To be Argued by:
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(Of the bar of the District of Columbia)
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New York Supreme Court

Appellate Division—First Department

OSQUGAMA F. SWEZEY,

Petitioner-Respondent,

– against –

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Respondent,

– and –

PHILIPPINE NATIONAL BANK and ARELMA, INC.,

Intervenors-Appellants.

BRIEF FOR INTERVENORS-APPELLANTS

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INTRODUCTION

Intervenors-appellants Philippine National Bank ("PNB") and Arelma, Inc. ("Arelma") ask this Court to reverse the trial court's judgment and conclude—as the U.S. Supreme Court did in *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2008)—that a foreign sovereign is an indispensable party to a proceeding brought to resolve the ownership of assets to which the sovereign asserts a non-frivolous claim.

In the proceedings below, petitioner Osqugama F. Swezey ("Swezey") seeks the turnover of Arelma assets being held by respondent Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill"). Arelma is a Panamanian corporation established by Ferdinand E. Marcos when he was President of the Republic of the Philippines (the "Republic"). Swezey claims to be a judgment creditor of the Marcos estate 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 forfeit to the Republic from the moment that Marcos misappropriated them and never became a part of his estate. Ownership of the Arelma assets is now being determined by the Philippine courts, where the Sandiganbayan, a special anti-corruption court, has held them to be the property of the Republic.

The Republic did not enter an appearance in this proceeding and, instead, asserted sovereign immunity. PNB, which holds Arelma's bearer shares in escrow

and is obligated to deliver the Arelma assets to whomever is determined to be their owner by the Philippine courts, and Arelma moved to dismiss the turnover proceeding on the grounds that (1) the absent Republic is an indispensable party and (2) the judgment petitioner seeks to enforce has lapsed. But in a decision and judgment issued on November 16, 2009 (the "November Decision"), the trial court (Ramos, J.) denied that motion and indicated that it will conduct a trial to determine ownership of the disputed assets without the Republic's participation. That decision was wrong, and this Court should reverse.

Less than two years ago—in a federal interpleader action involving the *very same parties and the very same corpus of assets* that are before this Court—the U.S. Supreme Court in *Pimentel* ordered dismissal on indispensable party grounds because the Republic could not be joined. Invoking principles of international comity that also have been embraced by the New York courts, the U.S. Supreme Court 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." *Pimentel*, 128 S. Ct. at 2191. This Court should follow the lead of the U.S. Supreme Court, in a case that bears on the foreign relations of the United States: adjudication of petitioner's claim on the merits in the Republic's absence would 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.

PNB and Arelma therefore believe that it is inappropriate to reach the merits of Swezey's claim. If the Court disagrees, however, it should order the dismissal of the proceeding on the independent ground that Swezey lacks an enforceable judgment against the Arelma assets, even assuming that they belong to the Marcos estate. Swezey is a member of a class that obtained a judgment against the estate in the U.S. District Court for the District of Hawaii in 1995. But that judgment lapsed in 2005. To evade expiration of the judgment, petitioner is now seeking to enforce in New York not the underlying Hawaii judgment, but the *registration* of that judgment in an Illinois federal court. No court (other than the trial court below) has *ever* allowed such a registration to be enforced in another jurisdiction, an approach that would effectively free federal judgments of state time limitations and allow them to be enforced forever. This Court should not be the first.

QUESTIONS PRESENTED

1. Whether an action brought to settle ownership of assets claimed by a foreign sovereign may proceed in the sovereign's absence when the sovereign has not been joined in the litigation because it is immune from suit?

The trial court answered yes.

2. Whether the period during which a federal judgment is enforceable may be extended without limitation by registering the judgment in other courts *seriatim*, and then treating those registrations as freestanding judgments that can themselves be enforced elsewhere after the underlying judgment has lapsed?

The trial court answered yes.

STATEMENT OF THE CASE

A. Factual Background And Foreign Proceedings

The background of the Arelma litigation is described in detail in the U.S. Supreme Court's decision in *Pimentel*. *See* 128 S. Ct. at 2185-87. In brief, this is a dispute over ownership of some of the assets stolen by Ferdinand Marcos while he was President of the Republic of the Philippines.

In 1972, then-President Marcos caused the incorporation of Arelma as a Panamanian corporation. (R. 37 at ¶¶ 6-7.) Arelma opened a brokerage account with Merrill in New York (*id.* at ¶ 8) and maintained its bearer share certificates in Switzerland. (R. 38 at ¶ 12.) Today, that account (the "Arelma assets") contains approximately $35 million.[1] (R. 36 at ¶ 4.) Merrill claims no interest of its own in the Arelma assets. (R. 48 at ¶ 4.)

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[1] Following the U.S. Supreme Court's remand in *Pimentel*, the Hawaii district court transferred to Merrill what was said to be the entirety of the interpleaded Arelma assets. The U.S. Court of Appeals for the Ninth Circuit recently ordered a corrected accounting of the Arelma assets for the period that they were held in the Hawaii district court's registry. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v.*

The Arelma assets 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 Philippine Presidential Commission on Good Government ("PCGG") to recover property wrongfully appropriated by Marcos. (R. 229 at ¶ 4.) The Republic and the PCGG claimed Arelma and other Marcos-related assets, 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. *Pimentel*, 128 S. Ct. at 2186, 2191-92.

At the PCGG's request, the Swiss government froze certain Marcos-related Swiss assets, including the Arelma shares. *Pimentel*, 128 S. Ct. at 2186; (R. 230 at ¶ 5.) The Swiss Federal Supreme Court subsequently ordered these Marcos-related 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." *Swiss Federal 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

Arelma, Inc., 587 F.3d 922, 925 (9th Cir. 2009). That accounting has determined that approximately $5 million in assets were improperly retained in the registry of the Hawaii court; those funds will be returned to Merrill.

at ¶ 5(b)); *Pimentel*, 128 S. Ct. 2180 (2008) (No. 06-1204), 2008 WL 177688, at *79. Pursuant to this decision, the Swiss assets "were transferred to an escrow account set up by [the PCGG] at the [PNB], pending the Sandiganbayan's decision as to their rightful owner." *Pimentel*, 128 S. Ct. at 2186. 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 at ¶ 6.)

As contemplated by the Swiss Federal Supreme Court's decision, the Republic asserted a claim to Arelma before the Sandiganbayan. 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." *Republic of the Philippines v. Heirs of Ferdinand E. Marcos*, Case No. 0141 (Sandiganbayan Spec. Div. Apr. 2, 2009), *reprinted in* (R. 176). 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*.

