Supp. 3d 1, 13 (D.D.C. 2020).

To the extent Roxas claims an interest as a result of his judgment against Marcos, this does not confer Article III standing. As the Government notes that Roxas "has not secured its money judgment

against the Arelma Assets, by way of lien, levy or other legal attachment," Gov't Standing Mem. at 2, and thus Roxas is a "mere unsecured judgment creditor," id. at 4. Roxas does not contest this point and even appears to concede it. See Roxas Standing Opp. at 4 (arguing that the Government's contention "falls flat" because "[s]ecuring a levy or lien is not the sole way to demonstrate Article III standing").

Case law is clear that a "general unsecured creditor 'does not possess a legal right, title, or interest in the property that is forfeited as required for standing.'" In re 650 Fifth Ave. & Related Props., 2014 WL 1998233, at *4 (S.D.N.Y. May 15, 2014) (quoting DSI Assocs. LLC v. United States, 496 F.3d 175, 184 (2d Cir. 2007)); see United States v. $10,000 in U.S. Currency, 2020 WL 5757471, at *5 (N.D.N.Y. Sept. 28, 2020) ("General creditors do not possess a legal right, title, or interest in the property in forfeiture proceedings, because an interest in property must be an interest in a particular, specific asset, as opposed to a general interest in an entire forfeited estate or account.") (citation omitted); cf. United States v. Agnello, 344 F. Supp. 2d 360, 363 (E.D.N.Y. 2004) ("general creditor" failed to establish "security interest" in payments at issue); United States v. Khan, 129 F.3d 114, 114 (2d Cir. 1997) (summary order) ("[A]ppellants all are essentially unsecured creditors of the owner's seized property, and as such do not have standing to challenge this seizure."). Thus, Roxas's unsecured interest in Marcos's property

as a judgment creditor is insufficient to confer Article III standing with respect to the instant case.

Roxas also argues that it has an interest in the assets because Roxas discovered the Yamashita Treasure, and Philippine law grants an interest in treasure to the finder "as a matter of legislatively created right." Roxas Standing Opp. at 6. This is supported by the declaration of Roxas's expert, Diane Desierto, who states that "[u]nder Philippine law, from [the] date [of discovery], through and including the present, Roger Roxas and [Golden Budha] have had a present, actual, identifiable, and legal interest in the treasure and any and all assets accumulated . . . through [the] use of any aspect of the [Treasure]." Declaration of Diane Desierto, filed Oct. 27, 2022 (Docket # 217) ("Desierto Decl."), ¶ 35. Desierto fails to clearly identify the nature of this "legal interest," however, and Roxas makes no attempt to clarify. See Roxas Standing Opp. at 6-7. The Government provides no evidence to contradict Roxas's interpretation of Philippine law.

"[W]hen a claimant responding to a summary judgment motion predicates his claim on an ownership interest, the 'manner and degree of evidence required' [to establish standing] is the 'assertion of ownership' combined with 'some evidence of ownership.'" Baer VIII, 2020 WL 7649213, at *6 (quoting United States v. $17,900 in U.S. Currency, 859 F.3d 1085, 1090 (D.C. Cir. 2017)). "When assessing the 'sufficiency and probity of the evidence

that purports to demonstrate a colorable ownership interest,' therefore, 'courts generally look to indicia of dominion and control such as possession, title, and financial stake.'" Id. (quoting United States v. All Assets Held at Bank Julius Baer & Co., Ltd., 959 F. Supp. 2d 81, 100 (D.D.C. 2013)). The Hawaii court found that Roger Roxas discovered the Yamashita Treasure and that the Treasure was later taken by Marcos. See Roxas v. Marcos, 89 Haw. at 113-14. Desierto opines that this interest continues to the present as a matter of Philippine law, which is uncontradicted by the Government. Roxas has thus provided an "assertion of ownership" and "some evidence" of that ownership with regard to the Treasure. The Treasure, however, is not necessarily the res subject to forfeiture in this action — instead, the subject of this action is the Arelma Account. Thus, Roxas's alleged interest hinges on the traceability of the assets in the Arelma Account to the Yamashita Treasure.

The parties agree that the contents of the Arelma Account derive from a single deposit of $2,000,000, made in 1972. Gov't Standing Mem. at 1; Roxas Standing Opp. at 8, 11 n.4. Additionally, the parties agree that, at the time, the only portions of the Yamashita Treasure that had been taken from Roxas were the golden Buddha statue, 17 bars of gold, and "three handfuls" of uncut diamonds. Roxas Standing Opp. at 8; Gov't Standing Mem. at 5. Roxas alleges that the "Arelma deposit was derived (either in whole

or in substantial part) from the . . . 17 bars of gold and the three handfuls of diamonds." Roxas Standing Opp. at 9. While the parties agree that the value of the gold bars was adjudged to be approximately $9,305, see Roxas Standing 56.1 Response ¶ 5, they do not agree on the value of the diamonds.

Roxas provides the following as evidence that the Arelma Assets derived from the portion of the Yamashita Treasure taken by Marcos in 1971 as described in Roxas v. Marcos, 89 Haw. at 101-02. First, Roxas notes that a forensic accountant named John W. Buckley once testified that "[t]he most likely source" of the Arelma Assets was "the treasure that the Japanese left buried . . . when they exited [the Philippines]." [6] See Roxas Standing Opp. at 12. Second, Roxas notes that Imelda Marcos publicly stated, including in prior legal proceedings, that the Marcos family's wealth was derived in part from the Yamashita Treasure. Id. at 15. Finally, he argues that there is "no . . . proof" that the Marcos family had any source of "excess wealth, other than that which was taken from Roxas" prior to the 1972 Arelma deposit. Id. at 20. We address each of these in turn.

1. Testimony of Buckley

[6] Although Roxas identifies Buckley as a "percipient witness," Roxas Standing Opp. at 13, there is no indication on the record that Buckley had firsthand knowledge of any underlying events in this case.

As to the testimony of forensic accountant John Buckley, Buckley is deceased and thus cannot testify. His deposition appears in the record, see Deposition of John Buckley, annexed as Ex. M to Robbins Decl. (Docket # 211-13) ("Buckley Dep."), but is admissible under Fed. R. Civ. P. 32 only if the case in which it was taken involves "the same subject matter between the same parties, or their representatives or successors in interest," Fed. R. Civ. P. 32(a)(8). "The 'same subject matter' and 'same party' requirements have been 'construed liberally in light of the twin goals of fairness and efficiency.'" Fed. Housing Fin. Agency v. Merrill Lynch & Co., 2014 WL 798385, at *1 (S.D.N.Y. Feb. 28, 2014) ("FHFA") (citing Hub v. Sun Valley Co., 682 F.2d 776, 778 (9th Cir. 1982)); accord District Attorney, 307 F. Supp. 3d at 209.

Here, Buckley's deposition was conducted in the Interpleader Case, to which neither the Republic nor the Government was a party. See Pimentel, 553 U.S. at 859 (Republic asserted sovereign immunity in the Interpleader Case). Thus, the requirement that "the same parties, or their representatives or successors in interest" be involved in both cases is not obviously satisfied. Roxas argues that the analysis in District Attorney, where the court found the Buckley deposition admissible on summary judgment, has equal force here. Roxas Standing Opp. at 13. In that case, Roxas sought to offer Buckley's testimony against the Duran Class in a dispute relating to assets purchased by the Marcos family. See District

Attorney, 307 F. Supp. 3d at 205-06, 10. The court noted that Duran, as a judgment creditor of Marcos — a party in the Interpleader Case — "st[ood] in the shoes of [the] judgment debtors" in relation to Roxas. Id. at 210. Accordingly, the court found that the testimony was admissible under Rule 32 because the Duran Class or "their predecessors in interest — Mr. and Mrs. Marcos — were represented and had the same motive to cross-examine the deponent" as Duran did in the District Attorney action. Id. (punctuation omitted). Thus, the court found that the "same party" requirement was satisfied. Id. Here, however, the opposing party is the Government, which is not a judgment creditor of the Marcos family and was not a party to the Interpleader Case. As such, the argument that the Government is Marcos's "successor in interest" cannot be made on the same grounds as applied in the District Attorney action. Instead, we must undertake a fresh analysis of whether under the liberal construction contemplated by case law the Government is a successor in interest to the Marcos defendants.

