To be argued by:
CHARLES A. ROTHFELD

STATE OF NEW YORK
COURT OF APPEALS

Osqugama F. Swezey,

Petitioner-Appellant,

vs.

Merrill Lynch, Pierce, Fenner & Smith Incorporated,

Respondent,

and

Philippine National Bank and Arelma, Inc.,

Intervenors-Respondents.

New York County
Index No. 104734/2009

BRIEF FOR INTERVENORS-RESPONDENTS

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DISCLOSURE STATEMENT

The Philippine National Bank ("PNB") is a publicly traded corporation. PNB has no parent corporation. Its overseas subsidiaries and affiliates are: PNB International Investments Corp.; PNB Remittance Centers, Inc.; PNB RCI Holdings Co., Ltd.; PMB Remittance Company Canada; PNB Global Remittance and Financial Co., HK, Ltd.; PNB Europe Plc.; PNB Italy, SpA; PNB Corporation, Guam; PNB Remittance Company Nevada; PNB Global Filipino Remitance Spain, S.A (suspended operations); and PNB Austria Financial Services GmbH (suspended operations). Its Philippine subsidiaries are: PNB Holdings Corporation; PNB Capital & Investment Corporation; PNB Forex, Inc.; Management Development Corporation (MADECOR); PNB General Insurers Co., Inc.; PNB Securities, Inc.; Bulawan Mining Corporation (BUMICO); and Japan-PNB Leasing and Finance Corp..

Arelma S.A.—sued herein as "Arelma Inc." ("Arelma")—is a Panamanian corporation whose shares are held in escrow by PNB. It has no parents,

subsidiaries, or affiliates.

Dated: New York, New York
January 12, 2012

Respectfully submitted,

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INTRODUCTION

In *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), the U.S. Supreme Court held that the Republic of the Philippines (the "Republic") and its Presidential Commission on Good Government ("PCGG") (collectively, "the Republic") are indispensable parties to a proceeding brought to resolve the ownership of assets to which the Republic asserts a substantial claim and that, in their absence, the suit must be dismissed. In this case, the Appellate Division reached the identical conclusion in a suit involving the *very same parties* and the *very same corpus of assets* that were before the U.S. Supreme Court in *Pimentel*. Petitioner-appellant Osqugama F. Swezey ("Swezey") challenges that ruling.

The decision below faithfully applies the indispensable-party rules set forth in CPLR 1001 and principles of international comity long recognized by the New York courts. In particular, adjudication of Swezey's claim in the Republic absence would greatly prejudice both the Republic and the stakeholder maintaining the assets in question; effectively override the Republic's sovereign immunity; undermine international anti-corruption policies, which direct that ownership of stolen assets be determined by courts of the nation where the assets originated (here, the Philippines); and interfere with ongoing judicial proceedings over the assets in the Philippines. Indeed, the Sandiganbayan, the special anti-corruption court in the Philippines, has already held that the Arelma assets are the property of

the Republic; an appeal of that ruling is pending before the highest court of the Republic.

For all these reasons, this Court should follow the lead of the U.S. Supreme Court in identical circumstances and hold that, because the Republic is an indispensable party to this litigation, it would be inappropriate to reach the merits of Swezey's claim in the Republic's absence. Even if the Court disagrees, however, it should not, as Swezey asks, "remand . . . for a final hearing" on ownership of the assets. There remains the threshold issue whether the proceeding should be dismissed on the independent ground that Swezey lacks a judgment enforceable in New York. Because the Appellate Division ordered dismissal of the case on indispensable-party grounds, it did not address this alternative argument for reversal of the trial court's ruling. Accordingly, if the Court determines that the Republic is not an indispensable party, it should return this case to the Appellate Division for the purpose of determining whether Swezey has an enforceable judgment.

QUESTION PRESENTED

Whether an action brought to settle ownership of assets to which a foreign sovereign asserts a non-frivolous claim may proceed in the sovereign's absence when the sovereign has not been joined because it is immune from suit?

The Appellate Division answered no.

STATEMENT OF FACTS

The background of this litigation is described in detail in the U.S. Supreme Court's decision in *Pimentel*, *see* 553 U.S. at 856-60, and in the decision below, *see Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 87 A.D.3d 119, 123-25 (1st Dep't 2011). Briefly, Swezey claims to be a judgment creditor of the estate of former Philippine President Ferdinand Marcos and asserts that the Arelma assets are the estate's property. Those assets are also claimed by the Republic, which maintains that, under Philippine law, they were forfeited to the Republic from the moment that Marcos misappropriated them and never became a part of his estate. Philippine National Bank ("PNB") holds Arelma's bearer shares in escrow and is obligated by the escrow agreement to deliver the Arelma assets to whomever is determined to be their owner by the Philippine courts.

A. Factual Background And Foreign Proceedings

During his time in office, Marcos caused the incorporation of a Panamanian corporation called Arelma, Inc. (R. 37 ¶¶ 6-7), which used assets stolen by Marcos to open a brokerage account with Merrill Lynch, Pierce, Fenner & Smith ("Merrill") in New York (*id.* ¶ 8) and maintained its bearer share certificates in Switzerland. R. 38 ¶ 12; *see Swezey*, 87 A.D.3d at 123-24. Today, Arelma's

account with Merrill contains approximately $35 million.[1] Merrill claims no interest of its own in the Arelma assets. R. 48 ¶ 4; *see Swezey*, 87 A.D.3d at 124 n.2, 131-32.

The assets in the Arelma account already have been the subject of judicial proceedings in both Switzerland and the Philippines. After the overthrow of the Marcos dictatorship in 1986, the Republic created the PCGG to recover property wrongfully appropriated by Marcos. R. 229 ¶ 4. At the Republic's request, the Swiss government—relying on Philippine law providing that property derived from the misuse of public office is "forfeited to the Republic from the moment of misappropriation" and therefore *never* belonged to Marcos or entered his estate after his death, *Pimentel*, 553 U.S. at 858; *Swezey*, 87 A.D.3d at 125—froze certain Marcos-related Swiss assets, including the Arelma shares. *Pimentel*, 553 U.S. at 858-59; R. 230 ¶ 5.

The Swiss Federal Supreme Court subsequently ordered these assets returned from Switzerland to the Philippines, on the condition that the Philippine courts determine ownership. The Swiss court explained that, under international anti-corruption law, resolution of claims to the assets "must be carried out in the Philippines, which is the situs where the alleged criminal acts were committed."

[1]The funds from this account currently are being held by the Commissioner of Finance of the City of New York. *Swezey*, 87 A.D.3d at 124 n.2. If this action is finally dismissed, the funds will be returned to Merrill.

Swiss Fed. Office of Police Matters v. Fondation Maler, No. 1A.91/1997/odi ¶ 5b (Swiss Fed. Sup. Ct. Dec. 19, 1997), *reprinted in* R. 324-325 ¶ 5(b); J.A. at 79, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 177688; *see Swezey*, 87 A.D.3d at 127 n.6. Pursuant to this decision, the Swiss assets "were transferred to an escrow account set up . . . at [PNB], pending the [Philippine courts'] decision as to their rightful owner." *Pimentel*, 553 U.S. at 858-59. As a consequence, the Arelma share certificates are now being held in escrow in the Philippines by PNB, which is Arelma's sole shareholder. R. 230 ¶ 6; *Swezey*, 87 A.D.3d at 124.

As contemplated by the Swiss Federal Supreme Court's decision, the Republic asserted a claim to Arelma and the Arelma assets before the Sandiganbayan, the Philippine anti-corruption court. In April 2009, the Sandiganbayan ruled that the Arelma assets were "ill-gotten gains" of Marcos that have at all times belonged to the Republic and that "the assets, investments, securities, properties, shares, interests, and funds of Arelma, Inc . . . are hereby forfeited in favor of . . . the Philippines." *Rep. of Phil. v. Heirs of Ferdinand E. Marcos*, Case No. 0141 (Sandiganbayan Spec. Div. Apr. 2, 2009), *reprinted in* R. 176; *Swezey*, 87 A.D.3d at 125. That ruling is now on appeal to the Philippine Supreme Court. If the Sandiganbayan's interpretation of Philippine law is correct, the Republic has a right to the Arelma assets as their original owner, not as a mere judgment creditor of the Marcos estate. *See Swezey*, 87 A.D.3d at 126.

B. Prior U.S. Proceedings

Meanwhile, in the United States, Merrill commenced an interpleader action in the U.S. District Court for the District of Hawaii to settle ownership of Arelma. Arelma was claimed not only by the Republic but also by various judgment creditors of the Marcos estate, including a class (the "Pimentel class") of human rights claimants, to which Swezey belongs. R. 230 at ¶ 7; *see Swezey*, 87 A.D.3d at 130 n.11.[2] The Republic asserted its sovereign immunity in that interpleader action. *In re Republic of Phil.*, 309 F.3d 1143, 1149-52 (9th Cir. 2002).[3] Although the lower federal courts would have allowed the suit to proceed in the Republic's absence, the U.S. Supreme Court held that the action had to be dismissed under Fed. R. Civ. P. 19 because the absent Republic was a necessary and indispensable party. *Pimentel*, 553 U.S. at 862, 873-74 (reversing and vacating *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885 (9th Cir. 2006)).

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[2] The Pimentel class is a judgment creditor of the Marcos estate pursuant to a judgment entered by the Hawaii district court on February 3, 1995 (the "Pimentel judgment"). R. 35-36 ¶¶ 2-3; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 983 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1993 (2009). On December 1, 2009 the Hawaii district court granted Swezey's request for permission to act on behalf of the class. *See In re: MDL 840*, No. 1:03-cv-11111-MLR, Dkt. #10619 (D. Haw. Dec. 7, 2009).

[3] Subject to exceptions not applicable here, a foreign state and its instrumentalities are, absent their consent, "immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604.

Rejecting the contrary contentions of the Pimentel class, the U.S. Supreme Court held that an action to determine ownership of the Arelma assets could not proceed in the absence of a sovereign that is a "necessary" (or, in the revised language of the federal rule, a "required") party, as the Pimentel class conceded the Republic to be. The Court's holding was definitive: "A case may not proceed when a required-entity sovereign is not amenable to suit." *Pimentel*, 553 U.S. at 867. In other words, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* The Court concluded that, "[o]nce it was recognized that [the Republic's] claims were not frivolous, it was error for the Court of Appeals to address them on their merits when the required entities had been granted sovereign immunity. The court's consideration of the merits was itself an infringement on foreign sovereign immunity[.]" *Id.* at 864.

C. This Article 52 Case To Date

Notwithstanding the U.S. Supreme Court's ruling, Swezey, again acting as an alleged judgment creditor of the Marcos estate, initiated a special proceeding against Merrill in Supreme Court, New York County, pursuant to CPLR 5225 and 5227, seeking turnover of the Arelma assets in partial satisfaction of the Pimentel judgment against Marcos. Swezey did not attempt to join (or, indeed, even notify)

the Republic or the other claimants to these assets. R. 192 ¶ 6; *Swezey*, 87 A.D.3d at 129 n.10. Upon learning of the litigation, PNB and Arelma, in furtherance of their escrow obligation to dispose of Arelma's assets as ordered by a Philippine court, sought leave to intervene and moved to dismiss the suit on the ground that the Republic, which all concede to be immune from suit in New York, is a necessary and indispensable party under CPLR 1001 and 1003.

The trial court allowed PNB and Arelma to intervene as "interested persons" under CPLR 5239 (R. 26-27), but denied their motion to dismiss for failure to join an indispensable party. But the Appellate Division reversed by a 4-1 vote, "conclud[ing], as did the United States Supreme Court in an earlier proceeding concerning ownership of the same assets, . . . that respect for the principles of sovereign immunity and international comity mandates dismissal pursuant to CPLR 1003 and 3211(a)(10)." *Swezey*, 87 A.D.3d at 124-25.