B. Prior U.S. Proceedings

In July 2000, while the Marcos-related litigation was pending in the Philippine courts, the PCGG asked Merrill to surrender the Arelma assets to PNB

to be held in escrow pending final determination of their ownership. But Merrill declined to do so. Other claimants to the assets had come forward: in addition to the Republic and PNB, these included various alleged judgment creditors of the Marcos estate, including the "Pimentel class" to which petitioner Swezey here belongs,[2] which claim ownership of the Arelma assets on the theory that Arelma belonged to Marcos and is therefore now part of his estate.[3] Faced with these competing claims, Merrill commenced an interpleader action in the U.S. District Court for the District of Hawaii to settle ownership of Arelma. (R. 230 at ¶ 7.) Although the Republic and PCGG asserted their sovereign immunity (*In re Republic of Phil.*, 309 F.3d 1143, 1149-52 (9th Cir. 2002)), the district court and the U.S. Court of Appeals for the Ninth Circuit resolved the interpleader on the merits in the Republic's absence and awarded the Arelma assets to the Pimentel

[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 at ¶¶ 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 petitioner'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] The Estate of Roger Roxas also has indicated that it will stake a claim to the Arelma assets as a creditor of the Marcos estate. As we understand it, the Roxas estate maintains that its assets were stolen by Marcos and used to establish Arelma, and that its claim therefore has priority over that of the Pimentel class. As of the filing of this brief, the Roxas estate had not yet formally sought to intervene in this proceeding.

class. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885 (9th Cir. 2006).

The U.S. Supreme Court reversed in June 2008, however, holding that the action had to be dismissed under Fed. R. Civ. P. 19 because the absent Republic and PCGG were necessary and indispensable parties. Rejecting the contrary contentions of the Pimentel class, the 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 language of the revised Fed. R. Civ. P. 19, a "required") party, as the Pimentel class conceded the Republic and PCGG to be. *Pimentel*, 128 S. Ct. at 2189. The Court's holding was definitive: "A case may not proceed when a required-entity sovereign is not amenable to suit"; "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 2191. The Court explained: "Once 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 2189.

C. Proceedings Below

Notwithstanding the U.S. Supreme Court's ruling, petitioner here—again, acting as an alleged creditor of the Marcos estate—initiated a special proceeding against Merrill in the Supreme Court, New York County, pursuant to CPLR 5225 and 5227, seeking turnover of the Arelma assets in partial satisfaction of the Pimentel judgment. Petitioner did not attempt to join (or, indeed, even notify) the Republic, the PCGG, or the other claimants to these assets. (*See* R. 192 at ¶ 6.) Upon learning of the litigation, PNB and Arelma, in furtherance of their escrow obligation to deliver Arelma's assets as ordered by a Philippine court, sought leave to intervene and moved to dismiss the suit on the grounds (1) that the Republic, which is immune from suit, is a necessary and indispensable party under CPLR 1001; and (2) that, in any event, petitioner's claims have lapsed.

The trial court allowed PNB and Arelma to intervene as "interested persons" under CPLR 5239 (R. 26-27), but denied their motion to dismiss. On the indispensable party question, the trial court, although recognizing that Federal Rule 19 "is similar to CPLR 1001," expressly refused to follow the holding of the U.S. Supreme Court in *Pimentel*. (R. 25.) The trial court reasoned that "any unfairness to the Republic . . . is mitigated by [its] own ability to avoid that prejudice by voluntary intervention in this proceeding" (R. 23) and that, "if given an opportunity, the Republic may elect to participate in this turnover proceeding." (R.

26.) The trial court also rejected intervenors' argument that petitioner's judgment against the Marcos estate had lapsed. (R. 27-29.) The court ordered the petition set down for a hearing to resolve the "[t]riable issues" that "remain as to which party has superior rights to the [Arelma] Assets." (R. 27.)

Intervenors filed a notice of appeal from the denial of their motion to dismiss. On January 7, 2010, the trial court denied from the bench intervenors' motion to stay trial proceedings pending appeal;[4] it subsequently scheduled trial for March 2010.

SUMMARY OF ARGUMENT

A. The Court should order this case dismissed pursuant to CPLR 1001 and 1003 because the Republic and PCGG are 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." 128 S. Ct. at 2191. This conclusion rested on basic immunity principles: 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

[4] Intervenors have moved this Court to stay trial; as of the date of the filing of this brief, the Court had not yet resolved that request.

proceed without it." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

In nevertheless declining to dismiss the petition, the trial court reasoned that the Republic could avoid prejudice by participating in the litigation. But that approach fundamentally misunderstands 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*, 128 S. Ct. 2190), 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 during his time in office. 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. Permitting 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. For this reason, the United States and Switzerland (where Marcos had secreted Arelma's shares) strongly urged the U.S. Supreme Court in *Pimentel* that the Republic's claim to the Arelma assets be determined, in the first instance, by the Philippine courts.

The trial court also opined that it was not bound by the U.S. Supreme Court's holding in *Pimentel* because that case involved application of the federal rules rather than New York law. But the principles of sovereign immunity and comity held dispositive in *Pimentel* are as much a part of New York as of federal law. Indeed, New York courts anticipated the rule of *Pimentel*, stating that "an action involving specific property in which a sovereign asserts an interest" must be dismissed if the 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." *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). Here, it would be a grave affront to the Republic for the Arelma assets to be "seized by the decree of a foreign court" in a proceeding to which the Republic is not a party. *Pimentel*, 128 S. Ct. at 2190.

B. If the Court does not order the case dismissed on joinder grounds, it should hold that petitioner's claim has lapsed. There can be no doubt, as the U.S. Court of Appeals for the Ninth Circuit recently held, that the Hawaii class claim that petitioner seeks to enforce expired under Hawaii law when the class neglected to renew it. *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). To evade the expiration of that judgment, petitioner now asserts that she is seeking to enforce in

New York, not the underlying lapsed Hawaii judgment, but a *registration* of that judgment lodged in Illinois federal district court pursuant to 28 U.S.C. § 1963. Registration under § 1963, 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. With the exception of the trial court below, *no* court, *anywhere*, has allowed enforcement of a registration in such circumstances. This Court should not, either; petitioner and her class have only themselves to blame for not timely renewing their Hawaii judgment.

ARGUMENT

Standard of Review

The Appellate Division will reverse an indispensable party determination under CPLR 1001(b) when the trial court improvidently exercises its discretion. *O'Connell v. Zoning Bd. of Appeals*, 267 A.D.2d 742, 745 (3d Dept. 1999). Because this Court is "vested with the same power and discretion" as the trial court, 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). 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).

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). Thus, this Court owes no deference to the trial court's conclusions regarding the transferability and enforceability of a federal court's registration of another federal court's judgment under § 1963.