When considering whether to admit a deposition from a prior lawsuit, "courts have adopted a 'realistically generous approach over one that is formalistically grudging,' admitting testimony where 'it appears in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination.'" FHFA,

2014 WL 798385, at *1 (quoting Lloyd v. Am. Export Lines, Inc., 580 F.2d 1179, 1187 (3d Cir. 1978)) (punctuation omitted). "To be 'similar,' the motives to develop the testimony should be 'of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue.'" Id. (quoting United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1993)). In the Interpleader Case, the Marcos defendants had, as the court in District Attorney explained, a motive "to establish that Mr. Marcos had not stolen Roxas's treasure or, in the alternative, that whatever was stolen was of little value." 307 F. Supp. 3d at 210. That is not the Government's motive here; instead, the Government here has a motive to show that the portion of treasure stolen before the Arelma deposit was made was not the source of the Arelma deposit. Thus, we cannot say that the same "motive" for cross-examination existed in both cases.

But even if it were admissible under Rule 32, the testimony suffers from two separate defects. First, Buckley is not being offered as a fact witness but rather as an expert witness. See, e.g., Roxas Standing Opp. at 12. However, Roxas did not make the required expert disclosure regarding this testimony by the deadline in the instant case. Second, Buckley's testimony does not provide competent evidence as to the source of the Arelma Assets. Buckley testified to his opinion that the Yamashita Treasure was "the most likely source of most of the wealth that Marcos accumulated," including the Arelma Assets. Buckley

Dep. at 33:12-17. But his deposition testimony provides no reasonable support for this conclusion. Although Roxas cites Buckley's explanation that Marcos must have possessed the Treasure given his attempts "to sell gold worth . . . in excess of a trillion dollars," Buckley Dep. at 32:12-16; see Roxas Standing Opp. at 12, this testimony gives no context as to when this gold was acquired, and Roxas acknowledges that the "vast bulk" of the Treasure had not been recovered at the time of the Arelma deposit, see Roxas Standing Opp. at 8. As to Buckley's conclusion that "[t]he other source[s]" that may have formed the Arelma deposit, including "reparations that the Philippines received from Japan or . . . siphoning off of . . . aid money that the U.S. sent to the Philippines," were "small in comparison to the [T]reasure," Buckley Dep. at 33:15-23, this testimony again fails to address the timing of the acquisition or the traceability of the Treasure to the $2,000,000 Arelma deposit.

Indeed, Buckley testified that he "was not asked to trace gold or the treasure," and did not know if anyone had ever attempted to trace the source of the Arelma deposit. Id. at 33:2-11. Buckley testified that because he "was not asked to investigate the [Yamashita] [T]reasure," he "didn't do any independent investigation of it." Id. at 47:22-24. Because Buckley's opinion was based on no "independent investigation," and by his admission he did not investigate the source of these assets at all, a

reasonable factfinder could not use his testimony to conclude that the Arelma assets are traceable to the Yamashita Treasure. See S.E.C. v. Yorkville Advisors, LLC, 305 F. Supp. 3d 486, 504 (S.D.N.Y. 2018) ("[E]xpert testimony that rests on merely subjective belief or unsupported speculation is inadmissible and should be precluded.") (citation omitted). Thus, Buckley's testimony sheds no light on whether the particular deposit at issue here derived from the Treasure, much less the portion seized from Roxas in 1971.

2. Marcos's Public Statements

Roxas provides various public statements by Imelda Marcos and her representatives in which Marcos claimed that the Marcos family fortune was derived from the Yamashita Treasure, and argues that these statements show the Arelma deposit must be traceable to Roxas's discovery. See Roxas Standing Opp. at 15. Roxas points to the opening statement made by Imelda Marcos's attorney in New York criminal proceedings, where counsel forecast that a witness would "tell [the jury] that part of [Ferdinand Marcos's] wealth came from the discovery of what is called the Yamashita gold hoard." Transcript, annexed as Ex. G to Robbins Decl. (Docket # 211-7) ("Marcos Tr."), at 110:14-24. Roxas argues that this statement is a judicial admission, and thus is conclusive proof that the Yamashita Treasure was the

source of Marcos's assets. Roxas Standing Mem. at 15. Assuming arguendo that this is correct and that the statement was admissible, the statement still does not provide any information regarding the origins of the Arelma deposit. It shows only that "part" of Marcos's wealth came from the Yamashita Treasure, without reference to time frame or any indication that the portion of the wealth at issue was used to fund the Arelma Account — in short, the statement provides no proof for the assertion that the res at issue here is traceable to the Yamashita Treasure stolen before 1972.

Although Roxas also states that "the Marcos family and its cronies have made many similar assertions" in other proceedings, Roxas Standing Opp. at 15-16, Roxas cites only to its expert witness's testimony regarding a news article in which Imelda Marcos allegedly stated that "some of the gold her husband had was [the] legendary Yamashita treasure," Deposition of Diane Desierto, annexed as Ex. J to Robbins Decl. (Docket # 211-10) ("Desierto Dep."), at 120:15-24. Setting aside the issue of whether this statement would ever be admissible, this statement is no more persuasive as to the origins of the Arelma deposit than the last. It gives no information as to when the wealth was allegedly gained and makes no reference to the Arelma deposit. Additionally, it says that only "some" of the gold came from the Treasure.

Thus, the statement would not allow a finding that the Arelma Assets were derived from the portion of Treasure taken from Roxas prior to 1972.

3. Other Sources of Assets

Finally, Roxas argues that "[w]hen one considers the timing" of the 1971 seizure of the Yamashita Treasure and 1972 Arelma deposit, "coupled with the fact that the earliest and only judicially confirmed occurrence of Marcos [seizing property] . . . is the 1971 Marcos Raid on Roxas'[s] home, one is left with a strong inference . . . that the Arelma deposit was derived (either in whole or in substantial part) from the [] 17 bars of gold and the three handfuls of diamonds." Roxas Standing Opp. at 8-9. Roxas notes that "Marcos'[s] tax returns during the period . . . reflect only modest legitimate earnings and there is no evidence that Marcos earned or inherited any legitimate substantial wealth prior to taking office." Id. at 18 (citing Sandiganbayan Judgment). As further evidence of its theory, Roxas points only to the absence of proof that different funds were used to create the Arelma deposit. See id. at 17-18. Roxas asserts that because the Arelma account deposit occurred shortly after Marcos declared martial law, "it is unlikely that the Arelma account was funded by any 'ill-gotten' wealth . . . acquired during martial law." Id. at 18. Roxas argues that, in sum, "this creates a very strong inference" that the Arelma

Assets are traceable to the 1971 seizure of the Yamashita Treasure. Id.