In reaching that conclusion, the Appellate Division

> reject[ed] petitioner's argument that the Republic is merely another creditor of the Marcos estate and, as such, subject to permissive joinder entirely as a matter of the court's discretion. The Republic is not a general "claimant" (CPLR 5225) against the Marcos estate that would have no claim to the Arelma assets if it lost the "race of diligence" among creditors to execute against that fund . . . . Rather, the Republic is a person that (according to the Sandiganbayan's ruling) "possesses an actual, current interest in the property in question" . . . and, as such, its right in that property cannot be placed in

> jeopardy by the outcome of the race among the estate's general creditors.

Swezey, 87 A.D.3d at 125-26. By the same token, the Appellate Division observed that Swezey has *no* claim to the Arelma assets if the Republic is correct that Marcos stole them because "her claim to the Arelma assets derives entirely from the estate's purported title to that fund" and, "[n]eedless to say, 'a creditor stands in no better position with respect to property of the garnishee than does his debtor.'" *Id.* at 127.

From this starting point, the Appellate Division held that, "[w]hile *Pimentel* (as an application of a federal procedural rule) is not binding on us, we find persuasive the United States Supreme Court's resolution in that case of substantially the same question under Federal Rule[] of Civil Procedure . . . 19(b)." *Swezey*, 87 A.D.3d at 129-30. "The Republic's asserted interest in the Arelma assets would be irretrievably lost if those assets were disposed of, and dispersed to the class, pursuant to a judgment in this proceeding. To require the Republic to participate in this proceeding to avoid such a result would essentially negate the Republic's sovereign immunity." *Id.* at 130. Thus, like the U.S. Supreme Court, the Appellate Division held that, "'where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.'" *Id.* at 131 (quoting *Pimentel*, 553 U.S. at 867).

The Appellate Division noted that this conclusion followed from earlier holdings of the New York courts. *See Swezey*, 87 A.D.3d at 131 (citing *Fed. Motorship Corp. v. Johnson & Higgins*, 192 Misc. 401, 405 (Sup. Ct. N.Y. Co. 1948), *aff'd*, 275 A.D. 660 (1st Dept. 1949), and *Oliner v. Canadian Pac. Ry.*, 34 A.D.2d 310, 315 (1st Dept. 1970), *aff'd*, 27 N.Y.2d 988 (1970)). And the majority pointedly observed that not even the dissent "suggest[ed] that there is any relevant material difference in the analysis of indispensable party issues between federal law and New York law." *Id.* at 133.

In particular, although Swezey and "the dissent rel[ied] heavily on *Saratoga County Chamber of Commerce v. Pataki*," 100 N.Y.2d 801 (2003), nothing there "warrant[ed] disregarding the Republic's preference to have its own courts adjudicate its claim to be the true owner of such assets." *Swezey*, 87 A.D.3d at 134-35. There, this Court held that an Indian tribe was not an indispensable party to a challenge to the constitutionality of a gaming compact between the governor and that tribe. *See* 100 N.Y.2d at 821. *Saratoga County* was, the Appellate Division explained, a narrow and "limited" holding resting on the "public interest in maintaining recourse to the courts to protect the integrity of the constitutional structure of state government." *Swezey*, 87 A.D.3d at 134.

Because the Appellate Division ordered the dismissal of the special proceeding "based on the inability to join the Republic," an indispensable party, it

did "not address [PNB and Arelma's] alternative argument that [Swezey] does not have an enforceable judgment." *Swezey*, 87 A.D.3d at 135 n.15.

SUMMARY OF ARGUMENT

I. The Court should affirm the decision below and hold that this case must be dismissed pursuant to CPLR 1001 and 1003 because the Republic and PCGG are necessary and indispensable parties. In *Pimentel*, a suit involving the very same parties and assets that are now before this Court, the U.S. Supreme Court ordered dismissal because, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." 553 U.S. at 867. That conclusion rested on basic immunity and comity principles equally applicable in the New York courts: allowing the claim to proceed in the Republic's absence would effectively override its sovereign immunity, putting the Republic to the "Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). It also, as the Appellate Division recognized, would "pose[] a serious risk of duplicative liability for Merrill Lynch," as the absent Republic would not be bound by a judgment in New York court awarding the assets to a third party and "might sue Merrill Lynch in a later proceeding (possibly in a foreign country)." *Swezey*, 87 A.D.3d at 131-32.

A. In nevertheless arguing against dismissal, Swezey first maintains that the Republic is not a "necessary" party because, according to her, the New York statute of limitations could not be satisfied in an action brought by the Republic against Merrill to recover the Arelma assets. Accordingly, Swezey continues, there is no need to protect the Republic's interest in the assets.

But this contention cannot be seriously advanced, and, indeed, it is barred by collateral estoppel. Not only the Appellate Division, but also the U.S. Supreme Court, has recognized that the Republic would have substantial arguments against application of the statute of limitations. The U.S. Supreme Court—which had before it the very same July 12, 2000, letter upon which Swezey now principally relies as triggering the statute of limitations—expressly held that the Republic would have non-frivolous arguments that the statute of limitations would not start to run until Merrill "refused to hand over the assets" *after* the Sandiganbayan, the Philippine anti-corruption court, determined ownership of the assets and a demand had been made. *Pimentel*, 553 U.S. at 868. And that did not occur until 2009, when the Sandiganbayan held that the Arelma assets belong to the Republic. The U.S. Supreme Court's holding estops Swezey's identical argument here.

In addition, and wholly apart from the question of estoppel, Swezey's statute-of-limitations argument is simply wrong. Because the reason that the funds in the Arelma account were not released in 2000 was inseparable from the federal

interpleader action that Merrill brought later that year—*i.e.*, Merrill faced conflicting claims to the same funds—failure to release the funds at that time cannot have constituted a breach of a legal duty to the Republic that triggered running of the statute of limitations. In sum, the Appellate Division was correct to conclude that the Republic is a necessary party to this litigation within the meaning of CPLR 1001(a).

B. Swezey next argues that even if the Republic were a necessary party, it is not an indispensable one—*i.e.*, a party that "must be joined lest the action be dismissed." *Saratoga County*, 100 N.Y.2d at 819. But her arguments on this point—which principally center on the notion that the Republic has the *ability* to intervene, and that, as a result, it can have no complaint if the trial court determines the ownership of the Arelma assets in its absence—fundamentally misunderstand sovereign immunity, which protects the sovereign's right to determine *when* and *on what terms* it will submit to suit. The Republic's exercise of immunity in this proceeding, where "[c]omity and dignity interests take concrete form" (*Pimentel*, 553 U.S. at 866), is hardly capricious: the Republic seeks to protect an essential sovereign interest by ensuring that *its* courts would be the first to determine ownership of assets that it believes were stolen within *its* territory by *its* former president. Indeed, ownership of the Arelma assets is presently being determined by the Philippine courts, where the Sandiganbayan has already held them to be the

property of the Republic. For a New York court to entertain claims to the same assets would directly undermine both the sovereign interests of the Republic and international anti-corruption policies, which direct that ownership of stolen assets be determined by courts of the nation where the assets originated.

Swezey nevertheless argues that this Court should depart from the U.S. Supreme Court's ruling in *Pimentel* and hold that the Republic is not an indispensable party. But the principles of sovereign immunity and comity considered dispositive in *Pimentel* are as much a part of New York as of federal law. The factors that moved the U.S. Supreme Court in *Pimentel* therefore should lead this Court to the same conclusion here: a New York court should not determine ownership of specific assets that an absent sovereign claims were stolen in that nation by its former President and that currently are the subject of a suit in that nation's courts.

In fact, New York courts anticipated the rule of *Pimentel* long ago, holding that, when "the real dispute is between the plaintiff and [a foreign nation]" over assets held in New York, the "action should not proceed in the absence of [that foreign nation]." *Oliner*, 34 A.D.2d at 315. Swezey's reliance on *Saratoga County* for a contrary proposition is misplaced. The holding of that case is, as the Appellate Division explained, targeted at protecting the integrity of New York's system of "checks and balances" and preventing executive action from being

immunized from judicial review—not allowing disputes over assets claimed by a sovereign to go forward in the sovereign's absence. Indeed, the Court's decision in *Saratoga County* specifically noted that that "in other cases sovereign immunity might support dismissal," 100 N.Y.2d at 821, and nothing in that case supports Swezey's position that the lack of an alternative remedy for the plaintiff is by itself sufficient to avoid dismissal.

In the end, Swezey appears to recognize that a ruling for her would effectively override the Republic's sovereign immunity by forcing the Republic to appear in the trial court or have its substantial claim to the Arelma assets be adjudicated in its absence. But she asserts that this consideration is entitled to virtually no weight under CPLR 1001(b) because New York courts should not "be under the thumb" of another sovereign (Opening Br. 20); the Appellate Division's holding, she continues, would allow rogue tribal or foreign governments to veto New York litigation by the simple expedient of asserting claims to the assets at issue, "whether or not [the claim] is false" or supported by any evidence. *Id.* at 21, 31-35.

It should be manifest, however, that these arguments are aimed at the flimsiest of straw men. Whatever the proper outcome might be in the unlikely case imagined by Swezey, in *this* case (1) a Philippine court already has held that the Arelma assets belong to the Republic; (2) those assets were found by a Swiss court

to have been stolen from the Philippine people by its former President; (3) both the United States and Swiss governments have expressed the view that the Republic is entitled to establish ownership of Arelma *in its own courts*; and (4) the U.S. Supreme Court has concluded that the Republic has a non-frivolous claim to the Arelma assets. In light of these considerations, it is difficult to imagine a more compelling case for dismissal under CPLR 1001(b).

II. If the Court does not order the case dismissed on indispensable-party grounds, it should remand to the Appellate Division with directions to consider our contention, raised but not determined on the appeal thereto, that Swezey lacks an enforceable judgment. The underlying Hawaii judgment that Swezey seeks to enforce expired under Hawaii law in 2005 when the class neglected to renew it. Swezey now seeks to enforce in New York, not the lapsed Hawaii judgment, but a *registration* of that judgment lodged in Illinois federal district court pursuant to 28 U.S.C. § 1963, which Swezey has in turn *re-registered* in New York. Registration of a valid judgment, however, simply provides a mechanism for enforcement of the underlying judgment *in the district of registration*; it does not create a new, freestanding judgment that may itself be filed and enforced elsewhere. As the Appellate Division noted, there have been "conflicting federal court decisions" concerning the enforceability of a re-registration of a lapsed judgment. *Swezey*, 87 A.D.3d at 135 n.15. In the event that this Court holds that the Republic is not an

indispensable party, the Appellate Division should be given the opportunity to pass upon the issue whether Swezey has an enforceable judgment.

ARGUMENT

Standard of Review

De novo review is applied to all questions of law, including questions of statutory interpretation. *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 419 (1996). The Appellate Division is "vested with the same power and discretion" as the trial court, and so it may "substitute its own discretion even in the absence of abuse." *Brady v. Ottaway Newspapers, Inc.*, 63 N.Y.2d 1031, 1032 (1984); *Kover v. Kover*, 29 N.Y.2d 408, 415 n.2 (1972). The Appellate Division's exercise of this discretion is "reviewable by [this Court] only for abuse of discretion as a matter of law." *Brady*, 63 N.Y.2d at 1032.[4] Likewise, "the Appellate Division has the same power to review the record and decide the questions of fact as the trial court." *Kilgus v. Bd. of Estimate of City of New York*, 308 N.Y. 620, 627 (1955). Factual

[4] Although the Appellate Division's order granting Swezey's motion for leave to appeal states that its decision was "'made as a matter of law and not in the exercise of discretion,' [this Court is] not bound by that characterization." *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745 (2000). Here, as in *Andon*, "the Appellate Division's decision, regardless of its characterization, nonetheless reflects a discretionary balancing of interests"; moreover, the Appellate Division's "opinion stated that its reversal was 'on the law and the facts.'" *Id.* at 745-46; *see Swezey*, 87 A.D.3d at 129 (reciting "consideration of the factors enumerated in CPLR 1001(b)"); *id.* at 132 (analyzing whether certain CPLR 1001(b) factors "overcome the weight" of others); *id.* at 136 (reversing on "the law and the facts"). Thus, the Appellate Division did not direct dismissal on indispensable-party grounds solely as a matter of law, and an abuse-of-discretion standard of review should apply.

findings are upheld so long as there is "evidence in the record to support" them. *In re Estate of Janes*, 90 N.Y.2d 41, 50, 54 (1997).