I. 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.

In 2008, the U.S. Supreme Court held that an interpleader action brought by Merrill to settle ownership of the Arelma assets had to be dismissed under Fed. R. Civ. P. 19 because the Republic and PCGG were "required" parties (*i.e.*, "[w]ithout [them] as parties in this interpleader action, their interests in the subject matter are not protected"), who were entitled to sovereign immunity and in whose absence the action should not proceed. *Pimentel*, 128 S. Ct. at 2189 (internal quotation marks omitted). In doing so, the U.S. Supreme Court overturned holdings of lower courts that purported to resolve ownership of the Arelma assets because those courts failed to give "the necessary weight to the absent entities' assertion of sovereign immunity," erroneously addressed "the merits of the Republic and the [PCGG's] claims to the Arelma assets . . . when the required entities had been granted sovereign immunity," and incorrectly concluded that a judgment rendered in the absence of those parties would not prejudice them. *Id*.

Under CPLR 1001 and 1003, 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 Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 819 (2003) (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.'"[5] *Id*. These factors confirm that, as the U.S. Supreme Court concluded in *Pimentel*, dismissal is the only appropriate course of action here.

A. The Republic And PCGG Are Necessary Parties.

The trial court plainly was correct in finding that the Republic and PCGG are "necessary parties to these proceedings within the meaning of CPLR 1001(a)" because their interest in the Arelma assets would be adversely affected if the

[5] 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).

petition is granted. (R. 16-17.) The turnover order sought by petitioner is flatly inconsistent with the Republic's and PCGG's interest in the Arelma assets because it would "consume the entire account, . . . necessarily render[ing]" them "aggrieved person[s]" 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*, 128 S. Ct. at 2192 (internal quotation marks omitted). That is especially so here "because '[w]ithout [the Republic and the PCGG] as parties in this interpleader action, their interests in the subject matter are not protected.'" *Id.* at 2189 (quoting *In re Republic of Phil.*, 309 F.3d at 1152).[6]

Similarly, both New York and federal law recognize that no action without the Republic and PCGG could conclusively settle the ownership of the Arelma

[6] In holding that the Republic and PCGG are necessary parties, the trial court necessarily, and correctly, rejected petitioner's argument that PNB or Arelma could adequately represent the Republic's interests. As the U.S. Court of Appeals for 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 escrow agent precludes it from acting on behalf of any party to the escrow. *In re Republic of Phil.*, 309 F.3d at 1152. Similarly, the sovereigns' interest in the disposition of the Arelma assets is not represented by "the named respondent, [Merrill Lynch], who, not illogically, might have viewed itself as no more than a neutral stakeholder." *Martin v. Ronan*, 47 N.Y.2d 486, 490-91 (1979); *see also Storrs v. Holcomb*, 245 A.D.2d 943, 946 (3d Dept. 1997).

assets "because the Republic and the [PCGG] would not be bound by the judgment." *Pimentel*, 128 S. Ct. at 2193. 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.

B. The Republic and PCGG are indispensable parties.

Despite recognizing that the Republic and PCGG are necessary parties entitled to invoke sovereign immunity (R. 16-17, 21),[7] the trial court concluded that the action could go forward in their absence (R. 24). The court described as "palpable" the prejudice to petitioner and the Pimentel class that would result from dismissal of the case on indispensable party grounds, minimized the impact on the

[7] 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. Because their entitlement to sovereign immunity is not disputed, the Republic and PCGG may not be joined without their "consent or appearance." CPLR 1001(b).

Republic and PCGG from continued adjudication, and set the petition down for a hearing. (R. 24, 30.)

The trial court's error, like that committed by the federal district court in the *Pimentel* interpleader, was "not that [it] gave too much weight to the interest of the Pimentel class, but that it did not accord proper weight to the compelling claim of sovereign immunity" asserted by the Republic and PCGG. *Pimentel*, 128 S. Ct. at 2192. Proper consideration of the CPLR 1001(b) factors compels the conclusion that the turnover proceeding should be dismissed.

1. Continuation Of This Proceeding Greatly Prejudices The Republic And The PCGG.

The Republic and PCGG would suffer profound prejudice if the trial court were to enter a judgment in their absence. CPLR 1001(b)(2). As a practical matter, distribution of the Arelma assets to petitioner (and, in turn, to the almost 10,000 members of the Pimentel class) 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. The trial court largely discounted this reality, reasoning that the Republic had "elected not to participate in this proceeding" (R. 20) and suggesting that any prejudice could be avoided by the Republic's "voluntary appearance in this proceeding by waiver of sovereign immunity" (R. 21.)

By insisting that the mere *ability* to appear makes irrelevant any prejudice that might otherwise accrue from a non-party's absence, however, the trial court effectively precluded any sovereign invoking immunity from *ever* qualifying as an indispensable party under CPLR 1001(b). After all, the sovereign could always, at least in principle, simply waive its immunity and enter an appearance. It cannot be that sovereign immunity offers only such chimerical protection from suit—indeed, the U.S. Supreme Court and the New York courts have expressly held to the contrary.

a. The trial court's rule vitiates the important "[c]omity and dignity interests" (*Pimentel*, 128 S. Ct. at 2190) furthered by the doctrine of sovereign immunity. Since Revolutionary times, 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) (Hamilton) (emphasis in The Federalist)). So far as foreign sovereigns are concerned, the principle of immunity was recognized "very 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).[8]

The trial court disregarded this ancient and important principle when it refused to dismiss the action and instead ordered a hearing to resolve—in the Republic's absence—the "[t]riable issues [that] remain as to which party has superior rights" to the Arelma assets. (R. 27.) 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).

[8] It has long been the position of the United States that immunity in domestic courts for foreign sovereigns serves interests of substantial public importance: "'the purpose of sovereign immunity in modern international law . . . is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts.'" *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (quoting testimony of State Department Legal Advisor)). Such immunity is provided as a "gesture of comity between the United States and other sovereigns." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003).

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 sovereign 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. Thus, 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. If the November Decision induces the Republic to waive its immunity, the Republic will have suffered a grievous injury to its "dignitary interests" by virtue of having been coerced into submitting to the trial court's process. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). And if the Republic does not participate at trial, the trial court's consideration of the merits of the competing claims in its absence would "itself [be] an infringement on foreign sovereign immunity." *Pimentel*, 128 S. Ct. at 2189. In either case, 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*, 128 S. Ct. at 2190. 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. Letter from Ambassador Willy C. Gaa to Harold Hongju Koh, Legal Adviser, U.S. Dept. of State (July 13, 2009), *reprinted in* (R. 481-484) (copy sent to trial court). The Republic also noted that litigation in the trial court would "cause an affront to the Republic's sovereign dignity, violate the principles of international comity, and prejudice the rights of

the Republic and the [PCGG]." (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 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*, 128 S. Ct. at 2192.[9]

[9] The Sandiganbayan determined the ownership of the Arelma assets as between the Republic and the Marcos estate. Petitioner'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."); David D. Siegel, *New York Practice* § 488 (4th ed. 2009) ("If the judgment debtor has no right to the money or property, then neither has the judgment creditor . . . .").