Although the Government acknowledges that "it is theoretically possible that the 17 gold bars were liquidated and used to purchase a small portion of the Arelma Assets," it nonetheless argues that "Marcos could have equally funded such a tiny sliver of the Arelma Assets through virtually any tranche of licit or illicit wealth." Gov't Standing Reply at 3. The Government points to several reports that suggest Marcos had accumulated some of his wealth prior to the 1971 seizure. See Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan (June 2007), https://www.unodc.org/documents/ corruption/StAR-Sept07-full.pdf, at 20 ("Marcos started accumulating his ill-gotten wealth in 1965."); Ferdinand Marcos' Daughter Tied to Offshore Trust in Caribbean, Int'l Consortium of Investigative Journalists (Apr. 2, 2013), https://www.icij.org/ investigations/ offshore/ferdinand-marcos-daughter-tied-offshore-trust-caribbean/ (Marcos's use of illicit funds in 1968); David A. Chaikin, Controlling Corruption by Heads of Government and Political Elites, in Corruption and Anti-Corruption 97, 97-99 (Peter Larmour & Nick Wolanin eds., 2001), https://www.jstor.org/stable/pdf/j.ctt2tt19f.9.pdf (Marcos siphoned U.S. foreign aid in the 1960s); Nick Davies, The $10bn Question: What Happened to the Marcos Millions?, The Guardian (May 7, 2016), https://www.theguardian.com/world/2016/

may/07/10bn-dollar-question-marcos-millions-nick-davies (describing the Marcos accounts as "loaded" with funds "[b]y February 1970"). The Government gives no explanation as to why these documents are admissible, however. The Government also points to a decision by the Ninth Circuit in which the court explained that the Marcos family had disposed of $400,000 in assets through foreign funds and accounts as early as 1970. See Republic of Phil. v. Marcos, 862 F.2d 1355, 1362-63 (9th Cir. 1988).

We will assume, arguendo, that Roxas has shown that it is more likely than not (1) that the Arelma Assets and 1971 seizure assets were both in Marcos's possession in 1972, (2) that Marcos's tax returns reflect no legitimate income sufficient to be the source of the Arelma deposit, and (3) that in 1971 the Marcos family had not yet gained any wealth as a result of martial law seizures. The problem is that these facts simply do not allow a reasonable inference that the Arelma Assets are derived from the 1971 seizure. Any such inference requires the assumption that the Marcos tax returns would necessarily show previously accumulated wealth and that the Marcos's had no source of income other than martial law seizures. Nothing in the record supports this assumption, however. This is particularly true here where the gold bars have been valued at only $9,305 and there is no competent valuation of the remaining Treasure that was taken.

In sum, a finding that the Arelma deposit came from the 1971 seizure of the Yamashita Treasure would rest on speculation rather than any reasonable inference. Because a reasonable factfinder could not find that the Arelma Account was funded by the Treasure seized in 1971, Roxas does not have standing to challenge the recognition of the Philippine action. Accordingly, the Government's motion seeking to dismiss Roxas for lack of standing should be granted.

Notwithstanding the above, Roxas raises no arguments challenging the forfeiture that have not also been raised by Duran. Because we find for the reasons stated below that the Government's application must be granted, whether or not Roxas has standing has no practical significance for the disposition of this case.

B. Government Summary Judgment Motion

The Government has moved for summary judgment on Duran's Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Affirmative Defenses, and Roxas's First and Third Affirmative Defenses. See Gov't SJ Mem. The defenses at issue fall into three categories: those contemplated by section 2467, those not contemplated by the statute, and Duran's request to limit the enforcement amount if the application is granted. See Answer, filed Sept. 11, 2019 (Docket #

35) ("Duran Ans."); see also Gov't SJ Mem. We address each in turn.

1. Section 2467 Defenses

As noted, section 2467 provides that:

> The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that — (A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law; (B) the foreign court lacked personal jurisdiction over the defendant; (C) the foreign court lacked jurisdiction over the subject matter; (D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property . . . in sufficient time to enable him or her to defend; or (E) the judgment was obtained by fraud.

28 U.S.C. § 2467(d)(1). Of these five defenses, Duran alleges three: that the Sandiganbayan did not provide adequate notice to the Duran Class, that the judgment was obtained by fraud, and that the Sandiganbayan

lacked jurisdiction over the Arelma Assets. See Duran Ans. ¶¶ 27, 39, 45. We address each of the statutory defenses next.

a. Notice

Duran's Fifth Affirmative Defense argues that the Philippine Republic "failed to give any notice, consistent with the principles of due process, of the Arelma forfeiture proceeding . . . to the members of the [Duran] Class." Duran Ans. ¶ 45. The parties disagree as to whether United States law or Philippine law regarding due process controls the question of whether notice was adequate. See Gov't SJ Mem. at 7; Roxas SJ Opp. at 4; Duran SJ Opp. at 11. We therefore first address the appropriate choice of law before turning to the merits.

i. Choice of Law

The Government argues that "the phrase 'due process' in section 2467 is measured according to U.S. due process standards," under which "if the litigation procedures employed by the foreign nation are 'analogous' to procedures that are permissible in U.S. litigation, . . . the foreign nation's procedures satisfy due process for the purposes of Section 2467." Gov't SJ Mem. at 7 (quoting In re Restraint of All Assets Contained or Formerly Contained in Certain Inv. Accounts at UBS Fin. Servs., Inc., 860 F. Supp. 2d 32,

42 (D.D.C. 2012) ("UBS")). Duran does not provide a choice of law analysis, arguing only that "the Republic failed to give notice to Class members as required by both United States and Philippine law." Duran SJ Opp. at 11.

The few cases that have considered the issue of "due process" under section 2467 all appear to consider whether the foreign process was consistent only with United States' standards of due process, not a foreign country's standards. See In re $6,871,042.36, 2021 WL 1208942, at *5 (D.D.C. Mar. 31, 2021) (considering whether Brazilian forfeiture proceedings gave claimants "an opportunity to be heard"); Eclipse, 2022 WL 4119773, at *5 (finding with regard to section 2467(d)(1)(A), [7] that Spanish due process procedures were "consistent with the requirements of due process in the United States"); In re Seizure of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency, 903 F. Supp. 2d 19, 34 n.15 (D.D.C. 2012) ("$12,116,153.16") ("[T]he proceedings in Brazil appear to meet the requirements of due process under U.S. law."); UBS, 860 F. Supp. 2d at 42 ("the procedures employed to obtain the [foreign] [o]rder . .

[7] Section 2467(d)(1)(A) provides a defense where "the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law," as contrasted with section 2467(d)(1)(D)'s defense that "the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property . . . in sufficient time to enable him or her to defend."

. [were] analogous to procedures used in the United States," and were "not incompatible with due process" where they "have analogs in our own legal system") (analyzing § 2467(d)(1)(A) and § 2467(d)(3)(A)(ii)(I), which incorporates (d)(1)(A) by reference).

We agree that section 2467's invocation of "due process" must be intended to refer to notions of due process under United States law, rather than foreign law. This is particularly true since "due process" is a well-understood concept in United States law and Congress likely did not believe that the same concept was expressed in the law of the many dozens of foreign countries whose judgments might be at issue in section 2467 proceedings. Further, if a foreign government's notion of "due process" was anathema to our own — for example, a regime that charged an exorbitant filing fee to contest the forfeiture — we have little doubt that Congress intended that the lack-of-due-process defense would be satisfied. Thus, we consider only whether the notice provided in this case comports with due process under United States law.

ii. Merits

Duran argues that although "the [Duran] Class was an interested party [with regard to the Arelma Assets] beginning in November 1991," "[t]he Republic neither gave notice of the [motion for summary judgment] to the Class members nor attempted to give them notice." Duran SJ Opp. at 11-12.