I. The Appellate Division Correctly Determined That The Republic Is A Necessary And Indispensable Party To The Turnover Proceeding Because It Is A Foreign Sovereign That Has Asserted Non-Frivolous Claims To The Arelma Assets.

Under CPLR 1001, as under Fed. R. Civ. P. 19, the absence of a necessary and indispensable party from an action requires dismissal. A party is "necessary" if "joinder is necessary to accord 'complete relief' between the parties, or when the interests of the [absent party] might be 'inequitably affected by a judgment in the action.'" *Saratoga County*, 100 N.Y.2d at 819 (quoting CPLR 1001(a)). To say that a party is "indispensable" is to express the legal conclusion that it is a necessary party that "must be joined lest the action be dismissed." *Id.* The five factors listed in CPLR 1001(b) inform the decision "whether to dismiss an action where . . . 'jurisdiction over [the necessary party] can be obtained only by his consent or appearance.'" *Id.* These factors confirm that, as the U.S. Supreme Court concluded in *Pimentel* and as the Appellate Division concluded below, dismissal is the only appropriate course of action here.

A. The Republic And PCGG Are Necessary Parties.

1. As a threshold matter, the Appellate Division plainly was correct in finding that the Republic is a necessary party within the meaning of CPLR

1001(a).[5] A ruling for Swezey on the merits of her claim would both have an obvious adverse effect on the Republic and subject Merrill to the risk of duplicative liability.

As the Appellate Division explained, "given its substantial claim to be the true owner of the Arelma assets," the Republic "'might be inequitably affected by a judgment' disposing of those assets in its absence." *Swezey*, 87 A.D.3d at 128-29. In particular, the turnover order sought by Swezey is flatly inconsistent with the Republic's interest in the Arelma assets because it would "consume the entire account, . . . necessarily render[ing]" the Republic an "aggrieved person" entitled to "participate in the proceedings leading to" a determination of the competing rights to the account. *Triangle Pac. Bldg. Prods. Corp. v. Nat'l Bank of N. Am.*, 62 A.D.2d 1017, 1017 (2d Dept. 1978). As the U.S. Supreme Court noted, "[c]onflicting claims . . . to a common [fund] present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." *Pimentel*, 553 U.S. at 870 (internal quotation marks omitted). That is especially so here "because '[w]ithout [the Republic and the PCGG] as parties in this

[5] The trial court also found that the Republic is a necessary party. R. 16-17. The U.S. Supreme Court agreed in *Pimentel*. 553 U.S. at 863-64. Indeed, the Pimentel class conceded the point before the U.S. Supreme Court (*id.* at 864) and Swezey did not contest it before the trial court in this proceeding. *See* R. 16, 441, 448.

interpleader action, their interests in the subject matter are not protected.'" *Id.* at 863-64 (quoting *In re Republic of Phil.*, 309 F.3d at 1152).

Similarly, both New York and federal law recognize that no action without the Republic could conclusively settle the ownership of the Arelma assets "because the Republic and the [PCGG] would not be bound by the judgment." *Pimentel*, 553 U.S. at 871. The "failure to assure the presence of all adverse claimants will prevent the judgment, in which the proceeding culminates, from binding the omitted claimant." David D. Siegel, *Practice Commentaries*, CPLR C5227:1. Thus, "in the absence of" the Republic and the PCGG, "there would be no legal bar to [their] instituting an action against [Merrill] and contending that the money was" theirs. *Mechta v. Scaretta*, 52 Misc. 2d 696, 697 (Sup. Ct. Queens Co. 1967); *see* Siegel, *Practice Commentaries*, *supra*, CPLR C5209:1. The presence of the Republic and PCGG therefore is necessary to offer complete relief between the parties and, in particular, to relieve Merrill of the risk of duplicative or multiple liability. *See Swezey*, 87 A.D.3d at 131-32 & n.13.

2. Swezey's only response on this point is to assert that the Republic is not a necessary party because any claim to the Arelma assets that the Republic eventually might pursue in New York would be barred by the six-year statute of

limitations for breach-of-contract claims. Opening Br. 18-20.[6] Yet not only the Appellate Division, *Swezey*, 87 A.D.3d at 130 n.12, but the U.S. Supreme Court, *Pimentel*, 553 U.S. at 867-68, recognized that the Republic would have substantial and non-frivolous arguments against application of the statute of limitations.[7]

To begin with, Swezey's contention is barred by principles of collateral estoppel precisely because it *has been* rejected by the U.S. Supreme Court. "[W]here it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one." *Schwartz v. Pub. Adm'r of Bronx Cnty.*, 24 N.Y.2d 65, 69 (1969). "[T]here are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair

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[6] Swezey concedes that her present argument about the statute of limitations is premised on documents outside the record. Opening Br. 13 n.11, 18 n.12. As our opposition to Swezey's pending motion to enlarge the record explains, Swezey's counsel has had these documents in his possession for a decade and failed to present them to either the trial court or to the Appellate Division. For that reason alone, Swezey's statute-of-limitations argument is not properly before this Court. Having said that, it should be added that the documents have no bearing on the outcome, as the discussion in text explains.

[7] Swezey points out that lower federal courts have stated that the Republic's claim to the Arelma assets would be barred by the statute of limitations. Opening Br. 14. Of course, by directing "[d]ismissal of the [federal interpleader] action under Rule 19(b)," the U.S. Supreme Court "vacat[ed]" the lower courts' judgments, *Pimentel*, 553 U.S. at 862, 873, a ruling that "[o]f necessity . . . deprive[d] [those] opinion[s]" of any legal effect. *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 634 n.6 (1979) (internal quotation marks omitted).

opportunity to contest the decision now said to be controlling." *Id.* at 71. Both of these prerequisites are met here.

In *Pimentel*, the U.S. Supreme Court, after full argument on the point, decided against Swezey on the merits of the statute of limitations argument she now advances, holding that the Republic will in fact have substantial grounds on which to resist application of the statute of limitations if it brings suit against Merrill.[8] Merrill (supporting the Pimentel class on this point) raised precisely the same statute of limitations argument that Swezey now asserts. It specifically called the Court's attention to the very same July 12, 2000, letter from the Republic upon which Swezey now principally relies,[9] stating:

> On May 8, 2000, PCGG notified Merrill that instructions concerning the Arelma assets would be forthcoming. CA9 E.R. 0285. On July 12, 2000, PCGG requested that Merrill transfer the Arelma assets to an escrow account with PNB. *Id.* at 0162. Merrill responded by letter on July 19, citing competing claims over the ownership of the Arelma shares as a basis for refusing PCGG's request. *Id.* at 0163-65.

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[8] The U.S. Supreme Court's decision in *Pimentel* binds Swezey, an unnamed member of the class. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011); *Taylor v. Sturgell*, 553 U.S. 880, 901-02 (2008).

[9] Although Swezey points to four documents, the two earliest ask Merrill to resist requests from other claimants for the funds and the fourth simply authorizes the Republic's attorneys to seek transfer of the Arelma assets. Only the July 12, 2000, letter requests a transfer of funds by Merrill, and even that letter asks that the funds be transferred, not to the Republic, but to an escrow account in a Philippine bank.

Br. of Merrill Lynch, Pierce, Fenner & Smith, Inc., as *Amicus Curiae* at 6, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 225205. Merrill went on to argue, as Swezey does now, that the statute of limitations on a breach of contract claim against it by the Republic accordingly started to run "no later than July 2000." *Id.* at 27. And the Pimentel class endorsed Merrill's argument: "Merrill Lynch has conclusively demonstrated . . . that any lawsuit that might be brought by the Republic against Merrill Lynch would be barred by a New York statute of limitations." Resp. Br. at 41, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 467887. PNB responded that Merrill's refusal to transfer the funds in 2000 did not trigger the running of the statute of limitations, and that the statute would not start to run until Merrill definitively refused to transfer the funds after a ruling of the Philippine courts determining ownership of the assets. Pet. Reply Br. at 15-16, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 659543.

The *Pimentel* Court, knowing all this, agreed fully with PNB, explaining that the Republic might "file suit for breach of contract against Merrill Lynch" on the theory that "[t]he statute of limitations would start to run if and when Merrill Lynch refused to hand over the assets" *after* the Sandiganbayan, the Philippine anti-corruption court, determined ownership of the assets (which occurred in 2009, when the Sandiganbayan held that the assets belong to the Republic). *Pimentel*, 553 U.S. at 868. Or, the Supreme Court continued, rather than sue for breach of

contract, "the Republic and the Commission might bring an action . . . to enforce the Sandiganbayan's judgment" directly. *Id.* (citing 1 Restatement (Third) of Foreign Relations Law of the United States § 482 (1987), and 28 U.S.C. § 2467(c)). The Court noted that "Merrill Lynch makes arguments why these actions would not succeed . . . . We need not seek to predict the outcomes. It suffices that the claims would not be frivolous." *Id.* Thus, the statute-of-limitations argument that Swezey hopes to advance in reliance on extra-record documents was resolved against her, not only necessarily but *expressly*, by the U.S. Supreme Court.

There also can be no serious dispute that the second collateral estoppel requirement is satisfied. Every factor that "enter[s] into a determination whether a party has had his day in court"—*e.g.*, the size of the claim, the forum of the prior litigation, the extent of the litigation, the competence and experience of counsel, and the availability of new evidence—favors recognizing the preclusive effect of the U.S. Supreme Court's *Pimentel* judgment. *Schwartz*, 24 N.Y.2d at 72. Accordingly, Swezey's argument that the Republic is not a necessary party on account of the statute of limitations is barred because it rests on a legal proposition that has been decided against her.

3. In addition, and wholly apart from the question of estoppel, Swezey's statute-of-limitations argument is simply wrong. Because the reason that the funds in the Arelma account were not released in 2000 was inseparable from the

interpleader action that Merrill brought later that year—*i.e.*, Merrill faced conflicting claims to the same funds—the non-release of the funds then cannot have constituted breach of a legal duty to the Republic that triggered running of the statute of limitations.

Courts consistently have held that a stakeholder does not breach its contract with a purported owner of property when the stakeholder "elect[s], as here, not to distribute the funds in controversy pursuant to the terms of a contract, but instead, institute[s] an interpleader action after receiving conflicting claims to those funds." *Atlantic Bank of New York v. Homeowners Fin. Corp.*, 1999 WL 144508, at *4 (S.D.N.Y. Mar. 17, 1999). "When a party acknowledges that money is due under a contract, but does not know to whom to pay the money because multiple claimants make demands for the money, an attempt to interplead the money does not amount to a breach of the contractual duty to pay." *Flores v. Jewels Mktg. & Agribusiness*, 2010 WL 1486913, at *4 (E.D. Cal. Apr. 13, 2010).[10] That is just what Merrill did when it commenced the federal interpleader proceeding in September 2000, just months after receiving the letter from the Republic on which Swezey now relies.

[10] Along the same lines in other New York federal cases, see, for example, *Koons v. Christie, Manson & Woods Int'l Inc.*, 1999 WL 38195, at *2 (S.D.N.Y. Jan. 27, 1999); *John v. Sotheby's, Inc.*, 141 F.R.D. 29, 36 (S.D.N.Y. 1992). And in other jurisdictions, see, for example, *Minn. Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977, 981 (9th Cir. 1999); *National Life Ins. Co. v. Alembik-Eisner*, 582 F. Supp. 2d 1362, 1370 (N.D. Ga. 2008); *Commerce Funding Corp. v. S. Fin. Bank*, 80 F. Supp. 2d 582, 585 (E.D. Va. 1999).