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*, 128 S. Ct. at 2190. International law, as well as fundamental anti-corruption policies endorsed by the United States, recognizes that stolen assets should be returned to the nation of origin to be disposed of by that nation's courts. *See* United Nations Convention Against Corruption, G.A. Res. 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.[10] Thus, the Republic's exercise of immunity here was hardly capricious: 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.*

[10] *See* Br. for the United States, *Pimentel*, 128 S. Ct. 2180 (No. 06-1204), 2008 WL 225206; Note of the Embassy of Switzerland to U.S. Dept. of State (Apr. 5, 2007), *reprinted in* Pet. Reply. Br., *Pimentel*, 128 S. Ct. 2180 (2008) (No. 06-1204).

c. The other reason given by the trial court in support of its conclusion that the Republic would not be prejudiced is similarly unpersuasive. Endorsing arguments that Merrill and the Pimentel class made *unsuccessfully* to the U.S. Supreme Court,[11] the trial court was of the view that any prejudice that might accrue to the Republic was "mitigated" because the Republic had "waive[d] sovereign immunity on other occasions" and the Republic would have to voluntarily appear in "New York courts at some point to attempt to recover the Arelma assets." (R. 23.) This reasoning misapprehends a fundamental aspect of sovereign immunity: the sovereign's right to determine *when* and *on what terms* it will submit to suit. *See, e.g.*, *Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990). The sovereign's "interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *See Feeney*, 495 U.S. at 307. 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—or that the Republic may *someday* choose to submit to a U.S. court's jurisdiction to resolve the disposition of the Arelma assets has no bearing

[11] *See* Br. for Merrill Lynch, Pierce, Fenner & Smith Incorporated as *Amicus Curiae* at 21, *Pimentel*, 128 S. Ct. 2180 (2008) (No. 06-1204), *available at* 2008 WL 225205; Br. for Respondent Mariano J. Pimentel at 6, *Pimentel*, 128 S. Ct. 2180 (2008) (No. 06-1204), *available at* 2008 WL 467887.

on its privilege not to waive its immunity as a defendant or intervenor in *this* action *today*.[12]

Thus, "[t]o the extent [the Republic] has chosen to consent to certain classes of suits while maintaining its immunity from 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).

d. New York courts, like the U.S. Supreme Court in *Pimentel*, have long recognized that "an action involving specific property in which a sovereign asserts an interest" must be dismissed if the sovereign is entitled to immunity "because no adjudication of the rights of others in that property can be made without affecting

[12] The trial court noted that the Republic is now participating in an interpleader action in Singapore (*see* R. 22-23) and suggested that the Singapore proceedings constituted a "changed circumstance[]" since the U.S. Supreme Court's decision in *Pimentel*. (R. 25-26.) But the Republic is involved in that litigation because the Singapore Court of Appeals, applying an entirely different decisional framework from that operative in the United States, determined that the Republic could not assert sovereign immunity with respect to assets held by a third party. In any event, the March 2008 Singapore decision was hardly a "changed circumstance" contemplated by the *Pimentel* Court (128 S. Ct. at 2194), as it *predated* the U.S. Supreme Court's June 2008 decision in that case.

the interests of the sovereign." *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).[13]

The decision in *Oliner v. Canadian Pac. Ry. Co.*, 34 A.D.2d 310 (1st Dept. 1970), *aff'd*, 27 N.Y.2d 988 (1970), 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." *Id.* at 312. The plaintiff in *Oliner*, who claimed entitlement to those assets (like petitioner here), sought a judgment directing the defendants to turn the assets over to him. *Id.* The Canadian government (like the Republic here) asserted that it owned the assets pursuant to Canadian laws vesting ownership in the Custodian of the Department of the Secretary of State of Canada. *Id.* The Custodian, who 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 were vested in the Custodian. *Id.* at 312.

The Appellate Division ordered dismissal of the action for failure to join a necessary and indispensable party. Given the "inescapable" conclusion "that the

[13] 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.

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. A like conclusion should be drawn in this case, where the real dispute over ownership of the Arelma assets is between petitioner and the Republic.

2. The Palpable Injury Inflicted By Continued Litigation To The Comity And Dignitary Interests Served By The Doctrine Of Sovereign Immunity Requires Dismissal, Notwithstanding The Other Factors Cited By The Trial Court.

The trial court offered a potpourri of reasons why, in its view, the Republic's sovereign immunity is outweighed by other factors drawn from the considerations listed in CPLR 1001(b). None of those reasons stands up to scrutiny.

a. The trial court placed principal emphasis on petitioner's asserted lack of an alternative forum when it permitted the continuation of this action in the Republic's absence. (R. 18, 24.) We do not minimize the sympathetic position of the Pimentel class, whose members suffered grievous injuries at the hands of the Marcos regime (*see* R. 24); nor do we discount the class's interest in recovering damages against the Marcos estate.[14] For present purposes, however, that is wholly beside the point.

[14] As explained below, though, petitioner lacks an enforceable judgment against the estate.

Even 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." 128 S. Ct. at 2194. *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 is enough to make the asserted lack of an alternative remedy immaterial, it is also worth noting that the nature of petitioner's claim undermines her interest in litigating here. 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. for the United States at 28-29, *Pimentel*, 128 S. Ct. 2180 (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. (R. 176.) If that 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*, 128 S. Ct. at 2190.

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. 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).[15]

[15] *See, e.g.*, *Bass v. Bass*, 140 A.D.2d 251, 253 (1st Dept. 1988) ("While petitioner may indeed stand in the shoes of the judgment debtor in relation to any debt owed

b. In addition, the trial court brushed aside the possibility that continuing with this litigation could prejudice the Republic or Merrill. (R. 19-20.) We have already explained the flaw in the court's view that the Republic and PCGG were not prejudiced. And the court also was wrong in its view that deciding this case would pose no risk of duplicative liability for Merrill. The court opined that, if petitioner "succeed[ed] in demonstrating its superior right to the [Arelma] assets and Merrill is ordered to turn them over, should other purported claimants [*e.g.*, the Republic] subsequently institute actions against Merrill, [New York] courts certainly would not permit it to be subject to double liability." (R. 20.) But even if that is true, Merrill could be subject to suit outside New York, in locations where it is amenable to personal jurisdiction.

Moreover, it is clear that Merrill could not escape duplicative liability even in New York. "[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 (same); *Bergdorf Goodman, Inc. v. Marine Midland*

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him or a property interest he may own, petitioner cannot, however, reach assets in which the judgment debtor has no interest."); *Smith*, 43 A.D.2d at 792-93 (rejecting creditor's 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.")