Section 2467(d)(1)(D) provides that a foreign judgment should not be registered if "the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property . . . in sufficient time to enable him or her to defend." We begin by assessing whether Duran was a "person with an interest in the property" under section 2467. Because, as described below, Duran was not a person with "an interest" in the Arelma Assets, we need not address whether he was given notice.

I. Timing of Interest

Duran provides no framework for how a court should determine under section 2467 whether a party has an "interest," and acknowledges that the statute itself "does not elaborate on the nature or extent of the interest a person must have." Duran SJ Opp. at 11. Nonetheless, the first issue we must address is at what point the existence of the "interest" should be evaluated. The Government argues that what matters is not whether Duran has gained an interest in the Arelma Assets since the Sandiganbayan judgment, but rather whether Duran had an interest at a time when due process required the Republic to give notice of the Sandiganbayan proceedings before they occurred. See Gov't SJ Reply at 13 & n.6. Although there appears to be no case law addressing this question, we believe that the Government's contention

is the only reasonable interpretation of the statute. If section 2467's notice requirement applied to interests existing after the decision was rendered, the requirement that the foreign nation "take steps . . to give notice . . . in sufficient time to enable [the interested person] to defend" would be impossible to satisfy. See 28 U.S.C. § 2467(d)(1)(D). Thus, the relevant question is whether Duran had an interest at some time before the Sandiganbayan judgment was rendered on April 2, 2009.

This does not dispose of the timing question, however, because the parties still disagree on whether the existence of a party's interest at the time of judgment is necessary as long as the interest existed at some time before the date of judgment. The Government argues that, unless Duran's interest existed at the time the Sandiganbayan judgment was rendered — that is, April 2, 2009 — Duran's defense must fail. Gov't SJ Reply at 13. Duran counters that the relevant date on which the Class must have had an interest is the date of filing of the motion for partial summary judgment in this case: that is, July 16, 2004. Duran Cross-Mot. Mem. at 12. The Government's argument is premised on the contention that "when a court forfeits property in which a challenger has no present interest, the challenger is not harmed by the court's decision. . . . even if the challenger had an interest in the property at some earlier time." Gov't SJ Reply at 14 (emphasis added). Although the Government acknowledges that "a court should

determine interested parties at an early stage of proceedings, so that they can be provided with notice," it argues that in a section 2467 proceeding, "a putative challenger was not harmed by the foreign forfeiture judgment unless she had an interest in the property at the time of the foreign judgment." Id. Thus, the Government argues that if the Duran Class lacked an interest on April 2, 2009, when the assets were forfeited, it was not an "interested party" under section 2467(d)(1). See id. Duran responds that the Government's argument is "nonsensical," because "[t]he point of giving notice is for the court to receive and consider the positions of persons with an interest." Duran Cross-Mot. Mem. at 12.

We believe this question must be answered in light of the purpose of section 2467 and the notice defense. See generally Abramski v. United States, 573 U.S. 169, 179 (2014) (when interpreting a statute, courts should look "to the statutory context, structure, history, and purpose"). The purpose of the notice requirement was surely to give a party with an actual interest in the property a chance to persuade the foreign court to recognize their interest — not to penalize a foreign government for failing to jump through a pointless procedural hoop. We will assume arguendo that the Duran Class had in interest in the Arelma Assets in 2004. If the Duran Class in fact had an interest in the Arelma Assets at the time of the forfeiture in 2009, notice to the Duran Class in 2004 would potentially have achieved the purpose

contemplated by the statute; that is, to allow the Duran Class an opportunity to be heard by the Sandiganbayan before it issued its judgment. But if the Duran Class did not have such an interest at the time of the judgment in 2009, the Duran Class was not harmed by the failure to have notice of the proceeding and thus could not claim that it was denied appropriate process. In light of the complete lack of harm in this latter scenario, we do not believe it was the intention of section 2467 to have U.S. courts refuse to recognize a foreign forfeiture judgment simply because the foreign court failed to give notice to a party that had no interest in the property at the time it was actually forfeited.

II. Whether Duran had an Interest on April 2, 2009

We thus turn to whether the Duran Class had an interest in the property on April 2, 2009, at the time the forfeiture judgment was made. Duran presents a series of arguments as to why "the Class had an interest in the Arelma Assets beginning no later than November 1991 . . . [and] continu[ing] unabated to the present." Duran Cross-Mot. Mem. at 9. First, Duran asserts that in 1991, the District of Hawaii "enjoined any transfer or dissipation of the [Marcos] Estate's assets," id. at 8 (citing Hilao II, 103 F.3d at 771), after which "[i]n February 1995, the injunction became permanent upon entry of the final

judgment," id. (citing Hilao I, 103 F.3d at 763). Subsequently in 2000, Merrill Lynch "deposited the Assets" with the District of Hawaii, and in 2004, "the Class prevailed . . . and judgment was entered awarding title to the Class and directing transfer of the Assets to the Class[] Settlement fund held by the Clerk of Court." Id. (citing Merrill Lynch v. Arelma, 2004 WL 5326929, at *7). Although Duran acknowledges that the "Supreme Court reversed the [District of Hawaii] judgment" in 2008 and "remanded the case to the Ninth Circuit with directions to dismiss the case and transfer the Arelma Assets to Merrill Lynch," id. at 9 (citing Pimentel, 553 U.S. at 851), Duran asserts that "the transfer was piecemeal" and the Assets were not transferred in full until February 2010, id. Duran asserts that the Class "transferred its first judgment" to this District, and subsequently to state court, and then "levied on the Arelma Assets" beginning on November 30, 2009. Id. (citing Swezey, 2009 WL 4009121; Duran R. 56.1 Statement ¶¶ 66-69). Finally, Duran points to the D.C. District Court's prior ruling in this matter, id., in which Judge Leon found that "[t]his levy means the Duran Class is not merely a general unsecured creditor — it has a specific interest in the Arelma funds." See In re Arelma, 2019 WL 3084706, at *3.

We conclude, however, that none of these circumstances show that Duran had an interest in the property as of April 2, 2009.

First, the injunction against the Marcoses requiring that they not dissipate their assets does not show an interest in 2009 because the judgment expired in 2005. See In re Est. of Marcos Human Rights Litig., 496 F. App'x at 759 n.1.[8]

Next, the results of the Interpleader Case do not show an interest in the Arelma Account in 2009 because the Supreme Court required dismissal of that action in 2008. The Supreme Court's mandate was issued on June 12, 2008. See Pimentel, 553 U.S. at 873. While the district court took a long time to fulfill the seemingly ministerial task of returning the funds to Merrill Lynch, it cannot be said that the Duran Class had any "interest" in these funds during this period — or, more precisely, that the Duran Class had an interest in the funds that were actually returned to the Arelma Account and that are thus the subject of this section 2467 proceeding. This is because the Supreme Court's decision and mandate definitively determined that the interpleader judgment had

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[8] Even if it had not expired, we question whether a broad injunction against dissipation of any assets would constitute an "interest" in particular property requiring a forfeiture court to give notice to the party that obtained such an injunction. Notwithstanding an injunction of this kind, the party remains a "general creditor," and it is well settled that a general creditor does not have an interest in property subject to a forfeiture action. See In re 650 Fifth Ave. & Related Props., 2014 WL 1998233, at *4; United States v. Schwimmer, 968 F.2d 1570, 1581 (2d Cir. 1992) ("We turn then to the question of whether a general creditor has an interest in property ordered forfeited that invalidates an order of forfeiture. We hold that it does not.").

improperly adjudicated that the Duran Class had an interest in the funds, even if those funds were not returned to Merrill Lynch until later. As the Ninth Circuit noted, during this period the funds were merely in the "clerk of court's custody," see Merrill Lynch v. Arelma, 587 F.3d at 924, and cannot be said to have been the property of the Duran Class at any time after the Supreme Court's mandate issued on June 12, 2008, Pimentel, 553 U.S. at 857.[9]

As to the levies, we will assume arguendo that the Duran Class's levy on the Arelma Assets reflected an interest in the Arelma Account. But the levies do not help the Duran Class because the first levy did not occur until November 30, 2009, see Duran 56.1 Statement ¶ 68, months after the April 2, 2009, forfeiture judgment.