As the Third Circuit explained:

> [W]here a stakeholder is allowed to bring an interpleader action, rather than choosing between adverse claimants, its failure to choose between the adverse claimants (rather than bringing an interpleader action) cannot itself be a breach of a legal duty. *See Lutheran Bhd. v. Comyne*, 216 F. Supp. 2d 859, 862 (E.D. Wis. 2002) (holding that the bringing of a valid interpleader action shields a plaintiff from liability for counterclaims where those "counterclaims are essentially based on the plaintiff's having opted to proceed via an interpleader complaint rather than having chosen from among competing adverse claimants"); *Metropolitan Life Ins. Co. v. Barretto*, 178 F. Supp. 2d 745, 748 (S.D. Tex. 2001) (holding that interpleader protection extends to counterclaims that arise from "utilizing the protections afforded by the interpleader").

Prudential Ins. Co. v. Hovis, 553 F.3d 258, 265 (3d Cir. 2009).

In short, only truly "'independent' claims for relief against the interpleader plaintiff may form" the basis for a proper breach of contract claim, which "must be based on wrongful conduct independent from the filing of an interpleader, or the retention of interpleaded assets pending direction from the court." *Bank of New York v. First Millennium, Inc.*, 2008 WL 953619, at *7 (S.D.N.Y. Apr. 8, 2008). Thus, the Republic *could not* have brought a breach of contract claim against Merrill in 2000, and the limitations period did not start running at that time.

4. Finally, even viewing the documents now invoked by Swezey in isolation, there are substantial arguments that a breach-of-contract action by the Republic would not be not time barred. The statute of limitations for breach of contract starts

running when the contract is breached. *E.g.*, *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550 (1979). It seems unlikely that Merrill actually breached its agreement with the owner of the disputed funds in 2000. At that point, the Sandiganbayan had not yet determined ownership either of the funds or of Arelma itself, which was the entity that had deposited the funds with Merrill. It therefore was far from clear at that time that the Republic owned the Arelma account. Moreover, it is questionable whether Merrill's statement to the Republic that it needed "additional time to confer with [its] outside counsel," Affirmation of Jeffrey E. Glen, dated November 22, 2011, Exhibits at ML-0001645, constituted an "unequivocal[] refus[al] to pay the full amount demanded." *John J. Kassner & Co.*, 46 N.Y.2d at 450. For this reason as well, it seems plain that the Republic would have substantial arguments against application of the statute of limitations were it to bring suit on the Arelma assets.

* * *

In adopting the U.S. Supreme Court's statute-of-limitations analysis, the Appellate Division correctly concluded that the Republic's claim to the assets "would not be frivolous." *Pimentel*, 553 U.S. at 868; *see also Swezey*, 87 A.D.3d at 130 & n.12. The Republic thus does in fact have an interest in Arelma that would be adversely affected by the continuation of litigation in its absence and, accordingly, it is a necessary party under CPLR 1001(a).

B. The Republic And PCGG Are Indispensable Parties.

The Republic and PCGG are entitled to invoke sovereign immunity, 28 U.S.C. § 1604, and in fact "asserted [their] sovereign immunity" in this case, *Swezey*, 87 A.D.3d at 129 n.10; *see also* Letter from Ambassador Willy C. Gaa to Harold Hongju Koh, Legal Adviser, U.S. Dep't of State (July 13, 2009), *reprinted in* R. 482-484; R. 17 n.8. Thus, they are necessary parties who cannot be joined without their "consent or appearance." CPLR 1001(b). "[B]ased on a consideration of the factors enumerated in CPLR 1001(b)," the Appellate Division correctly determined that they are indispensable parties and that this proceeding should not "be allowed to go forward" in their absence. *Swezey*, 87 A.D.3d at 129.[11] Although Swezey's brief challenging that ruling focuses almost exclusively on a single factor (whether she has an alternative remedy), we consider the complete range of statutory factors—most of which decisively favor dismissal—before turning to her narrow argument.

[11] The factors are: "[W]hether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; [] the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; [] whether and by whom prejudice might have been avoided or may in the future be avoided; [] the feasibility of a protective provision by order of the court or in the judgment; and [] whether an effective judgment may be rendered in the absence of the person who is not joined." CPLR 1001(b).

1. *Continuation Of The Proceeding In The Republic's Absence Would Greatly Prejudice The Republic.*

As did the U.S. Supreme Court in *Pimentel*, the Appellate Division properly focused on "'the prejudice which may accrue from the nonjoinder . . . to the'" Republic. *Swezey*, 87 A.D.3d at 130 (quoting CPLR 1001(b)(2)). In her brief, Swezey virtually ignores the adverse impact on the Republic from continued adjudication of this action in its absence and therefore fails to "accord proper weight to the compelling claim of sovereign immunity" asserted by the Republic and PCGG. *Pimentel*, 553 U.S. at 869.

Swezey does not—and cannot—dispute that, as a practical matter, distribution of the Arelma assets to her (and, in turn, to the thousands of Pimentel class members) would dissipate them beyond recovery, even were the Philippine courts eventually to make a final determination that the Arelma assets always belonged to the Republic. Thus, as the Appellate Division stated, the Arelma assets would be "irretrievably lost if [they] were disposed of, and dispersed to the class, pursuant to a judgment rendered in this proceeding." *Swezey*, 87 A.D.3d at 130.

Swezey instead asserts that any prejudice could be avoided by the Republic's waiver of immunity and appearance. Opening Br. 26. But it cannot possibly be the case that the mere *ability* to appear makes irrelevant any prejudice that might otherwise accrue from a non-party's absence. For one thing, Swezey's argument is circular, since a coerced waiver of immunity is *itself* the prejudice that

the Republic seeks to avoid. And for another, her rule, if adopted, would preclude any sovereign invoking immunity from *ever* qualifying as an indispensable party under CPLR 1001(b) and thus render a dead letter this Court's observation in *Saratoga County* that "in *other* cases sovereign immunity might support dismissal." 100 N.Y.2d at 821 (emphasis added). After all, the sovereign would always, at least in principle, have the "ability" to simply waive its immunity and enter an appearance. The U.S. Supreme Court and the New York courts have long rejected the view that sovereign immunity offers only such chimerical protection from suit. The decision below faithfully applies that precedent.

a. Swezey's proposed rule vitiates the important "[c]omity and dignity interests" (*Pimentel*, 553 U.S. at 866) furthered by the doctrine of sovereign immunity. Since the founding of the Republic, it has been thought "'inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind.'" *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (quoting The Federalist, No. 81, at 487-488 (Clinton Rossiter ed., 1961) (Alexander Hamilton) (emphasis in The Federalist)). So far as foreign sovereigns are concerned, the principle of immunity was recognized "[v]ery early in our history" and "has since become part of the fabric of our law" (*Nat'l City Bank v. Republic of China*, 348 U.S. 356, 358 (1955)), established first by the U.S. Supreme Court

as a matter of common law (*see Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) and subsequently codified in the Foreign Sovereign Immunities Act, which applies to federal and state courts alike (28 U.S.C. § 1604).

To decide the ownership of the Arelma assets in the Republic's absence would work a radical and unprecedented departure from this ancient and important principle. Even though the Republic is not bound in a *technical* sense by a judgment in this action, allowing this litigation to proceed when the Republic has asserted a non-frivolous claim to the Arelma assets deprives the Republic of the substantial benefit of sovereign immunity. There is no doubt that proceeding to trial in this matter would "effectively abrogate the [Republic's] sovereign immunity" (*Enter. Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989)) because "[a] judgment for [petitioner] would necessarily be based on a holding that the [Republic] had no right in the [Arelma assets]." *Am. Guar. Corp. v. Burton*, 380 F.2d 789, 791 (1st Cir. 1967). Thus, any consideration of the merits of the competing claims in the Republic's absence would "itself [be] an infringement on foreign sovereign immunity." *Pimentel*, 553 U.S. at 864.

In fact, allowing such a judgment to issue would do more than award to private litigants assets that are claimed by a sovereign; it also would coerce the Republic into formally surrendering its immunity and appearing in court so that it is able to defend interests that otherwise would simply be overborne without its

participation. As the U.S. Supreme Court has explained, when resolution of a case in the sovereign's absence would have the same practical effect as a judgment against the sovereign, the sovereign either "would effectively be required" to appear or would "substantially compromise its ability to defend itself at all." *Fed. Maritime Comm'n*, 535 U.S. at 762. To believe that this sort of "choice" does not "coerce" a sovereign into participating in litigation, the Court continued, "would be to blind ourselves to reality." *Id.* at 763-64. And whether or not this coercion induces the Republic to waive its immunity, it is "wholly at odds with the policy of [sovereign] immunity to put the [sovereign] to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita*, 788 F.2d at 776.

That prejudice is especially acute in this case, where "[c]omity and dignity interests take concrete form." *Pimentel*, 553 U.S. at 866. As the U.S. Supreme Court recognized:

> The claims of the Republic and the Commission arise from events of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest in resolving the ownership of or claims to the Arelma assets and in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos. There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause. Then, too, there is the more specific

> affront that could result to the Republic and the Commission if property they claim is seized by the decree of a foreign court.

Id. Indeed, in this very proceeding, the Republic brought to the trial court's attention the "extreme national importance to the Republic" of recovering the Arelma assets and returning them to the Philippines.[12] Letter from Ambassador Willy C. Gaa, *supra*, *reprinted in* R. 481-484 (copy sent to trial court, *see* R. 17 n.8). The Republic also noted that continuing litigation would "cause an affront to the Republic's sovereign dignity, violate the principles of international comity, and prejudice the rights of the Republic." R. 482. These considerations, just as in *Pimentel*, dictate dismissal of the action.

b. In fact, the case for dismissal on indispensable-party grounds is even more compelling today than it was when the U.S. Supreme Court decided *Pimentel* because the Sandiganbayan—the special anti-corruption court in which the Republic has reposed the authority to resolve ownership of Marcos-related

[12] Swezey notes that the Republic did not itself appear in the trial court to assert its immunity. Opening Br. 12, 16. But this is of no moment for the reasons given by the Appellate Division. *Swezey*, 87 A.D.3d at 129 n.10. The Republic had no occasion to formally assert its immunity, as Swezey did not name it in this action—because, presumably, she knew that the Republic *would* assert its immunity if joined to the action, as it did in the federal *Pimentel* litigation. In any event, as the Appellate Division noted, the Republic *did* formally notify the trial court by letter that it claimed the Arelma assets and would not participate in U.S. litigation. Thus, "the only reasonable conclusion from the Ambassador's letter is that the Republic [was], in fact, asserting its sovereign immunity." *See id.*

assets—has since held that the Arelma assets have indeed belonged to the Republic *ab initio*. (*See* R. 176.) Any judgment awarding the Arelma assets to petitioner would fundamentally "challenge the power," *Anderson v. Town of Lewiston*, 244 A.D.2d 965, 966 (4th Dept. 1997), of the Sandiganbayan to determine the appropriate disposition of the Arelma assets. Such a judgment would require rejection of the Sandiganbayan's ruling because, "[i]f the Marcos estate did not own the [Arelma] assets, or if the Republic owns them now"—as the Sandiganbayan has decided—"the claim of the Pimentel class likely fails." *Pimentel*, 553 U.S. at 870.[13]

This result would, in the U.S. Supreme Court's words, interfere with the compelling "comity interest in allowing a foreign state to use its own courts for a dispute." *Pimentel*, 553 U.S. at 866. International law, as well as fundamental anti-corruption policies endorsed by the United States, states in the strongest terms that misappropriated assets should be returned to the nation of origin for disposition by *that nation's* courts. *See* United Nations Convention Against Corruption, G.A. Res.

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[13] The Sandiganbayan has determined the ownership of the Arelma assets as between the Republic and the Marcos estate. Swezey's claim here, as an alleged judgment creditor of the estate, is wholly derivative of the estate's interest in the Arelma assets. *See Smith v. Amherst Acres, Inc.*, 43 A.D.2d 792, 793 (4th Dept. 1973) ("[A] creditor stands in no better position with respect to property of the garnishee than does his debtor."); Siegel, *New York Practice*, *supra*, § 488 ("If the judgment debtor has no right to the money or property, then neither has the judgment creditor . . . .").