Bank, 97 Misc. 2d 311, 314 (Civ. Ct. N.Y. City 1978) (explaining "that the rights of an individual . . . who possesses an actual, current interest in the property in question" are in no way "jeopardized by the 'race of diligence' among creditors" in a turnover proceeding). For Merrill to give the Arelma assets to petitioner without a determination by a "court, with jurisdiction of the [Republic] (who would then be bound by all findings)," that the Arelma assets are "the judgment debtor's [*i.e.*, Marcos's]" therefore 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, or merely to assume, that the property belonged to the judgment debtor." David D. Siegel, *New York Practice* § 515 (4th ed. 2009).

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." 128 S. Ct. at 2193. Both as a matter of New York law (Siegel, *Practice Commentaries*, *supra*, CPLR C5227:1)[16] and of federal due process principles

[16] If Merrill were ordered to turn the Arelma assets over to petitioner, CPLR 5209 would discharge Merrill only from its "obligation to the [putative] judgment debtor," not from its 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, and not to Marcos, 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

(*Taylor v. Sturgell*, 128 S. Ct. 2161, 2174 (2008)), the Republic and PCGG cannot be bound by a judgment rendered in their absence.[17] The trial court therefore lacked the power to render an effective judgment.

c. The trial court also gave short shrift to sovereign immunity when it characterized as a "protective measure" under CPLR 1001(b)(4) the possibility that the Republic could surrender its immunity and voluntarily appear. (R. 21.) As explained above, sovereign immunity would mean little if the sovereign could be forced to choose between its immunity and having its claims determined in its absence; requiring appearance by an entity not subject to the court's jurisdiction cannot be the sort of "protective measure" contemplated by CPLR 1001(b)(4).

In fact, no "protective provision," or other means to avoid prejudice, is available here because both the Republic and petitioner are claiming the entirety of

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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] . . . [s]hould [the Republic] prevail, [Merrill] *would have to deliver or pay again, sustaining a double loss*." *Id.*; *see also* 9A Carmody-Wait, et al, *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 garnishee's obligation to other persons therefor is not affected.").

[17] Of course, that the Republic and the PCGG "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*, 305 F.3d at 1024 (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968)).

the Arelma assets. CPLR 1001(b)(3)-(4). There is no middle ground here: either the Arelma assets belong to the Republic or they do not. *See Pimentel*, 128 S. Ct. at 2192. Under such circumstances, there is "no way that [the court] might shape relief to lessen the potential prejudice" to the Republic and PCGG *U.S. 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], . . . [who] would . . . be subjected to the danger of double financial liability." *Oliner*, 34 A.D.2d at 315 (emphasis added); *accord Pimentel*, 128 S. Ct. at 2192 ("No alternative remedies or forms of relief . . . appear to be available.").

d. For similar reasons, the trial court was incorrect in concluding that it could render an "effective judgment" in the absence of the Republic and the PCGG. CPLR 1001(b)(5). For the reasons just explained, judgment in this case would not preclude the possibility of future litigation over these same assets. In reaching the contrary conclusion, the trial court reasoned that it could "determine the priority and validity of the rival claims to the disputed assets . . . in this race of diligence." But this observation simply does not address the point that the Republic will not be bound by the trial court's judgment. The trial court was, moreover, wrong even on its own terms: as explained above, the Republic's claim does not raise issues of "priority" among creditors at all and the rights of a party

"who possesses an actual, current interest in the property in question"—which is the kind of claim asserted by the Republic—are not "jeopardized by the 'race of diligence' among creditors." *Bergdorf Goodman*, 97 Misc. 2d at 314.

e. In addition, the trial court was concerned that dismissal of the proceeding would mean that the Arelma assets might remain in Merrill's hands indefinitely, without any final resolution of their ownership. (R. 20, 25.) In the trial court's view, this "stalemate" would prejudice Merrill because "it may be forced to defend lawsuits by various purported claimants indefinitely." (R. 20.) But the Republic's exercise of immunity is hardly open-ended: it seeks simply to allow the Philippine courts to resolve, in the first instance, the ownership of the Arelma assets. That process is well underway, with the Sandiganbayan having ruled and the case now on appeal to the Philippine Supreme Court. Thus, this is not a situation where the foreign court "cannot or will not issue its ruling within a reasonable period of time." *Cf. Pimentel*, 128 S. Ct. at 2194. Assuming that the Sandiganbayan judgment becomes final and enforceable, the Republic presumably will take whatever steps are required to secure the Arelma asserts, possibly including appearance in a U.S. court with jurisdiction over them.

Moreover, dismissal of this proceeding for non-joinder of indispensable parties would protect Merrill in some important respects. As the U.S. Supreme Court observed, although such a disposition would not "provide Merrill Lynch

with a judgment determining the party entitled to the assets, . . . it likely would provide Merrill Lynch with an effective defense against piecemeal litigation and inconsistent, conflicting judgments." *Pimentel*, 128 S. Ct. at 2193. Were this proceeding to be dismissed on the grounds asserted by intervenors, "in any later suit against it Merrill Lynch may seek to join the Republic and the Commission and have the action dismissed" on the same basis, "should they again assert sovereign immunity." *Id.*

f. Finally, in departing from the U.S. Supreme Court's decision in *Pimentel* the trial court remarked that the U.S. "Supreme Court's interpretation of federal procedure, while informative, is not binding on New York courts." (R. 25.) But although it is of course true that Fed. R. Civ. P. 19 does not use terms identical to those in CPLR 1001, as a general matter Federal 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 and Appeals*, 5 N.Y.3d 452, 458 n.2 (2005)), making case law under Fed. R. Civ. P. 19 "pertinent to CPLR 1001(b)." Siegel, *New York Practice* § 133. And more 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. We have noted New York decisions, disregarded by the trial court, that anticipated the sovereign immunity rule of *Pimentel*. *See Oliner*, 34 A.D.2d at 312; *Federal Motorship Corp.*, 192 Misc. at

405. And New York courts repeatedly have applied principles of comity. *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.").

Although both CPLR 1001 and its federal equivalent contemplate some exercise of discretion in determining whether to excuse the non-joinder of a necessary party, the U.S. Supreme Court held that the Arelma litigation does not present a close question. The Court explained that "*[w]hatever* the appropriate standard of review . . . the judgment [resolving the interpleader without the Republic and the PCGG] could not stand." *Pimentel*, 128 S. Ct. at 2189 (emphasis added). That conclusion should be decisive here: "[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). *See In re Nunns*, 188 A.D. 424, 433 (2d Dept. 1919) ("[C]ases in the [U.S.] Supreme Court are of the highest persuasive authority, and

even a *gratis dictum* therein is entitled to the greatest respect. Moreover, when the question presented is one of general policy, *a fortiori* should we respect the declarations of the highest court of our land.").