Finally, Duran points to a 2019 ruling of Judge Leon stating that a Duran Class levy "means the Duran Class is not merely a general unsecured creditor — it has a specific interest in the Arelma funds." In re Arelma, 2019 WL 3084706, at *3. In other words, Judge Leon found a continuing "interest" in the Arelma Assets as of 2019 based on the levy. This statement, however, was merely an assessment of the interest that the Duran Class had at the time it

[9] We note that the view of Duran's expert was that any interest Duran had in the Arelma Assets under Philippine law was "based on [the] U.S. Federal Court decision" — presumably referring to the interpleader decision. See Francisco Report ¶ 22. Thus, Philippine law does not support the notion that the Duran class had an interest in those assets.

sought to intervene in 2019, not the interest as of the date relevant to the section 2467 analysis here — that is, April 2, 2009.[10]

For these reasons, we find that the Duran Class did not have an "interest" in the property within the meaning of section 2467(d)(1)(D) and thus no notice was required to be given to the class. As a result, the Government should be granted summary judgment as to Duran's Fifth Affirmative Defense.

b. Fraud

Section 2467(d)(1)(E) requires that a foreign judgment of forfeiture not be recognized if it "was obtained by fraud." As to the law that governs this defense, the Government cites case law applying Fed. R. Civ. P. 60(b)(3) — allowing for relief from a judgment for "fraud" — which has been articulated as the "fraud on the court" standard. See Gov't SJ Mem. at 18. Duran cites to case law involving civil claims of fraud by one party against another party. See Duran SJ Opp. at 32. We believe the "fraud on the court" standard is most analogous to the fraud defense in section 2467(d)(1)(E) inasmuch as the fraud at issue

[10] Additionally, Judge Leon was assessing the "injury-in-fact" requirement of Article III not the "interest" requirement of section 2467(d)(1)(D) and it is not clear that the standards for evaluating a party's interest in these circumstances are the same. See In re Arelma, 2019 WL 3084706, at *3.

in that defense is specifically a fraud aimed at obtaining a judgment from a court.

Under that standard, "fraud on the court"

> " . . . is limited to fraud which seriously affects the integrity of the normal process of adjudication." [Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir. 1988)] (citing Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972)). Fraud upon the court should embrace "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." Hadges[v. Yonkers Racing Corp.], 48 F.3d [1320,] 1325 (quoting Kupferman, 459 F.2d at 1078 (internal quotation marks omitted)). Fraud upon the court must be established by clear and convincing evidence. See Madonna v. United States, 878 F.2d 62, 65 (2d Cir. 1989).

King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002).

Duran's Fourth Affirmative Defense argues that the Sandiganbayan judgment "was obtained by

fraud" because the Republic "fil[ed] the claim for forfeiture of the Arelma Assets . . . despite having received full payment" as a result of a prior settlement agreement with Campos, and failed to inform the Philippine court that this settlement existed. Duran Ans. ¶¶ 39-41.

As an initial matter, we do not see how the filing of the claim for forfeiture can by itself constitute a "fraud" on the court. We thus address only the question of whether there was a fraud on the Court because the PCGG "fail[ed] to inform the Sandiganbayan that the Republic had been fully compensated for its claim to the Arelma Assets." Duran SJ Opp. at 30.

Duran's argument is premised on a 1986 settlement agreement between the Republic of the Philippines and Campos, an individual Duran describes as "a Marcos co-conspirator." Id. at 30-31. As part of this settlement, Duran avers that Campos "paid the Republic $15 million and transferred stock . . . with a total value of about $115 million." Id. at 31. Duran argues that this settlement "fully satisfied the Republic's claim that the money in the Arelma [A]ccount was the product of a conspiracy by Marcos and Campos to misappropriate the Republic's money" and, per a 1989 ruling of the Philippine Supreme Court, the amount of that settlement should have been applied as "a credit toward any damages assessed against a joint tortfeasor" such as Marcos. Id. at 31-32. Duran argues that the Republic's failure to

disclose the settlement to the Sandiganbayan constituted an attempt to seek double recovery, and thus by filing the motion for summary judgment before the Sandiganbayan and "representing its entitlement to forfeiture of the Arelma Assets, the Republic committed fraud." Id. at 33.

The Government argues that the settlement was, in fact, disclosed to the Sandiganbayan, and that in any event the Sandiganbayan would have been aware of the settlement and its implications through other sources. Gov't SJ Mem. at 18-19. To the extent that Duran's argument relies upon the contention that the Sandiganbayan was not informed of the purported "credit" resulting from the Campos settlement, the Government argues that the applicability of the "credit" principle is questionable. Id. at 21. Finally, the Government argues that even if the "credit" principle applied to the Sandiganbayan judgment, the amount of the credit was insufficient to satisfy the Sandiganbayan judgment, and the Arelma Assets would still be forfeitable. Id. at 22-23.

We need not reach all of the Government's arguments because we cannot find that the Philippine courts were in any way the victim of a "fraud on the court" based on the alleged failure to disclose the Campos settlement or to make the argument that the Marcoses were due credit from that settlement.

To put it simply: there can be no "fraud on the court" where any alleged omission was contained in documents the party actually presented to the Court

or where the Court made clear that it was aware of the allegedly omitted information. See Weldon v. United States, 225 F.3d 647, 647 (2d Cir. 2000) (summary order) ("All of [appellant's] allegations of 'fraud' in this case amount to a general claim that defense counsel mischaracterized the applicable law, and the evidence and affidavits submitted to the district court. Even assuming everything that [appellant] claims is true, this does not rise to the level of fraud on the court."); see also Wu v. Lehman Brothers Holdings Inc., 2022 WL 3646207, at *2 (S.D.N.Y. Aug. 24, 2022) ("[A] litigant's selective quotation of documents that are available in full on the public docket is far afield from the type of conduct that would constitute fraud under either Rule 60(b)(3) or 60(d)(3)."). Here, the Sandiganbayan judgment notes that the "assets, funds, and property involved in the Republic's forfeiture petition" included "[p]roperties surrendered to the government by Marcos crony Jose Y. Campos." Sandiganbayan Judgment at *32 & n.25. In addition, the Republic's petition to the Sandiganbayan annexed a letter which states, inter alia, that Campos agreed to deliver tract titles, stock shares, and cash to the Republic as a "compromise settlement." Campos Settlement Let., annexed as Ex. J to Second Sohn Decl. (Docket # 206-4), at *5-6. Finally, a 1989 decision of the Philippine Supreme Court made public the terms of the Campos settlement, including that Campos was to "pay a sum of money" and "surrender . . . properties and assets

disclosed and declared by him to belong to . . . Marcos" in return for release from liability. Republic of Phil. v. Sandiganbayan, annexed as Ex. K to Second Sohn Decl. (Docket # 206-5) ("1989 PSC Decision"), at *14-15. In light of these circumstances, we do not see how the Sandiganbayan or the Philippine Supreme Court could be characterized as a victim of fraud on the court. We reject Duran's argument that the motion for partial summary judgment itself had to annex these documents (rather than appearing in the initial petition), because the documents were obviously available to the courts, and if they were in fact legally or factually relevant, the adverse party (the Marcoses) could certainly have used them to their advantage. Of course, the Philippine Supreme Court's 1989 opinion referencing the terms of the Campos settlement was plainly sufficient to apprise the Sandiganbayan of its existence, particularly where the Sandiganbayan was itself a party to that case. See 1989 PSC Decision.