4 (LVII), U.N. Doc. A/RES/58/4 (2003), Arts. 51, 54(1)(a) (making "return of [stolen] assets . . . a fundamental principle" and obligating state parties to the Convention, including the United States, to "[t]ake such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party"). These interests are so consequential that the United States and Switzerland (the original repository of the Arelma shares) both supported dismissal of the federal *Pimentel* litigation.[14] *See also Swezey*, 87 A.D.3d at 127 n.6 (noting the Swiss Federal Supreme Court's holding that resolution of claims to the Arelma assets "'must be carried out in the Philippines, which is the situs where the alleged criminal acts were committed").

Thus, the Republic's exercise of immunity here was in no way arbitrary: it sought to protect an essential sovereign interest, in a manner encouraged by international legal practice, by ensuring that *its* courts would be the first to determine ownership of assets that it believes were stolen within *its* territory by *its* former President *during his time in office*.

c. The decision below correctly recognized that New York courts, like the federal courts, have long applied the rule that "'an action involving specific property in which a sovereign asserts an interest'" must be dismissed if the

[14] *See* Br. for the United States, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 225206; Note of the Embassy of Switzerland to U.S. Dep't of State (Apr. 5, 2007), *reprinted in* Pet. Reply. Br., *Pimentel*, 553 U.S. 851 (No. 06-1204).

sovereign is entitled to immunity "'because no adjudication of the rights of others in that property can be made without affecting the interests of the sovereign.'" *Swezey*, 87 A.D.3d at 131 (quoting *Fed. Motorship Corp.*, 192 Misc. at 405).[15]

The Appellate Division also drew upon its earlier decision in *Oliner* (which was affirmed by this Court without opinion, 27 N.Y.2d 988), which likewise illustrates how an assertion of immunity by an indispensable sovereign party requires dismissal. Defendants in *Oliner* and Merrill here occupied analogous positions: they held on their books contested assets and "found themselves in the position of a stakeholder, with no interest whatever in the litigation and yet placed in a position whereby they might be compelled to face double liability." 34 A.D.2d at 312. The plaintiff in *Oliner*, who claimed entitlement to those assets (like Swezey here), sought a turnover order. *Id.* The Canadian government (like the Republic here) asserted that it owned the assets pursuant to Canadian laws vesting ownership in an agency of that government. *Id.* That agency, which was "entitled to sovereign immunity" (*id.* at 315), refused to litigate in the New York state courts, instead seeking a declaration from a Canadian court that the shares in question belonged to it. *Id.* at 312. The Appellate Division in *Oliner* ordered

[15] The court in *Federal Motorship* ultimately did entertain the action, but only because the court determined that the suit was "not one which in any sense involves a fund." 192 Misc. at 406. This case, in contrast, involves a dispute over the specific Arelma assets held by Merrill.

dismissal of the action for failure to join a necessary and indispensable party. Given the "inescapable" conclusion "that the real dispute [was] between the plaintiff and the Custodian" (*i.e.*, the Canadian government), "it [was] clear that [the] action should not proceed in the absence of the Custodian." *Id.* at 315.

Tellingly, Swezey does not cite, let alone try to distinguish or counter the on-point reasoning of, either *Federal Motorship* or *Oliner*. The Appellate Division was correct to conclude that it would be "inappropriate for the courts of New York to put the Republic to a Hobson's choice between, on the one hand, its right not to litigate in this state and, on the other hand, protecting its interest in property that (through no fault of the Republic itself) happens to be located here." *Swezey*, 87 A.D.3d at 130-31.

2. *Continuation Of This Action In The Republic's Absence Would Prejudice Merrill By Subjecting It To The Risk Of Duplicative Liability And Could Not Result In An Effective Judgment.*

Besides ignoring the prejudice to the "person not joined" (*i.e.*, the Republic), Swezey's presentation also gives short shrift to all of the other CPLR 1001 factors that the Appellate Division carefully evaluated. In particular, as the Appellate Division found, "a judgment in this proceeding in the Republic's absence poses a serious risk of duplicative liability for Merrill Lynch," the defendant; this prejudice is "unavoidable" notwithstanding any "protective provision"; and an "'effective judgment [cannot] be rendered in the absence of the'" Republic. *Swezey*, 87

A.D.3d at 131-33 (quoting CPLR 1001(b)(3)-(5)). Swezey does not take issue with these conclusions, so we shall merely reprise them briefly.

a. Were Swezey to obtain the Arelma assets in a proceeding where the Republic is absent, the Republic could bring suit against Merrill, either in New York and elsewhere. "[I]f the [petitioner] were permitted a recovery here there would be no legal bar to [the Republic and PCGG] instituting an action against [Merrill] and contending that" the Arelma assets were theirs. *Mechta*, 52 Misc. 2d at 697; *see Oliner*, 34 A.D.2d at 315. In other words, for Merrill to give the Arelma assets to Swezey without a determination by a "court, with jurisdiction of the [Republic]," that the Arelma assets are indeed "the judgment debtor's [*i.e.*, Marcos's]" would potentially "subject[] [Merrill] to double liability," because the Republic, "in a later suit against [Merrill], would not be bound by any earlier proceedings purporting to adjudicate . . . that the property belonged to the judgment debtor." David D. Siegel, *New York Practice* § 515 (5th ed. 2011). The Appellate Division's holding that if Swezey "succeeds in executing on the Arelma assets in this proceeding, the Republic—which would not be bound by the outcome of litigation to which it was not party—might sue Merrill Lynch in a later

proceeding (possibly in a foreign country)" and thereby subject Merrill to the risk of duplicative liability is unassailable.[16] *Swezey*, 87 A.D.3d at 131-32.

b. The Appellate Division also was correct in concluding that the trial court could not render an "effective judgment" in the absence of the Republic and the PCGG. CPLR 1001(b)(5). For the reasons just stated, such a judgment would not preclude the possibility of future litigation by the Republic over the Arelma assets. As the U.S. Supreme Court confirmed in *Pimentel*, no action without the Republic and PCGG could conclusively settle the ownership of the Arelma assets "because the Republic and the [PCGG] would not be bound by [such a] judgment." 553 U.S. at 871. Both as a matter of New York law (Siegel, *Practice Commentaries*, *supra*, CPLR C5227:1) and of federal due process principles

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[16] Merrill was ordered to pay over the Arelma assets over to the Commissioner, *see supra* note 1, but the protective provisions of this consent order do not abate the risk of duplicative liability. CPLR 5209 would discharge Merrill only from its "obligation to the judgment debtor" (*i.e.*, the Estate of Ferdinand Marcos), not from Merrill's obligation to others with a claim to the Arelma assets. If it were later determined that the Arelma assets had always belonged to the Republic, Merrill would remain liable to the Republic. As the accompanying Practice Commentaries explain, that is why "the garnishee [*i.e.*, Merrill] must be wary . . . where some third person [*i.e.*, the Republic] other than the judgment debtor may be claiming the money or property at issue." Siegel, *Practice Commentaries*, *supra*, CPLR C5209:1. Should Merrill deliver the Arelma assets to Swezey, "and later be sued by [the Republic], [the Republic] would be entitled to prove that the property was [its]." *Id.* "Should [the Republic] prevail, [Merrill] *would have to deliver or pay again, sustaining a double loss*." *Id.* (emphasis added); *see also* 9A Carmody-Wait, *New York Practice with Forms* § 64:114 (2d ed. 2009) ("[CPLR 5209] refers only to the discharge of an obligation owed to the judgment debtor; the . . . obligation to other persons . . . is not affected.").

(*Taylor v. Sturgell*, 553 U.S. 880, 897 (2008)), the Republic and PCGG cannot be bound by a judgment rendered in their absence.[17]

c. Finally, it is clear that, as the Appellate Division found, no "protective measure," or other means to avoid prejudice, is available here because "both the Republic and the class claim the entirety of the Arelma assets." *Swezey*, 87 A.D.3d at 132. There is no middle ground here: either the Arelma assets belong to the Republic or they do not. Under such circumstances, there is "no way that [the court] might shape relief to lessen the potential prejudice" to the Republic. *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996). Moreover, as noted above, in the absence of the Republic and PCGG any disposition of the Arelma assets "would *necessarily* result in serious prejudice to [Merrill], . . . [which] would . . . be subjected to the danger of double financial liability." *Oliner*, 34 A.D.2d at 315 (emphasis added); *accord Pimentel*, 553 U.S. at 870 ("No alternative remedies . . . appear to be available.").

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[17] Of course, that the Republic "could litigate the issue of [the ownership of the Arelma assets] free of the constraints of res judicata or collateral estoppel does not by itself excuse their absence as necessary parties. Otherwise [indispensable party principles] would become a nullity: a person's interests could never be impaired or impeded in the absence of joinder." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968)).

3. *Notwithstanding Any Potential Prejudice To Swezey, The Prejudice To The Republic, Including The Injury To Its Comity And Dignitary Interests, Along With The Other CPLR 1001 Factors, Requires Dismissal.*

The only CPLR 1001(b) factor even arguably weighing in favor of Swezey is whether she "has another effective remedy in case the action is dismissed on account of the nonjoinder." Like the Appellate Division, we do not minimize the sympathetic position of the Pimentel class, whose members suffered grievous injuries at the hands of the Marcos regime; nor do we discount the class's interest in recovering damages against the Marcos estate, assuming that it does have an enforceable judgment against the estate. *See Swezey*, 87 A.D.3d at 132. For present purposes, however, all this is beside the point.

Even if one assumes that dismissal would leave petitioner without an effective remedy (*cf.* CPLR 1001(b)(1)), "the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis v. United States*, 343 F.3d 1282, 1293-94 (10th Cir. 2003). And as the U.S. Supreme Court noted in *Pimentel*, that is the situation here because "that result is contemplated under the doctrine of foreign sovereign immunity." 553 U.S. at 872; *see also Wichita*, 788 F.2d at 777 (noting unavailability of adequate alternative remedies, but nevertheless holding that "dismissal . . . [was] mandated by the policy of . . . immunity"). Dismissal of a suit is a "common consequence of sovereign

immunity" (*Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002)); "society has consciously opted to shield [sovereigns] from suit without . . . consent," even in the face of what would otherwise be plainly meritorious claims. *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (internal quotation marks omitted).

Although that consideration itself serves to diminish the legal significance of the asserted lack of an alternative remedy, it is also worth noting that the nature of Swezey's underlying claim undermines her interest in bringing it. As the United States explained in *Pimentel*:

> the Republic claims that the [Arelma] funds are the proceeds of public corruption and that *these very funds* were therefore forfeited to the Philippines, under Philippine law, at the time Marcos obtained them. If the Sandiganbayan were to find that Arelma and its assets are the rightful property of the Republic, the claims of the Pimentel claimants against those assets would be vitiated. They would then be seeking to execute a judgment that they possess vis-à-vis *Marcos* against assets of the *Republic*.

Br. of United States at 28-29, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 225206. The Sandiganbayan has since issued just that holding and found that the Arelma assets have at all times belonged to the Republic. (*See* R. 176.) If that ruling is correct, it is for the Republic to "determin[e] if, and how, the [Arelma] assets should be used to compensate those persons who suffered grievous injury under Marcos." *Pimentel*, 553 U.S. at 866.

Thus, the precedent question in this case is whether Arelma belongs to the Republic or to the Marcos estate—not which creditor of the estate has priority in asserting its claims. That is a matter to be determined, in the first instance, *between the Republic and the estate by the courts of the Philippines.*[18] And if the determination that Arelma belongs to the Republic rather than the estate is upheld, the sympathy owing to Swezey and her class does not entitle them to the award of the Republic's property: "A judgment cannot be a charge on property the debtor does not own." *Grebow v. City of New York*, 173 Misc. 2d 473, 479-80 (Sup. Ct. N.Y. Co. 1997).[19] For this reason, too, Swezey's inability to litigate her claim in the event this action is dismissed on indispensable party grounds is entitled to little weight in the CPLR 1001(b) analysis.