The trial court justified its refusal to follow the U.S. Supreme Court's decision by relying principally on the New York Court of Appeals' decision in *Saratoga County*. (R. 19, 25.)[18] But *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 importance to the

[18] The trial court also relied upon *Red Hook/Gowanus Camber of Commerce v. New York City Bd. of Standards & Appeals*, 5 N.Y.3d 452 (2005), and *L-3 Communications Corp. v. SafeNet, Inc.*, 45 A.D.3d 1 (1st Dept. 2007), but neither of those cases involved an absent sovereign asserting immunity. *St. Regis Tribe of Mohawk Indians v. State of New York*, 4 Misc. 2d 110 (Ct. Cl. 1956), *rev'd*, 5 A.D.2d 117 (3d Dept. 1957), *aff'd*, 5 N.Y.2d 24 (1958), also cited by the trial court (R. 19) did involve a sovereign that could not be joined, but is wholly inapposite. The St. Regis Tribe of Mohawk Indians brought an action against the State seeking compensation for the State's appropriation of a parcel of land called Barnhart's Island. 4 Misc. 2d at 112. The State moved for dismissal on non-joinder grounds, claiming that there was an absent sovereign, the *Canadian* branch of the St. Regis Tribe, that shared an undivided interest in Barnhart's Island with the named plaintiff, the *American* branch of St. Regis Tribe. *Id.* at 118. Applying *Keene v. Chambers*, 271 N.Y. 326 (1936), which adopted the rule "that one tenant in common of personal property may separately maintain an action for a wrong done to it, if his cotenants refuse to join with him as plaintiffs" (*id.* at 330), the Court of Claims allowed the claim to proceed. The absent Canadian tribal sovereign in *St. Regis* thus effectively was a *plaintiff* and, unlike the Republic here, suffered no prejudice whatsoever from not being a participant in the action.

outcome in *Saratoga County*: the Court of Appeals 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, 821. 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. *E.g.*, *Concern, Inc. v. Pataki*, 7 Misc. 3d 1030(A), 2005 WL 1310478, at *13 (Sup. Ct. Erie Co. 2005); *Huron Group, Inc. v. Pataki*, 5 Misc. 3d 648, 666 (Sup. Ct. Erie Co. 2004), *aff'd*, 23 A.D.3d 1051 (4th Dept. 2005); *Herald Co. v. Feurstein*, 3 Misc. 3d 885, 898 (Sup. Ct. N.Y. Co. 2004).[19]

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. "*Saratoga*'s main issue dealt with a citizen's constitutional challenge to the gaming compact signed by the governor." *Id.* By

[19] *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*, 128 S. Ct. at 2189 ("[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).

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.* Indeed, in *Saratoga County* itself, the Court of Appeals pointedly noted that in certain cases "sovereign immunity might support dismissal" on indispensable party grounds. 100 N.Y.2d at 821.

This is one such case: petitioner's claim does not implicate New York's system of "checks and balances." *Saratoga County*, 100 N.Y.2d 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). The Republic and PCGG accordingly are necessary and indispensable parties under CPLR 1001(a) and (b). Because the Republic and PCGG have not been joined, and may not be joined without their consent, the trial court should have dismissed the action.

II. THE SPECIAL PROCEEDING SHOULD BE DISMISSED BECAUSE SWEZEY LACKS AN ENFORCEABLE JUDGMENT.

For the reasons just explained, this case should be dismissed for failure to join an indispensable party. In the event the Court reaches the merits of the dispute over the Arelma assets, however, it should find that the trial court erred in concluding that petitioner (and the Pimentel class) has an enforceable judgment

against the Marcos estate in New York. The class judgment against the estate has lapsed; as a consequence, even if the Arelma assets are assumed to be part of the Marcos estate, petitioner's turnover petition should be dismissed.

A. The Hawaii Judgment And Its Subsequent Registrations.

We begin with some background: The only conceivable basis for petitioner's claim is the Pimentel class's judgment against the Marcos estate entered by the U.S. District Court for the District of Hawaii in February 1995 (the "Hawaii judgment"). *See In re Estate of Marcos*, 536 F.3d at 983. But under Hawaii law, all judgments are extinguished after 10 years unless they are timely renewed. *Id.* at 987. The Pimentel class neglected to renew the Hawaii judgment in the manner required by Hawaii law. Accordingly, as the U.S. Court of Appeals for the Ninth Circuit has conclusively determined, the Hawaii judgment expired in February 2005 and cannot now be extended. *Id.* at 987, 990. The Hawaii judgment has lapsed and is no longer enforceable.[20]

The Pimentel class did register the Hawaii judgment in the U.S. District Court for the Northern District of Illinois in January 1997 pursuant to 28 U.S.C.

[20] In July 2008, petitioner purported to register the Hawaii judgment in the U.S. District Court for the Southern District of New York. (R. 206-208.) Later that month, petitioner filed the purported New York federal registration with the New York county clerk. *Id.* The New York federal registration is ineffective because the Hawaii judgment was not "live, and thus registerable, at the time when it was registered" in New York. *See In re Estate of Marcos*, 536 F.3d at 989. The trial court's reasoning does not rely on this registration, so we shall not address it further.

§ 1963. (R. 52, 60.) The class revived the Illinois registration of the Hawaii judgment (which had become "dormant" under Illinois law after 10 years) in September 2008 and again in March 2009. (R. 52, 60.) On October 15, 2008, the class purported to register the September 2008 revival of the Illinois registration in the U.S. District Court for the Southern District of New York. (R. 53, 57.) Later that day, the class filed the Southern District's purported registration of the revived Illinois registration of the Hawaii judgment with the New York county clerk (the "NY-filed Illinois federal registration"). (R. 53, 35-36 at ¶ 2.)

Separately, the class also purported to file in Illinois state court the Illinois federal district court's March 2009 revival of the registration of the Hawaii judgment, pursuant to 735 ILCS § 5/12-652(a). (R. 450, 206-208.) On July 1, 2009, the class filed the Illinois state court's purported filing of the revived Illinois federal registration of the Hawaii judgment with the New York county clerk, pursuant to CPLR 5402 (the "NY-filed Illinois state filing"). *Id.*

B. The NY-Filed Illinois Federal Registration Is Not Enforceable In New York.

In reality, petitioner in this action is trying to enforce the Hawaii judgment, from which her claim against the Marcos estate derives. She evidently recognizes, however, that the Hawaii judgment has lapsed and is unenforceable. Petitioner therefore now purports to be attempting to enforce, not the Hawaii judgment, but the filing in New York of the unexpired registration in Illinois of the Hawaii

judgment. But this naked attempt to evade the expiration of the Hawaii judgment (and the negligence of the Pimentel class in allowing that judgment to lapse), through the erection of a Rube Goldberg structure based on the filing of the registration of a judgment, should not succeed. Under Illinois and federal law, 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. It therefore did not produce a judgment that is enforceable in New York. This is so for several reasons.