To the extent that Duran argues that the Republic failed to disclose the applicability of the "credit" to the Sandiganbayan, as reflected in the 1989 Supreme Court Opinion, we do not see how an alleged failure to disclose a legal principle to a court can constitute a "fraud" on that court within the meaning of section 2467. The Republic cannot possibly have concealed the principles of law embodied in a

Philippine Supreme Court decision from the Sandiganbayan.[11]

Accordingly, Duran has not provided evidence that the Sandiganbayan judgment was procured by fraud and the Government is entitled to summary judgment on Duran's Fourth Affirmative Defense.

c. Jurisdiction

Section 2467(d)(1)(C) provides that a forfeiture judgment shall not be entered if "the foreign court lacked jurisdiction over the subject matter." Duran's Second Affirmative Defense argues that the Sandiganbayan "lacked subject matter jurisdiction

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[11] Additionally, we do not follow Duran's credit argument. Duran argues that the Campos settlement amount should be deducted from liability for "alleged misappropriations by Marcos and Campos as joint tortfeasors." Duran SJ Opp. at 35. Duran characterizes the 1989 Decision as stating that "the Campos settlement credit applied only to damages for which Marcos and Campos were conspirators and jointly and severally liable." Id. at 36 (emphasis added). As Duran acknowledges, however, the motion for partial summary judgment that was the basis for the Sandiganbayan judgment was "specific to the Arelma Assets only." Id. at 35. In other words, it was not an action for damages based on torts committed by Marcos or Campos, but rather an in rem action for the forfeiture of a specific res — the Arelma Assets. See Sandiganbayan Judgment at *39-41, 43 ("[P]etitioner's [motion] . . . can be considered as seeking separate judgment with respect to the Arelma [A]ssets only. . . . [T]his forfeiture proceeding is an action in rem."). Thus, even if Duran were correct about the existence of a "credit," it would not apply here, where neither Marcos nor Campos was the subject of the Sandiganbayan judgment.

over the Arelma Assets" because "[a]t the time the Arelma forfeiture action was pending . . . the Arelma Assets were in custodia legis of the federal court in Hawaii." Duran Ans. ¶¶ 27-28.

We begin by noting that Duran asserts without citation that "the burden of establishing that the Sandiganbayan had jurisdiction over [the Arelma Assets] is on the [Government]." Duran Cross-Mot. Mem. at 1-2. In fact, the mandatory language in section 2467 — that the Court "shall" enter necessary orders unless it finds a listed defense applicable, see 28 U.S.C. § 2467(d)(1) — indicates that the burden is on Duran, as the party opposing enforcement, to demonstrate the existence of the affirmative defenses listed in section 2467.

In any event, Duran seeks to establish this defense by repeatedly citing to United States law on forfeiture and subject matter jurisdiction. See, e.g. Duran Cross-Mot. Mem. at 3-6. In fact, unlike the references to "due process" in section 2467(d)(1)(A), the reference to jurisdiction over the "subject matter" jurisdiction defense in section 2467(d)(1)(C) necessarily refers to whether the foreign country's laws, not United States forfeiture law, permitted the foreign court to issue an order regarding the forfeited asset. We reach this conclusion because the "subject matter" defense specifically refers to the "foreign court" having subject matter jurisdiction. 28 U.S.C. § 2467(d)(1)(C). Whether a "foreign court" could exercise subject matter jurisdiction can only be understood by

reference to the "foreign" law that the "foreign court" was applying.[12]

To meet his burden of demonstrating what Philippine law provides as to the jurisdiction of the Sandiganbayan, we would have expected Duran to supply an affidavit of an expert in Philippine law that cites to Philippine case law, rules, or statutes showing that the Sandiganbayan's exercise of subject matter jurisdiction was improper. But no such affidavit has been supplied.[13]

In the absence of a competent affidavit of an expert, we are left only with the Sandiganbayan's own ruling asserting subject matter jurisdiction over the Arelma Account. See Sandiganbayan Judgment at *48 ("There is no reason to doubt that this Court has jurisdiction and authority to render a judgment of forfeiture on all assets and funds of Arelma . . . including those funds . . . invested at Merrill Lynch

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[12] While the parties cite no case law that directly addresses this choice-of-law question, courts in other cases have looked to the law of the foreign country when applying this defense. See Eclipse, 2022 WL 4119773, at *6 (Spanish law); In re $6,871,042.36, 2021 WL 1208942, at *5 (Brazilian law).

[13] Roxas, who lacks standing, cites to a declaration of an expert who conclusorily asserts that the Philippine Courts did not have subject matter jurisdiction. See Desierto Decl. ¶ 23. Duran, however, does not rely on this affidavit and in any event, the affidavit is not persuasive as it lacks any citation to Philippine law for the jurisdictional point. See id. It was also filed without notice to the Government and in violation of the expert disclosure requirements, and thus would not be considered anyway. See Gov't SJ Reply at 31-32.

[in] New York."). Also in the record is the Philippine Supreme Court's statement on the issue in Marcos v. Republic of Phil., dated Mar. 12, 2014, annexed as Ex. A to Application (Docket # 1-1), at *98, which addressed the Sandiganbayan Judgement at issue here. That ruling stated that:

> [T]he Sandiganbayan did not err in granting the Motion for Partial Summary Judgment, despite the fact that the Arelma [A]ccount and proceeds are held abroad. To rule otherwise contravenes the intent of the forfeiture law, and indirectly privileges violators who are able to hide public assets abroad: beyond the reach of the courts and their recovery by the State. Forfeiture proceedings . . . are actions considered to be in the nature of proceedings in rem or quasi in rem, such that [j]urisdiction over the res is acquired either (a) by the seizure of the property under legal process, whereby it is brought into actual custody of the law; or (b) as a result of the institution of legal proceedings, in which the power of the court is recognized and made effective. In the latter condition, the property, though at all times within the potential power of

> the court, may not be in the actual custody of said court.

Id. at *101 (quotation omitted) (emphasis in original).

Duran argues that the Arelma Assets were subject to the "prior exclusive jurisdiction" doctrine at the time of the Sandiganbayan's assertion of in rem jurisdiction because they had been deposited with the District of Hawaii. Duran Cross-Mot. Mem. at 5-6. Duran characterizes this doctrine as holding that "once one court exercising in rem jurisdiction has taken control over an asset, no other court may purport to adjudicate interests in that res." Id. at 5 (citing Farmers Loan & Tr. Co. v. Lake St. Elevated R. Co., 177 U.S. 51, 61 (1900)). But Philippine law applies to the "subject matter" jurisdiction issue and Duran provides no evidence as to Philippine law on the matter. In any event, "prior exclusive jurisdiction" is a doctrine that stems from concerns regarding comity among state and federal courts, 13F Wright & Miller, Federal Practice & Procedure § 3631 ("[T]he prior-exclusive-jurisdiction rule is based at least in part on considerations of judicial comity."), which is not at issue here where the courts are one federal court and one foreign court. Additionally, as the Government observes, "Section 2467(d)(3)(A)(i) expressly allows a U.S. court to issue a restraining order against property to preserve the property for foreign forfeiture proceeding[,] even before a foreign

court has commenced forfeiture proceedings." Gov't SJ Reply at 29; see United States v. Federative Republic of Brazil, 748 F.3d 86, 90 n.4 (2d Cir. 2014) ("Congress amended 28 U.S.C. § 2467 to permit district courts to issue restraining orders 'at any time before or after the initiation of forfeiture proceedings by a foreign nation[.]'") (quoting 28 U.S.C. § 2467(d)(3)(A)). This demonstrates that a United States court's exercise of jurisdiction over the res — including the placement of the res under a restraining order — is not an act that deprives the foreign court of jurisdiction within the meaning of the statute.