C. Swezey's Arguments To The Contrary Lack Merit.

To review the bidding so far, the Appellate Division concluded—and Swezey does not seriously dispute—that all of the CPLR 1001(b) factors with the possible exception of one point in favor of dismissal: continuation of this action in

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[18] Swezey is not a party in the litigation before the Sandiganbayan, although the Marcos estate is. As a judgment creditor of the Marcos estate, Swezey "stand[s] in [its] shoes," and "cannot . . . reach assets in which the judgment debtor has no interest." *Bass v. Bass*, 140 A.D.2d 251, 253 (1st Dept. 1988).

[19] *See, e.g., Smith*, 43 A.D.2d at 792-93 (rejecting attempt to levy because "a creditor stands in no better position with respect to property of the garnishee than does his debtor"); *M. F. Hickey Co. v. Port of New York Auth.*, 23 A.D.2d 739, 739-40 (1st Dept. 1965) ("A money judgment can only be enforced against a property right to the extent that the judgment debtor can assign or transfer it.").

the Republic's absence would prejudice both the Republic and Merrill; that prejudice is unavoidable and no protective provision is feasible; and no effective judgment could be rendered in the absence of the Republic. Swezey's principal submission is that notwithstanding all these points, the Court should depart from the U.S. Supreme Court's ruling in *Pimentel* and hold that the Republic is not an indispensable party because, according to Swezey, New York's "strong policy against dismissal" means that *her* interest in pursuing the Arelma assets in this forum trumps all else. Opening Br. 25. It is Swezey, then, who seeks a "special rule" that attributes "overriding" weight to one of the CPLR 1001(b) factors in isolation. *Cf. id.* at 31. There is no basis in New York law or in this Court's decisions for such an extraordinary contention.

It is of course true that Fed. R. Civ. P. 19 does not use terms identical to those in CPLR 1001 and that *Pimentel* is not binding on this Court. But as a general matter Rule 19 is "[t]he federal analogue to New York's [joinder] statute" (*Red Hook/Gowanus Camber of Commerce v. New York City Bd. of Standards & Appeals*, 5 N.Y.3d 452, 458 n.2 (2005)), making case law under the federal rule "pertinent to CPLR 1001(b)." Siegel, *New York Practice*, *supra*, § 133.[20] More

[20] Swezey asserts that New York law differs from the federal standard because CPLR 1001 contemplates dismissal when jurisdiction over a necessary party can be obtained only by consent, whereas federal law permits dismissal when joinder is not "feasible." Opening Br. 25-26. But this distinction, if it is one, is immaterial

(footnote continued)

particularly, the considerations of comity and sovereign immunity that were central to *Pimentel* are as much a part of New York as they are of federal law. As we have noted, New York courts long ago anticipated the sovereign immunity rule of *Pimentel*. *See Oliner*, 34 A.D.2d at 312; *Fed. Motorship Corp.*, 192 Misc. at 405. And New York courts also repeatedly have applied principles of comity.[21] Because "a decision of the Supreme Court of the United States . . . is entitled to great weight by this court in considering a similar situation," *Jewett v. Commonwealth Bond Corp.*, 241 A.D. 131, 133 (1st Dept. 1934), particularly "when the question presented is one of general policy," *In re Nunns*, 188 A.D. 424, 433 (2d Dept. 1919), *Pimentel* should inform the application of CPLR 1001(b)—especially when, as in this case, the dispute involves the claim of a foreign nation, a matter that

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here because jurisdiction over the Republic is available only by consent on account of its sovereign immunity. *See supra* pages 28, 33 & note 12. Swezey's related reliance on *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), *overruled by Levin v. Commerce Energy*, Inc., 130 S. Ct. 2323, 2329 (2010) (tax comity bar), for the proposition that the federal and New York joinder standards differ also is misplaced; the party opposing dismissal in *Wilbur* cited state cases only for the proposition that dismissal was barred by the U.S. Constitution's Petition Clause, meaning that the federal court had no occasion to give detailed attention to state joinder rules. *See* 423 F.3d at 1115-16.

[21] *E.g.*, *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 85 (2006) ("fundamental principles of comity" would be undermined by interference "with the acts of a foreign jurisdiction's legislature or judicial body"); *People ex rel. Reynolds v. Martin*, 3 N.Y.2d 217, 220-21 (1957) (recognizing that "there exist[s], between and among governments, a reciprocal comity and pact of mutual assistance") (internal quotation marks omitted); *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 258 (1923) ("Experience points to the expediency of recognizing the legislative, executive, and judicial acts of other powers.").

implicates concerns of international comity and threatens to have a significant impact on the foreign relations of the United States.[22]

The factors that moved the U.S. Supreme Court in *Pimentel* therefore should lead this Court to the same conclusion here: a New York court should not determine ownership of specific assets to which an absent foreign sovereign asserts a substantial claim and that currently are the subject of a suit in that nation's courts. Contrary to Swezey's submission, there is nothing in *Saratoga County*, *Lamont*, or *Koehler* that calls for a contrary result.

1. *The Decision Below Is Consistent With* Saratoga County.

Swezey relies chiefly on *Saratoga County*, and insists that the case stands for the broad proposition that New York law focuses "on giving the absent party the ability to litigate" and that as long as the absentee has the "opportunity to be heard," dismissal on indispensable party grounds is improper.[23] Opening Br. 26.

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[22] Swezey attempts to distinguish *Pimentel* by contending that the U.S. Supreme Court's holding is "undermined" by a Singapore decision that predated *Pimentel*. Opening Br. 29. It would seem obvious that this Court should follow the guidance of the U.S. Supreme Court, rather than that of the Singapore Court of Appeal, which was applying an entirely different decisional framework from that operative in the United States.

[23] Swezey is wrong in arguing that intervenors are judicially estopped from attempting to distinguish *Saratoga* by statements they made to the U.S. Supreme Court in *Pimentel*. Opening Br. 28-29. Although intervenors observed without elaboration in *Pimentel* that CPLR 1001 "differs in its terms from Rule 19(b)," Pet. Reply Br. 5 n.4, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2007 WL 1143401, they very plainly did not suggest either that the sovereignty and comity

(footnote continued)

But as we have explained above (at 38-41, 44), that rule makes no sense, fixating on one CPLR 1001(b) factor (*i.e.*, whether the plaintiff will have an alternative "effective remedy") to the exclusion of every other CPLR 1001(b) factor (*e.g.*, prejudice to the absentee and to the respondent and the possibility of an effective judgment). If Swezey were correct, an absent sovereign could always avoid prejudice by waiving its immunity and participating in the action, and dismissal under CPLR 1001(b) would virtually *never* be permissible. And that is on its face inconsistent with this Court's ruling in *Saratoga County*, which both directed courts to consider *all* "five [CPLR] factors . . . . in deciding whether to dismiss an action" and pointedly noted that, although the particular suit before the Court in that case could go forward, "in *other cases* sovereign immunity might support dismissal." 100 N.Y.2d at 819, 821 (emphasis added); *see also Red Hook/Gowanus*, 5 N.Y.3d at 459 (CPLR 1001(b) "directs [courts] to consider all five" factors).[24]

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principles applied by the federal and New York courts differ, or that a New York court would entertain an action in circumstances like those here. In any event, the "submission of a *legal* argument is 'of a different character' than an inconsistent framing of one's *factual* pleadings, and therefore not a basis for judicial estoppel." *In re Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 529-30 (1st Dep't 1995) (emphasis added; citations omitted); *accord Pisciotta v. Lifestyle Designs, Inc.*, 299 A.D.2d 403, 404 (2d Dep't 2002) (only assertions of "fact . . . disproven in a prior proceeding" may be subject to judicial estoppel).

[24] Although both CPLR 1001 and its federal equivalent contemplate some exercise of discretion in determining whether to excuse the non-joinder of a necessary

(footnote continued)

The Appellate Division correctly rejected Swezey's contention that *Saratoga County* categorically holds that "the lack of an alternative remedy alone [is] sufficient to avoid dismissal." *Swezey*, 87 A.D.3d at 134.[25] The key consideration there disfavoring dismissal was the need to "'allow[] judicial review of th[e] *constitutional question*'" raised by the plaintiffs and thereby "protect the integrity of the constitutional structure of state government." *Id.* (quoting *Saratoga County*, 100 N.Y.2d at 821). As the Appellate Division explained, *Saratoga County* did not involve a dispute over assets claimed by a sovereign, as does this case. Instead, it held that an Indian tribe was not an indispensable party to an action challenging the Governor's authority to enter into a tribal gambling compact without legislative approval. 100 N.Y.2d at 808, 819. That very different context was of decisive

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party, this case does not present a close question. As the U.S. Supreme Court explained in *Pimentel* "*[w]hatever* the appropriate standard of review . . . the judgment [resolving the interpleader without the Republic and the PCGG] could not stand." 553 U.S. at 864 (emphasis added). Whether reviewed *de novo* or for abuse of discretion, *see supra* note 4, the Appellate Division's decision to order dismissal of this action is plainly correct. As discussed above, all but one of the CPLR 1001(b) factors points towards dismissal.

[25] That is consistent with how other courts have understood *Saratoga County* and indispensable-party principles under New York law. *See, e.g.*, *Cylich v. Riverbay Corp.*, 74 A.D.3d 646, 647 (1st Dep't 2010) (dismissing case on indispensable party grounds even though "petitioners have no other effective remedy if the proceeding is dismissed"); *Nowitz v. Nowitz*, 37 A.D.3d 788 (2d Dep't 2007), *appeal after remand*, *Fagan v. Nowitz*, 65 A.D.3d 1184, 1185-86 (2d Dep't 2009) (concluding that certain "entities are indispensable parties" because, *inter alia*, they "will suffer great prejudice if the matter proceeds in their absence," notwithstanding that plaintiff "has no other effective remedy").

importance to the outcome in *Saratoga County*: the Court found it critical that dismissal would "insulate[] [the Governor's actions] from review, a prospect antithetical to our system of checks and balances" that would leave "the alleged constitutional violation . . . without remedy." *Id.* at 820-21.

New York courts therefore have repeatedly recognized that *Saratoga County*'s holding is targeted at protecting the integrity of New York's constitutional structure from arbitrary exercises of power.[26] As the court explained in *Scott v. City of Buffalo*, 20 Misc. 3d 1135(A), 2008 WL 3843532 (Sup. Ct. Erie Co. 2008), *aff'd for reasons stated*, 67 A.D.3d 1393 (4th Dept. 2009), "*Saratoga* dealt with State power and the ability of the governor to enter into a treaty without legislative approval . . . *Saratoga* is a separation of powers case." *Id.* at *29 (internal quotation marks omitted). "*Saratoga*'s main issue dealt with a citizen's constitutional challenge to the gaming compact signed by the governor." *Id.* By contrast, where an action involves "challenges to a property transfer," joinder of the parties with an interest in the property is required and "*Saratoga* is distinguishable." *Id.*

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[26] *E.g.*, *Concern, Inc. v. Pataki*, 7 Misc. 3d 1030(A), 2005 WL 1310478, at *15 (Sup. Ct. Erie Co. 2005) ("alleged failure of the government respondents to comply with the law"); *Huron Group, Inc. v. Pataki*, 5 Misc. 3d 648, 666 (Sup. Ct. Erie Co. 2004) (alleged "violat[ions of] the principle of separation of powers"), *aff'd*, 23 A.D.3d 1051 (4th Dept. 2005); *Herald Co. v. Feurstein*, 3 Misc. 3d 885, 897 (Sup. Ct. N.Y. Co. 2004) ("system of checks and balances").

Saratoga County also is distinguishable because another tribe, the Oneida Indian Nation, "appeared as amicus curiae" and made "much the same arguments we would expect to be made by the [absent] Tribe had it chosen to participate." 100 N.Y.2d at 820. In this case, by contrast, the PCGG and the Republic "assert a claim distinct from those asserted by Arelma and the PNB." *In re Republic of Phil.*, 309 F.3d at 1152; *Pimentel*, 553 U.S. at 864 ("[W]ithout [the Republic and the PCGG] as parties in this interpleader action, their interests in the subject matter are not protected.") (internal quotation marks omitted). Furthermore, whereas in *Saratoga County* there was no danger of "multiple, inconsistent judgments relating to the same controversy," 100 N.Y.2d at 820—*i.e.*, either the New York Constitution authorized the Governor to enter into the gaming compact or it did not—in this case, there *is* a serious danger of duplicative liability if this case proceeds to judgment and the ownership of the Arelma assets is resolved in the absence of the Republic. *See supra* pages 18-20, 38-40.