1. The plain language of 28 U.S.C. § 1963 demonstrates that the Illinois federal registration of the Hawaii judgment was not *itself* a transferable Illinois federal judgment. Section 1963 supplies a streamlined procedure by which a judgment entered in one federal district court may be registered in another federal court "as the precursor to *enforcement* of the *original judgment*" in the registration court. *Home Port Rentals, Inc. v. Int'l Yachting Group, Inc.*, 252 F.3d 399, 404 (5th Cir. 2001) (emphasis in original). The statute thus allows for "[a] judgment in an action . . . entered in any . . . district court . . . [to] be registered by filing a certified copy of the judgment in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal." 28 U.S.C. § 1963. It goes on to provide that a "judgment so registered shall have the *same effect* as a judgment of the district court of the district where registered and may be *enforced*

in like manner." *Id.* (emphasis added). Section 1963 does not say that the resulting registration *becomes* a new judgment, either of the registration court or of the court that issued the underlying judgment.

Courts uniformly have understood that this distinction is critical. They have recognized that registration of a judgment does not create a "new judgment as would have been obtained in a plenary action duly filed" in the court of registration that may itself be registered and enforced elsewhere. *United States v. Kellum*, 523 F.2d 1284, 1289 (5th Cir. 1975); *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 128 F. Supp. 697, 699 (D. Haw. 1955) ("28 U.S.C. § 1963 does not give a new judgment to the judgment creditor."). As the U.S. Court of Appeals for the Seventh Circuit explained, § 1963 "does not say that the original judgment *becomes* a local one; it says that the original judgment has the *effect* of a local judgment." *Bd. of Trustees v. Elite Erectors, Inc.*, 212 F.3d 1031, 1034 (7th Cir. 2000) (emphasis added).

This fundamental distinction between an original judgment and a registration is confirmed by other elements of the statutory language. Section 1963 authorizes the registration only of a federal "*judgment* in an *action* . . . *entered*" by a federal court when the judgment "has become *final by appeal* or expiration of *the time for appeal*." (Emphasis added). Yet "registration under § 1963 'does not constitute an action,'" as the U.S. District Court for the Northern District of Texas found in

rejecting 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, at 7 (N.D. Tex. Jan. 9, 2009), *appeal pending*, No. 09-10581 (5th Cir.) (oral argument scheduled for Feb. 3, 2010) (quoting *Powles v. Kandrasiewicz*, 886 F. Supp. 1261, 1263 (W.D.N.C. 1995)), *reprinted in* (R. 216.) And the reference to "appeal" of a judgment makes no sense in the context of a registration, which cannot itself be appealed because it is not a final order. *See* 28 U.S.C. § 1291. A registration therefore is not the kind of animal that itself may be registered elsewhere under § 1963.

Thus, registration of the Hawaii judgment in Illinois merely provided a mechanism that enabled the Illinois district court to enforce the *Hawaii* judgment *in Illinois*. *See In re Estate of Marcos*, 536 F.3d at 989. It did not create a "completely new [Illinois] judgment" that could be taken, registered, and enforced in another state. Order, *Del Prado*, Dkt. #237, at 7, *reprinted in* (R. 216.) For that reason, the NY-filed Illinois federal registration is a nullity and is not enforceable in New York.

In the course of rejecting a claim identical to the one advanced by petitioner here, also put forward by the Pimentel class, the U.S. District Court for the Northern District of Texas applied these principles and denounced the very "sort of

piggy-backing, or, more formally stated—successive registration of registered judgments—that" petitioner is attempting in this case. Order, *Del Prado*, Dkt. #237, at 7, *reprinted in* (R. 216.) The court rejected the Pimentel class's argument that the "registration of the [Pimentel] judgment in the Northern District of Illinois created a completely new judgment that, in turn, could be registered in [the Northern District of Texas] despite the fact that the statute of limitations applicable to the [Pimentel] judgment has run." *Id.* As the court explained, "a registered judgment's effectiveness as a new judgment is limited to enforcement in the forum of registration." *Id.* at 9, *reprinted in* (R. 218.) This means that only the "initial judgment on the merits from the rendering court"—like the Pimentel Hawaii judgment when it was still live—"may be registered" under § 1963. *Id*. at 7, *reprinted in* (R. 216.) Thus, the court held, the Illinois registered judgment could not be registered by another district court. *Id.* at 11, *reprinted in* (R. 220.) There is no basis for a different conclusion here.

2. Lest there be any doubt about this, § 1963's legislative history confirms that the registration of a federal judgment under that provision does not create a new federal judgment in the registration court that may in turn be registered and enforced elsewhere.

When § 1963 was first enacted, the statute contained the same operative language that it does today: "A judgment so registered shall have the *same effect* as

a judgment of the district court where registered and may be enforced in like manner." Act of June 25, 1948, Pub. L. No. 80-773, § 1963, 62 Stat. 958 (emphasis added). In the act that created § 1963, Congress also recodified the already existing statute providing for registration of judgments entered by the U.S. Court of Federal Claims. *See* 28 U.S.C. § 2508. But that provision, in contrast to § 1963, provided that a registered Court of Claims judgment shall "*be . . . a judgment* of [the registration] court and enforceable as such." Act of June 25, 1948, Pub. L. No. 80-773, § 2508, 62 Stat. 977 (emphasis added). Congress thus plainly intended to distinguish between the judgment *of* a court on the one hand, and, on the other, the enforcement mechanism created by registration of a foreign judgment *in* the court. *Cf. Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (Congress's use of contrasting language is significant). Indeed, Congress later amended § 2508 to bring it in line with § 1963, providing that registration of a Court of Claims judgment simply allows enforcement of that judgment in the district of registration. As the accompanying House Report explained, under the amended language a registration of a Court of Claims judgment "is not a judgment of the district court [where it is registered]." H.R. Rep. No. 83-695 § 10 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2006, 2011.

Section 1963's history therefore makes clear that a federal judgment that is registered in another district under § 1963 does not become a new judgment of the

registration district. Rather, registration merely permits enforcement of the *underlying* judgment in the registration district. In view of this limited purpose, a federal registration, like the Illinois registration relied upon by petitioner here—as distinguished from a freestanding, plenary federal judgment—may not be taken or enforced elsewhere.