Duran also argues that a statement in the Ninth Circuit's denial of a petition for rehearing in the Interpleader Case should control here. Duran Cross-Mot. Mem. at 2. That decision stated that "[t]he Republic has no jurisdiction over the rem, which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States." Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp., 467 F.3d 1205, 1207 (9th Cir. 2006) (subsequent history omitted). This statement is dictum, and the Ninth Circuit's affirmance of the interpleader was of course reversed by the Supreme Court. See Pimentel, 553 U.S. at 873. In any event, this statement (1) was made without any reference to the requirements of section 2467; and (2) is inconsistent with the Supreme Court's own statement noting that the Republic "might bring an action" in the United States to enforce the forfeiture judgment,

citing section 2467. See Pimentel, 553 U.S. at 868. Thus, it has no bearing on our adjudication of the instant application.

In sum, Duran has not shown that the Sandiganbayan lacked subject matter jurisdiction to render the judgment sought to be enforced here. Accordingly, the Government should be granted summary judgment as to Duran's Second Affirmative Defense.

2. Other Defenses

Duran's answer lists additional defenses not contemplated by section 2467. Duran's Seventh Affirmative Defense argues that he and his class have priority over the Arelma Assets as first-in-time creditors. Duran Ans. ¶ 58. Duran's Eighth Affirmative Defense argues that this matter should be barred as res judicata due to previous cases filed by the Republic of the Philippines. Id. ¶ 64. Finally, Duran's Ninth Affirmative Defense argues that the court should reject the Government's application on comity grounds. Id. ¶ 65. Each of these defenses fails.

Duran is not entitled to raise defenses of priority or comity. Section 2467 lists five grounds upon which the court may decline to register a foreign judgment, involving due process, personal jurisdiction, subject-matter jurisdiction, notice, and fraud. See 28 U.S.C. § 2467(d)(1). The statute dictates that "[t]he district court shall enter such orders as

may be necessary to enforce the judgment" unless one of these flaws is present in the forfeiture judgment. Id. (emphasis added). A court does not have discretion to consider other defenses. See Eclipse, 2022 WL 4119773, at *5 ("Because [respondent's] claim does not fall within a statutory exception in 28 U.S.C. § 2467(d)(1), this [c]ourt will not consider it."). Because neither the priority of creditors defense nor the comity defense are listed in the statute, we do not entertain them here.

On the other hand, we are not convinced that the statutory language prevents respondents from raising res judicata. To do so would allow the Government to repeatedly bring the same application without regard to prior attempts, in defiance of the common law principle that a decision on the merits should "ensur[e] a definitive end to litigation." See Bryant v. United States, 71 F. Supp. 2d 233, 236 (S.D.N.Y. 1999) (citing Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981)). "[W]here a common-law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." Channer v. Dep't of Homeland Sec., 527 F.3d 275, 280 (2d Cir. 2008) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)). The purpose of section 2467 — to allow the United States Government to enforce a

foreign forfeiture judgment — is fully consistent with principles of res judicata.

As to the merits, the res judicata argument is rejected. Duran argues that the Government's application is barred under the "multiple dismissals" section of Rule 41 of the Federal Rules of Civil Procedure. Duran SJ Opp. at 24-26. Rule 41 provides that where a plaintiff unilaterally dismisses an action, "[u]nless the notice or stipulation states otherwise, the dismissal is without prejudice." Fed. R. Civ. P. 41(a)(1)(B). However, "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." Id. Duran points to three previous cases brought by the Republic of the Philippines against Marcos. See Duran SJ Opp. at 24; see Republic of Phil. v. Marcos, 806 F.2d 344 (2d Cir. 1986); Republic of Phil. v. Marcos, 862 F.2d 1355 (9th Cir. 1988); Republic of Phil. v. Marcos, No. 86-cv-1184 (S.D. Tex. 1986). He argues that these suits each, "in stunningly broad language, alleged the misappropriation of hundreds of millions or billions of the Republic's property" by Ferdinand Marcos, Duran SJ Opp. at 24, and that each suit was dismissed by the Republic, id. at 26. Duran argues that under Rule 41, these dismissals operate as an adjudication on the merits which should preclude any future suits relating to the same claim. Id. He asserts that the Sandiganbayan proceeding concerned the same allegations and argues that the instant application "is

'based on' the claim in the [Sandiganbayan] proceeding," and thus barred under Rule 41 as an attempt to relitigate the claims in the previously dismissed cases. Id. at 29.

Setting aside the question of whether these previous dismissals qualify as an adjudication on the merits, Rule 41 does not preclude the Government's application. The application before the court is not a civil suit against Marcos and does not seek a judgment against Marcos predicated on the misappropriation of funds, as was true of the three civil actions Duran relies on. Instead, this action is a suit brought by the United States to register and enforce a judgment already rendered by the Sandiganbayan. Duran argues that the bar applies because the three dismissed actions involved pleading that Marcos "loot[ed] billions of dollars" and the instant action is based on the same claim. Id. at 28. But this argument fails to recognize the different character of the three cases and the application here. Here, the application makes no claim against Marcos but claims only that a foreign judgment exists and must be enforced. See 28 U.S.C. § 2467. Indeed, the court here is bound not to re-adjudicate the underlying facts of the Sandiganbayan judgment. Id. § 2467(e). This accords with our previous holding that "[t]he section 2467 claim is a separate action to enforce an existing foreign forfeiture judgment" which "does not revisit the merits of the foreign judgment" and thus "is not the same 'claim' that was pursued by the foreign

government in its courts." In re Enf't of Phil. Forfeiture Judgment, 442 F. Supp. 3d 756, 762 (S.D.N.Y. 2020). Because this application is "a new claim for relief," see id., it cannot be precluded by the previous dismissals.

Because the comity and priority defenses are outside the scope of defenses allowed by the statute and the res judicata defense is unavailing, the Government should be granted summary judgment on Duran's Seventh, Eighth, and Ninth Affirmative Defenses.

3. Limitation of Enforcement Amount

The Government seeks summary judgment on Duran's Sixth Affirmative Defense. Gov't SJ Mem. at 27-28. This defense alleges that, even if the Government is allowed to register the Philippine judgment, the amount of the judgment should be capped at $3,369,975.00. Duran Ans. ¶ 52. We view this issue not as a "defense" but rather as an effort to define the scope of the "orders" a court is required to issue "as may be necessary to enforce the judgment" under section 2467(d)(1). We thus address it on the merits.

Duran argues that the judgment should be limited to this amount because "[b]oth Section 2467 and New York law only permit recognition and enforcement of foreign monetary judgments for sums certain," and "[t]he only sum certain in the 2009

Sandiganbayan judgment is $3,369,975.00." Duran SJ Opp. at 44. We reject this argument. There is nothing in section 2467 that refers to the necessity of a foreign forfeiture judgment being in the form of a "sum certain." Duran's support for this argument is to point to the portion of section 2467 that provides that the "[p]rocess to enforce a judgment shall be in accordance with Rule 69(a) of the Federal Rules of Civil Procedure." 28 U.S.C. § 2467(d)(2). Duran then notes that Rule 69(a) refers to the procedure for the enforcement of money judgments and that another portion of section 2467 addresses the rate of exchange to be used where there is judgment "requiring the payment of a sum of money submitted for registration." See Duran SJ Opp. at 45 (citing 28 U.S.C. § 2467(f)). Duran goes on to argue that New York law permits registration only of a foreign judgment for a sum certain. Id. at 45-46.