In *Saratoga County* itself, this Court recognized the limited nature of its holding and noted that in "other cases[,] sovereign immunity might support dismissal" on indispensable party grounds. 100 N.Y.2d at 821. This is one such case: Swezey's claim does not implicate New York's system of "checks and balances." *Id.* at 820. Instead, it "call[s] upon [a foreign sovereign] to sacrifice either [its] property or [its] independence" by participating in the action, thus

breaching the very "principle upon which [the sovereign's] immunity from jurisdiction rests." *De Simone v. Transportes Maritimos do Estado*, 200 A.D. 82, 86-87 (1st Dept. 1922) (internal quotation marks omitted). Swezey does not attempt to explain why the balance struck in *Saratoga County* should apply in the same way to the very different circumstances of this case.[27]

2. *The Decision Below Is Consistent With* Lamont.

The other decision Swezey relies upon at length (at Opening Br. 23-24), *Lamont v. Travelers Insurance Co.*, 281 N.Y. 362 (1939), offers her no support at all, for the reasons identified by the Appellate Division.

First, and most obviously, the Court there declared that "[t]he courts of this State cannot adjudicate any controversy to which a foreign sovereign government is a necessary party." *Lamont*, 281 N.Y. at 367. Here, as the Appellate Division correctly concluded, the Republic *is* a necessary party. *See supra* pages 18-27.

Second, *Lamont* applied a rule *stated by the U.S. Supreme Court* to govern "how far a suggestion by a foreign sovereign that it is the owner of property which

[27] The remaining decisions cited by Swezey (at Opening Br. 26-27, 30 n.30) are of no relevance here. *Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards & Appeals*, 5 N.Y.3d 452 (2005), did not involve an absent sovereign asserting immunity. In *Plaut v. HGH Partnership*, 59 A.D.2d 686 (1st Dept. 1977), the court held that a federal agency was not an indispensable party because its rights would not be affected by an adjudication of the defendant's liability to the plaintiff. *See id.* ("no prejudice is demonstrated"). Finally, *Herald* simply applied *Saratoga County* without elaboration.

is the subject-matter of a suit in the courts here must be accepted as true by the court." *See* 281 N.Y. at 372 (citing *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938)). Here, the applicable rule of the U.S. Supreme Court, declared unambiguously in *Pimentel*, requires dismissal. As the Appellate Division recognized, "in *Pimentel*, the United States Supreme Court made it clear that today an American court should not probe the merits of the claim of a foreign sovereign asserting immunity beyond determining whether the claim is 'frivolous' on its face." *Swezey*, 87 A.D.3d at 129 n.9.

Third, *Lamont* has, as the Appellate Division also correctly noted, been overtaken by a change in statutory law. *Swezey*, 87 A.D.3d at 129 n.9. That case was decided before the passage of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), at a time when courts "abided by 'suggestions of immunity' from the State Department." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). For that reason, this Court concluded in *Lamont* that the "mere assertion" of ownership by a foreign government need not lead to dismissal of the suit absent any indication that the *U.S. government* "has recognized and allowed the claim." 281 N.Y. at 373-74. But FSIA eliminated this case-by-case decisionmaking process, making foreign nations presumptively immune from the jurisdiction of U.S. courts. *Verlinden*, 461 U.S. at 488, 495-96 & n.22; *see* H.R. Rep. No. 94-1487, at 21 (1976) (noting that attachment of foreign assets can cause "serious

friction in the United States' foreign relations" and "significant irritation to many foreign governments"). *Lamont* therefore has no application in the post-FSIA era, when the endorsement of the federal government is no longer required to support a claim of immunity.

Finally, even if the rule of *Lamont* still applied, the United States, through its participation before the U.S. Supreme Court in *Pimentel*, has supported the Republic's claim to the Arelma assets as substantial and non-frivolous. Br. for the United States at 25-29, *Pimentel*, 553 U.S. 851 (No. 06-1204), *available at* 2008 WL 225206. This case does not involve a "mere assertion by a foreign government" of ownership without proof or support from the U.S. government. *Cf. Lamont*, 281 N.Y. at 373.

3. *The Decision Below Is Consistent With* Koehler.

Swezey next argues that that the decision below conflicts with this Court's decision in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009). Opening Br. 30-31. She appears to read *Koehler* as holding that an indispensable-party analysis has no application in a CPLR 5225 turnover proceeding because, according to Swezey, joinder is always "permissive, not mandatory." *Id.* at 31 & n.16. But *Koehler* does not stand for, and indeed did not even address, any such proposition. Instead, *Koehler* concerned the question "whether a court sitting in New York may order a bank over which it has personal jurisdiction to deliver" property in the

bank's possession that is owned by a judgment debtor to a judgment creditor when the property is located outside New York. 12 N.Y.3d at 536. That question has nothing to do with the issue presented in this case.

It may be added that, wholly apart from *Koehler*, Swezey's evident submission that joinder analysis is inapplicable to proceedings like this one is flatly wrong. For one thing, as the Appellate Division noted, "CPLR 1003, which provides for dismissal in the event joinder of a necessary party is not possible, applies to special proceedings, including CPLR 5225 turnover proceedings," because the "term 'action' as used in . . . CPLR [1003] is defined [in CPLR 105(b)] to include special proceedings." *Swezey*, 87 A.D.3d at 126 n.5.[28]

Moreover, although it may be true that not all *judgment creditors* are necessary parties who *must* be joined in a turnover proceeding—because Article 52 contemplates a "race of diligence" among creditors (*Ruvolo v. Long Island R.R.*, 45 Misc. 2d 136, 148 (Sup. Ct. Queens Co. 1965))—that principle is beside the point as regards this case, where the Republic claims the Arelma assets as their *owner*, not as a creditor of the Marcos estate.[29] As the Appellate Division recognized,

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[28] It therefore is unsurprising that courts routinely apply CPLR 1001(b)'s standards in special proceedings. *See, e.g.*, *Ferrando v. New York City Bd. of Standards & Appeals*, 12 A.D.3d 287, 288 (1st Dept. 2004); *Amodeo v. Town Bd.*, 249 A.D.2d 882, 884 (3d Dept. 1998).

[29] Swezey acknowledges that her contention that the Republic is a mere "judgment creditor [on its Philippine court judgment], nothing more," Opening Br. 19

(footnote continued)

because the Republic claims "an *actual, current interest* in the property in question" as the original and sole legitimate owner, that interest is not "jeopardized by the 'race of diligence' among *creditors*." *Bergdorf Goodman, Inc. v. Marine Midland Bank*, 97 Misc. 2d 311, 314 (Civ. Ct. N.Y. City 1978) (emphasis added). When, as here, "any decision on the merits . . . would necessarily involve a determination of the rights" of a party (like the Republic) that asserts a direct interest in the subject matter of the action, that "present interest . . . renders [the individual] a necessary party" that must be joined. *Id.* at 313; *see also Triangle Pac. Bldg. Prods.*, 62 A.D.2d at 1017. That has long been the law in New York, and the Appellate Division did not err in applying indispensable-party principles to this turnover proceeding.[30]

(internal quotation marks omitted), rests on the notion that any *ownership* claim that the Republic might assert to the Arelma assets is time-barred. But as the Appellate Division explained, *Swezey*, 87 A.D.3d at 128, 130 & n.12, and as discussed above (at 21-27), that premise is false.

[30] *See, e.g., Erin Capital Mgmt., LLC v. Celis*, 19 Misc.3d 390, 393 (Dist. Ct. Nassau Co. 2008) (dismissing CPLR 5225 petition because judgment creditor failed to name necessary parties); *Citibank (South Dakota), N.A. v. Island Fed. Credit Union*, 190 Misc.2d 694, 695 (App. Term. 2d Dept. 2001) (same as to CPLR 5225 and 5227); *Mendel v. Chervanyou*, 147 Misc.2d 1056, 1059 (Civ. Ct. N.Y. City 1990); *Weinstein v. Gitters*, 119 Misc.2d 122, 124 (Sup. Ct. Suffolk Co. 1983); Siegel, *Practice Commentaries*, *supra*, CPLR 5227:1 ("[if] there is any possibility that the debt is owed to someone other than the judgment debtor, the garnishee must assure that . . . any third person claimant is made a party"); *cf. Cadle Co. v. Satrap*, 302 A.D.2d 381, 382 (2d Dep't 2003) (holding that it was erroneous for the trial court not to "determine the wife's [an asserted part-owner's] interest in the vehicle before deciding that it should be turned over").

4. *Swezey's Remaining Arguments Are Insubstantial.*

Swezey finally unleashes a veritable school of red herrings. None has merit.

a. Swezey misreads the decision below when she claims that the Appellate Division "essentially held that factual assertions made on behalf of the Republic . . . are binding on human rights victims without any hearing." Opening Br. 33. In a related vein, Swezey contends that the Appellate Division's holding allows foreign sovereigns to "wreak havoc" in the New York courts and veto litigation simply by asserting potentially "false" and unsubstantiated claims to assets and "without having to present any evidence." *Id.* at 27, 31-32, 40.

We are at something of a loss in responding to these assertions because the decision below self-evidently does no such thing. In fact, following *Pimentel* and New York precedent, the Appellate Division applied the ordinary understanding of sovereign immunity to conclude that courts may not adjudicate ownership of property to which an absent sovereign makes a *substantial* claim. The majority repeatedly stated that dismissal on indispensable-party grounds is warranted only when the foreign sovereign's claim to the assets at issue is "not frivolous," "substantial," and made in "good faith." *Swezey*, 87 A.D.3d at 130-31 & n.12; *accord id.* at 128 ("substantial claim"), 129 n.9 (claims must not be "frivolous"), 130 n.12 ("good-faith, nonfrivolous arguments"), 135 ("substantial claim of ownership"). The decision below expressly does not compel New York courts to

accept the ownership claim of a foreign sovereign without further inquiry. It remains open for a court to "probe the merits," *id.* at 129 n.9, of such a claim to determine whether it is in fact substantial. There is no doubt here that the Republic's claim satisfies this test.[31]

b. Swezey also is incorrect in suggesting that the Republic has no genuine sovereign interest in litigating the ownership of the Arelma assets in its courts rather than in New York because "[i]t has litigated claims to Marcos assets in more than a dozen cases" in the United States. Opening Br. 34. In particular, Swezey asserts that "the Republic has been aware of the Arelma account at Merrill Lynch since 1986, initiated a lawsuit over the assets at that time in New York courts," "obtained an injunction freezing the assets," and "[t]hen . . . withdrew its claim" for want of proof. *Id.* But the decision she cites for this proposition concerned specific pieces of *real* property, makes no mention of Arelma, and does not list Merrill as a party. *New York Land Co. v. Republic of the Phil.*, 634 F. Supp.

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[31] Swezey's contention that the Republic has "absolutely no proof" that Arelma assets belong to it is obviously wrong. *Cf.* Opening Br. 12. As we have demonstrated at length (at 21-27), the U.S. Supreme Court already has held that the Republic's claim to the Arelma asserts is a substantial one (*Pimentel* 553 U.S. at 867-68) and the Sandiganbayan has held that it is a *winning* one because the evidence established that former President Marcos had no legitimate source for the Arelma funds. R. 176. And adding a third court to the mix, the Swiss Federal Supreme Court found that the Marcos assets held in Switzerland, including the Arelma shares, had an illegal provenance—meaning that they had been stolen from the Republic. R. 324-325 ¶ 5(b).

279 (S.D.N.Y. 1986), *aff'd sub nom. Republic of Philippines v Marcosxxxx*, 806 F.2d 344 (2d Cir. 1987). Although we noted this error when Swezey made this same argument below, she has repeated it verbatim before this Court.