None of these arguments prevents the forfeiture of the entire Arelma Assets as stated in the Sandiganbayan judgment. Section 2467 itself recognizes that a foreign forfeiture may either involve a "sum of money" or specific "property." See 28 U.S.C. § 2467(a)(2)(A), (B). Certainly, to effectuate the forfeiture of a bank account may require a court order directing the payment of money in the form of a money judgment.[14] But section 2467 does not require that

[14] Thus, Duran is incorrect that the term "property" cannot involve a bank account lest section 2467(a)(2)(A), referring to an order of a foreign court to "pay a sum of money," be rendered

the initial foreign forfeiture judgment be in the form of a money judgment. Under the Supremacy Clause, nothing in New York law can alter the effect of section 2467.

The Sandiganbayan judgment forfeits "all" of the Arelma Assets held at Merrill Lynch. Sandiganbayan Judgment at *57. While the judgment gives an "estimated" aggregate amount of the assets at the time of the judgment, the judgment is clear that the Arelma Assets from the Merrill Lynch account are forfeited in their entirety. Id.

Duran argues that "the investment account at Merrill Lynch ceased to exist after Merrill Lynch deposited the money into the Hawaii Federal Court in 2000" and that the 2009 transfer of the money to Merrill Lynch was not put into "an investment account." Duran SJ Opp. at 47-48. But the multiple court decisions and orders that governed the movement of this money from Merrill Lynch to the Hawaii Court and back to Merrill Lynch repeatedly refer to the money as being the Arelma Assets. See, e.g., Order for Return of Interpleaded Assets (referring to the "interpleaded assets"); Swezey Order (referring to the "Arelma Assets"). Thus, there is no ambiguity as to the intention and effect of the Sandiganbayan judgment.

"superfluous." Duran SJ Opp. at 48. The statute plainly seeks to cover foreign forfeiture judgments that involve either the payment of a specific sum or of the forfeiture of specific property. See 28 U.S.C. §§ 2467(A), (B).

In sum, the Government should be granted summary judgment as to Duran's Sixth Affirmative Defense.

C. Duran Cross-Motion

Duran's cross-motion seeks the dismissal of the Government's application. See Cross-Mot. Because Duran's cross-motion mirrors various aspects of the Government's motion, and the Government has prevailed on its motion, Duran's cross-motion must be denied.

IV. CONCLUSION

For the foregoing reasons, (1) the Government's motion for summary judgment as to Roxas's standing (Docket # 188) should be granted and Roxas should be dismissed as a respondent; (2) the Government's motion for summary judgment (Docket # 193) should be granted; and (3) Duran's cross-motion for summary judgment (Docket # 222) should be denied. The district court should issue the Order proposed by the Government registering and enforcing the foreign forfeiture judgment (Docket # 207).

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), 6(b), 6(d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court. Any request for an extension of time to file objections or responses must be directed to Judge Kaplan. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a), 6(b), 6(d); Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: October 3, 2023
New York, New York

/s/ Gabriel W. Gorenstein
GABRIEL W. GORENSTEIN
United States Magistrate Judge

Appendix F

28 U.S.C. § 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Appendix G

28 U.S.C. § 2467. Enforcement of foreign judgment

(a) Definitions. In this section—

(1) the term "foreign nation" means a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (referred to in this section as the "United Nations Convention") or a foreign jurisdiction with which the United States has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance; and

(2) the term "forfeiture or confiscation judgment" means a final order of a foreign nation compelling a person or entity—

(A) to pay a sum of money representing the proceeds of an offense described in Article 3, Paragraph 1, of the United Nations Convention, any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under Federal law if the offense were committed in the United States, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or

(B) to forfeit property involved in or traceable to the commission of such offense.

(b) Review by Attorney General.

(1) In general. A foreign nation seeking to have a forfeiture or confiscation judgment registered and enforced by a district court of the United States under this section shall first submit a request to the Attorney General or the designee of the Attorney General, which request shall include—

(A) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation judgment;

(B) [a] certified copy of the forfeiture or confiscation judgment;

(C) an affidavit or sworn declaration establishing that the foreign nation took steps, in accordance with the principles of due process, to give notice of the proceedings to all persons with an interest in the property in sufficient time to enable such persons to defend against the charges and that the judgment rendered is in force and is not subject to appeal; and

(D) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.

(2) Certification of request. The Attorney General or the designee of the Attorney General shall determine whether, in the interest of justice, to certify the request, and such decision shall be final and not subject to either judicial review or review under subchapter II of chapter 5, or chapter 7, of title 5 [5 USCS §§ 551 et seq. or 701 et seq.] (commonly known as the "Administrative Procedure Act").

(c) Jurisdiction and venue.

(1) In general. If the Attorney General or the designee of the Attorney General certifies a request under subsection (b), the United States may file an application on behalf of a foreign nation in district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States.

(2) Proceedings. In a proceeding filed under paragraph (1)—

(A) the United States shall be the applicant and the defendant or another person or entity affected by the forfeiture or confiscation judgment shall be the respondent;**(B)** venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the

basis for satisfaction of a judgment under this section may be found; and

(C) the district court shall have personal jurisdiction over a defendant residing outside of the United States if the defendant is served with process in accordance with rule 4 of the Federal Rules of Civil Procedure.

(d) Entry and enforcement of judgment.

(1) In general. The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that—

(A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;

(B) the foreign court lacked personal jurisdiction over the defendant;

(C) the foreign court lacked jurisdiction over the subject matter;

(D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property [of the proceedings] in sufficient time to enable him or her to defend; or

(E) the judgment was obtained by fraud.

(2) Process. Process to enforce a judgment under this section shall be in accordance with rule 69(a) of the Federal Rules of Civil Procedure.

(3) Preservation of property.

(A) Restraining orders.

(i) In general. To preserve the availability of property subject to civil or criminal forfeiture under foreign law, the Government may apply for, and the court may issue, a restraining order at any time before or after the initiation of forfeiture proceedings by a foreign nation.

(ii) Procedures.

(I) In general. A restraining order under this subparagraph shall be issued in a manner consistent with subparagraphs (A), (C), and (E) of paragraph (1) and the procedural due process protections for a restraining order under section 983(j) of title 18.

(II) Application. For purposes of applying such section 983(j)—

(aa) references in such section 983(j) to civil forfeiture or the filing of a complaint shall be deemed to refer to the applicable foreign criminal or forfeiture proceedings; and

(bb) the reference in paragraph (1)(B)(i) of such section 983(j) to the United States shall be deemed to refer to the foreign nation.

(B) Evidence. The court, in issuing a restraining order under subparagraph (A)—

(i) may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding; or

(ii) may register and enforce a restraining order that has been issued by a court of competent jurisdiction in the foreign country and certified by the Attorney General pursuant to subsection (b)(2).

(C) Limit on grounds for objection. No person may object to a restraining order under subparagraph (A) on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court.

(e) Finality of foreign findings. In entering orders to enforce the judgment, the court shall be bound by the findings of fact to the extent that they are stated in the foreign forfeiture or confiscation judgment.

(f) Currency conversion. The rate of exchange in effect at the time the suit to enforce is filed by the foreign nation shall be used in calculating the amount stated in any forfeiture or confiscation judgment requiring the payment of a sum of money submitted for registration.