At any rate, the Republic's participation in other litigation is immaterial. As the Appellate Division recognized, a sovereign is entitled to determine "whether and when to participate in litigation." *Swezey*, 87 A.D.3d at 135. The sovereign's "interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990) (internal quotation marks omitted); *accord Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996). Thus, "[t]o the extent [the Republic] has chosen to consent to certain" suits while asserting "its immunity [in] others, it has done no more than exercise a privilege of sovereignty." *See Alden v. Maine*, 527 U.S. 706, 758 (1999); *Horoch v. State*, 286 A.D. 303, 305 (3d Dept. 1955) (sovereign entitled to "qualify as it saw fit" its waiver of immunity); *Speers v. State*, 183 Misc. 2d 907, 912 (Ct. Cl. 2000) (sovereign entitled to "determine under what conditions it consents to waive its sovereign immunity from suit"), *aff'd*, 285 A.D.2d 872 (3d Dept. 2001).

In sum, the Appellate Division was correct to hold that the fact that the Republic chose to participate as a plaintiff in *other* U.S. litigation—principally in an effort to freeze Marcos assets to prevent their dissipation immediately after

former President Marcos was removed from power—or that the Republic may *someday* choose to submit to a New York court's jurisdiction to resolve the disposition of the Arelma assets has no bearing on its privilege not to waive its immunity and appear in *this* action *today*. *See Swezey*, 87 A.D.3d at 133-34.

c. Swezey also contends that the Appellate Division erred in stating that the judgment in Philippine proceedings regarding Arelma "would be binding on" her. Opening Br. 36. But here, too, she misreads the import of the decision below. The Appellate Division's point was simply that Swezey's "claim to the Arelma assets derives entirely from the [Marcos] estate's purported title to the fund," *Swezey*, 87 A.D.3d at 127, a statement that plainly was correct. The threshold issue regarding the Arelma assets is whether they belong to the Republic or to the Marcos estate—not *which creditor* of the estate has priority in executing against the estate's assets. As we have explained. that former issue is a matter to be determined, in the first instance, between the Republic and the estate by the courts of the Philippines. And if Arelma indeed belongs to the Republic rather than the estate, Swezey simply will have no basis on which to claim the Republic's property: "if a given . . . asset is unavailable to the debtor, it is unavailable to the creditor." David D. Siegel, *New York Practice*, *supra*, § 488; *see also supra* pages 34, 42-43.

d. Finally, Swezey makes several vitriolic assertions—consisting largely of attacks on the motives and conduct of PNB and the Republic—that are not relevant to the governing joinder standards. Because these assertions are patently inaccurate, however, we briefly reply.

First, Swezey asserts that PNB, "a partly-owned state run bank of the Republic," is a "stalking horse[] for the Republic," implying that PNB could adequately represent the Republic's interests. Opening Br. 11-12. Every part of this statement is false. The Republic has *no* ownership interest in PNB,[32] and we can assure the Court that PNB is not the Republic's "stalking horse." PNB's legal obligation as escrow agent is to deliver Arelma's assets to *whomever* is determined to be the owner by the Philippine courts. The Pimentel class made similarly baseless assertions about PNB in the federal interpleader litigation, where they were rejected by both the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit. *Pimentel*, 553 U.S. at 864; *In re Republic of Phil.*, 309 F.3d at 1152. As the Ninth Circuit explained, "[t]he Republic and the PCGG . . . assert a claim distinct from those asserted by Arelma and the PNB," since PNB's status as

[32] PNB's privatization process began in 1989 and was completed in August 2007, when the government's remaining shares were "sold to the public[,] . . . thus bringing about a complete exit of the government from PNB." *About Us: History*, *available at* http://www.pnb.com.ph/index.php?option=com_content&view=article&id=213&Itemid=177 (last visited January 9, 2012).

escrow agent precludes it from acting on behalf of *any* party to the escrow. *In re Republic of Phil.*, 309 F.3d at 1152.

Second, Swezey devotes considerable space to describing the injuries suffered by members of the class of human rights victims at the hands of the Marcos regime. Opening Br. 6-9 & n.3, 35. We do not dispute the sympathetic position or moral stature of these persons. But that has no bearing on the legal issue before the Court. The question here (if the Court reaches the merits) is whether the Arelma assets *are* a part of the Marcos estate, or whether they instead have at all times belonged to the Republic. If the latter is so—as the Sandiganbayan held—Swezey has no claim to those assets, no matter how sympathetic her position: "however morally compelling the claim underlying a judgment may be, the judgment creditor is entitled to execute only against property that actually belongs to the judgment debtor." *Swezey*, 87 A.D.3d at 132. The sympathy owing to the Pimentel class does not entitle it to take other people's property.

Third, the international law materials and treaties offered by Swezey provide no support for her current claim. Opening Br. 34, 39-40. For one thing, none of the cited materials is "self-executing"; they have no effect in the courts of this State. *Cf. Rissew v. Yamaha Motor Co.*, 129 A.D.2d 94, 98 (4th Dept. 1987). But more fundamentally, even if those materials are assumed to apply here, they would not

give Swezey either a claim to the Arelma assets or an entitlement to continue this litigation. The point was made expressly by the Swiss Federal Supreme Court: applying the same international law materials relied upon here by Swezey, that court rejected claims to Marcos-related Swiss assets advanced in Switzerland by the Pimentel class. The court explained that the "[v]ictims [of the Marcos regime] seeking relief generally must resort to either a lawsuit versus the estate [of Marcos] . . . or a lawsuit versus the Philippine government." R. 353. The government of Switzerland, in a diplomatic note issued after release of the most recent U.N. documents cited by Swezey, reiterated that "under international law, the Philippines should have the opportunity to determine . . . [how] the Marcos funds should be used for compensating victims of human rights violations under the Marcos regime," warning that contrary court rulings could undermine "intergovernmental cooperation" in fighting official corruption. Note of the Embassy of Switzerland to U.S. Dep't of State (Apr. 5, 2007), *reprinted in* Pet. Reply. Br., *Pimentel*, 553 U.S. 851 (No. 06-1204).

Finally, the criticism of the Republic offered by Swezey is immaterial. It is not our place to that criticism in detail; we therefore note only that the Republic is a long-standing and close ally of the United States, and that its entitlement to adjudicate ownership of Arelma in its own courts was supported by the United States and upheld by the U.S. Supreme Court in *Pimentel*. In all events, if Arelma

is not part of the Marcos estate, there is no legal basis for a U.S. court to deny the Republic its right to "determine[e] if, and how, the [Arelma] assets should be used to compensate" Marcos's victims. *Pimentel*, 553 U.S. at 866.

* * *

It is the general rule, both in New York and in the federal courts, that a foreign sovereign is an indispensable party to a dispute seeking to resolve the ownership of assets to which the sovereign asserts a non-frivolous claim. But even if that rule is not absolute, the particular circumstances of this case make the need for dismissal here *especially* acute. This Court is being asked to interject itself into a dispute between the Republic and its former President, over the ownership of assets stolen from the Republic during that President's tenure in office, and that also involves claims made by Philippine citizens against that President arising out of injuries they suffered in the Philippines. As a practical matter, a decision upholding the trial court here would frustrate the Republic's recovery of misappropriated state assets and effectively pretermit ongoing litigation in the Philippine courts between the Republic and the estate of its former President. In such circumstances, which "arise from events of historical and political significance to the Republic and its people," the Republic has "a unique interest in resolving the ownership of or claims to the Arelma assets." *Pimentel*, 553 U.S. at

866. The Appellate Division's decision ordering the dismissal of this action on indispensable-party grounds should, accordingly, be affirmed.

II. In The Event That The Court Holds That The Republic Is Not An Indispensable Party, It Should Remand The Case To The Appellate Division To Consider The Argument, Raised By Intervenors But Not Addressed By That Court, That Swezey Lacks A Judgment That Is Enforceable In New York.

For the reasons just explained, this case should be dismissed for failure to join an indispensable party. If the Court decides to the contrary, however, it should remand the cause for the Appellate Division to consider whether the trial court erred in concluding that Swezey (and the Pimentel class) has an enforceable judgment against the Marcos estate in New York. If, as we argued to the Appellate Division, the class judgment against the estate has lapsed, Swezey's turnover petition should be dismissed even if the Arelma assets are assumed to be part of the Marcos estate.

This issue was briefed at length before the Appellate Division. *See* App. Div. Opening Br. 41-53; App. Div. Reply Br. 18-26. Our submission, briefly, is that it is undisputed that the Pimentel class's underlying Hawaii judgment lapsed in 2005. *Swezey*, 87 A.D.3d at 123 n.1; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 987, 900 (9th Cir. 2008). To evade the expiration of the Hawaii judgment, Swezey now seeks to enforce the filing in New York of the registration in Illinois, pursuant to 28 U.S.C. § 1963, of the Hawaii judgment. But

the Illinois federal registration was solely a device for enforcing the underlying Hawaii judgment *in Illinois*, the state of registration, and did not create a new, freestanding judgment that could be enforced or taken elsewhere. The filing of the Illinois registration in New York therefore did not produce a judgment that is enforceable in New York.

And that must be so: All agree that the underlying source of a creditor's rights is the original judgment on the merits (*i.e.*, the Hawaii *Pimentel* judgment). Registration of that judgment, permitted under 28 U.S.C. § 1963, provides a mechanism with which to enforce the original judgment elsewhere. But it is impossible to see why Congress would have wanted such a registration to be the sort of rights-creating document that could *itself* be transferred and enforced elsewhere. In fact, it is impossible to see why a judgment winner would *want* to transfer a registration rather than the original judgment—unless the original judgment has become unenforceable (as it did here, because the judgment winner unaccountably allowed the judgment to lapse). That, however, is the very situation when enforcement of the registration is assuredly *inappropriate*: if the original judgment is no longer live and transferable, it would turn Full Faith and Credit principles upside down to allow transfer and enforcement of a registration and make an end-run around the policies of the judgment state.

The Appellate Division noted that the Pimentel class's Rube Goldberg efforts to enforce the filing of the registration of an expired judgment "have resulted in conflicting federal court decisions." *Swezey*, 87 A.D.3d at 135 n.15.[33] But because the Appellate Division ordered dismissal of "the proceeding without prejudice based on the inability to join the Republic," the court did not address intervenors' "alternative argument that petitioner does not have an enforceable judgment." *Id.* In the event that the Appellate Division's indispensable-party ruling is reversed, the matter should be remanded so that the Appellate Division can pass upon that alternative argument in the first instance. *E.g., Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 138 (2010) ("remit[ting] for consideration of issues raised but not determined on the appeal to" the Appellate Division); *Crawford v. Liz Claiborne, Inc.,* 11 N.Y.3d 810, 813 (2008) ("remit[ting] this case

[33] The U.S. District Court for the Northern District of Texas rejected the Pimentel class's attempt to register the Illinois federal registration in Texas, Order Denying Leave To File Amended Complaint, Denying Stay, and Granting Motion To Dismiss, *Del Prado v. B.N. Dev. Co.*, No. 4:05-CV-234-Y, Dkt. #237 (N.D. Tex. Jan. 9, 2009), in a decision that was later reversed by the U.S. Court of Appeals for the Fifth Circuit, 602 F.3d 660 (5th Cir. 2010). The U.S. District Court for the District of Colorado endorsed the Texas district court's reasoning and likewise held that a "judgment created by registration . . . is enforceable in jurisdiction where it is registered in accordance with the law of that jurisdiction, but it cannot be subsequently 're-registered' in other jurisdictions," expressly rejecting the Fifth Circuit's contrary conclusion. *De Leon v. Marcos*, 742 F. Supp. 2d 1168, 1172 (D. Colo. 2010). The Colorado district court's order was later vacated on procedural grounds because the parties had settled the suit. *De Leon v. Marcos*, 659 F.3d 1276, 1284 (10th Cir. 2011).

to the Appellate Division" because that court did not have "an opportunity to pass on the propriety of Supreme Court's" order on the merits).

CONCLUSION

The Appellate Division's decision should be affirmed.

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