3. In ruling to the contrary, the trial court reasoned that petitioner's "NY-Registered Illinois Judgment [*i.e.*, the trial court's label for the NY-filed Illinois federal registration] is enforceable under the full faith and credit clause of the Constitution." (R. 28.) The trial court stated that the NY-filed Illinois federal registration "was valid and conclusive in Illinois at the time of registration in New York." *Id.* In support of this conclusion, the court cited a number of decisions holding that the merits of a foreign judgment generally may not be collaterally attacked on the basis of a legal error committed by the foreign court rendering the judgment. (*See* R. 28) (citing *Roche v. McDonald*, 275 U.S. 449 (1928); *Cadle Co. v. Tri-Angle Assocs.*, 18 A.D.3d 100 (1st Dept. 2005); *Mee v. Sprague*, 144 Misc. 2d 1057 (Sup. Ct. Westchester Co. 1989)).

These observations, however, are not responsive to our argument. In the decisions cited by the trial court, a party seeking to avoid enforcement in State A of a judgment rendered in State B argued that State B's judgment was somehow

defective (or no longer operative) as a matter of State B's law.[21] In effect, the judgment debtor in those cases argued that State B's court should not have entered the judgment in the first place and, for that reason, the judgment could not be enforced in State A. This argument had to fail because "the full faith and credit clause of the Constitution requires that the judgment of a State court . . . shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered." *Roche*, 275 U.S. at 452-53. State A's court may not say that State B's court was wrong in deciding as it did.

Here, by contrast, we seek to *apply* this principle. PNB and Arelma do not contend (at least for purposes of this proceeding) that the Illinois federal registration was invalid as a matter of federal law. Rather, we argue that, *assuming* the validity of the Illinois federal registration, the Illinois district court would itself recognize that its registration of the Hawaii judgment is not transferable to other states and is effective *only* for purposes of enforcement of the Hawaii judgment *in Illinois*. The U.S. Constitution's Full Faith and Credit Clause does not prevent a New York court from assessing the Illinois district court's understanding of the Illinois federal registration; to the contrary, it requires *exactly* that analysis. That is so because an out-of-state judgment (much less an out-of-state registration of an

[21] *See Roche*, 275 U.S. at 451 (Washington statute of limitations); *Cadle*, 18 A.D.3d at 101 (Connecticut personal jurisdiction statute); *Mee*, 144 Misc. 2d at 1058 (Oklahoma dormancy statute).

earlier judgment) filed in a New York court "does not become" a freestanding New York judgment; it is simply "deemed" a New York judgment for purposes of enforcement. *FDIC v. Richman*, 98 A.D.2d 790, 791 (2d Dept. 1983). Such a filing "can be accorded no greater effect than the foreign judgment upon which it is based." *De Nunez v. Bartels*, 241 A.D.2d 414, 416 (1st Dept. 1997); *see also Boudreaux v. Dep't of Transp.*, 11 N.Y.3d 321, 325 (2008) ("same credit, validity, and effect"), *cert. denied*, 129 S. Ct. 2864 (2009); *State v. Int'l Asset Recovery Corp.*, 56 A.D.3d 849, 851 (3d Dept. 2008) ("same validity and effect" in New York "as the judgment would be given in its state of rendition").

The trial court failed to engage this point because it seemed to assume that the Illinois federal registration was an independent Illinois judgment for all purposes. But this assumption improperly conflates the Illinois district court's *registration* of the underlying Hawaii judgment pursuant to § 1963 with a freestanding *judgment* entered by the Illinois court, an analysis that is inconsistent with the language and purpose of § 1963. If petitioner wished to enforce the Hawaii judgment in New York, she should have registered that judgment in New York when it was still "live, and thus registerable." *See In re Estate of Marcos*, 536 F.3d at 989. She failed to do so and should be held to the consequences.

C. The NY-Filed Illinois State Filing Is Not Enforceable In New York.

Petitioner's New York filing of the revival of the Pimentel class's Illinois federal registration of the Hawaii judgment in Illinois *state* court also does not support her claim. As discussed above, the Pimentel class's registration of the Hawaii judgment in Illinois federal court pursuant to § 1963 merely permitted the Hawaii judgment to be enforced in Illinois. As such, the class's filing in Illinois state court *of the Illinois federal registration* pursuant to 735 ILCS § 5/12-652 cannot magically convert the federal registration into a free-standing and fully transferable judgment. *Cf. In re Estate of Wallen*, 633 N.E.2d 1350, 1358 (Ill. App. Ct. 1994) ("[A] foreign judgment should not be given greater effect in the forum State where it is registered than it had in the foreign jurisdiction that rendered it.").

Moreover, the plain language of § 5/12-652(a) demonstrates that the filing in Illinois state court of the Illinois federal registration of the Hawaii judgment was, like the federal registration itself, no more than a means to enforce the Hawaii judgment in Illinois; it did not create a free-standing and transferable state judgment. Section 5/12-652(a), which governs the filing of foreign judgments, states that a "copy of any foreign judgment . . . filed [with an Illinois county clerk] has *the same effect as* . . . a judgment of a circuit court for any county of this State and may be enforced or satisfied in a like manner." (Emphasis added.) The

italicized language is virtually identical to that found in § 1963, making clear that, like federal registration of a judgment, a filing in Illinois state court under § 12/5-652 simply provides an enforcement mechanism, in Illinois, for a foreign judgment. The legislative history of § 5/12-652 confirms that this similarity in language was no coincidence. Section 5/12-652 is "similar to § 2 of the Uniform Enforcement of Foreign Judgments Act (1964 Revision)" (Historical and Statutory Notes, 735 ILCS § 5/12-652), and the Prefatory Notes to the Uniform Act explicitly state that the Act sought to adopt the "method . . . for the inter-district enforcement of the judgments of the Federal District Courts [under] 28 U.S.C. § 1963." Prefatory Notes, Uniform Enforcement of Foreign Judgments Act 1964 Revised Act.

The filing in Illinois state court of the revival of the Illinois federal registration of the Hawaii judgment thus (at most) gave petitioner an additional mechanism with which to enforce the Hawaii judgment in Illinois. Her attempt to dress up the Illinois federal registration by filing it in Illinois state court in no measure increased the extraterritorial enforceability of the Illinois federal registration. Neither the New York filing of the Illinois federal registration nor the New York filing of the Illinois state filing provided petitioner an enforceable judgment in New York.

* * *

Under the trial court's reasoning, a federal judgment, as a practical matter, would never expire. Such a judgment could be extended without limitation by registering it in one court after another *seriatim*, and then treating those registrations as independent judgments that could themselves be registered and enforced elsewhere—including, presumably, in the state where the judgment originally was rendered—long after the underlying judgment had expired. This would result in the "repugnant" consequence that proceedings to enforce a judgment are "subject to no limitation whatever." *Campbell v. City of Haverhill*, 155 U.S. 610, 219-20 (1895).

It therefore is not surprising that we have found *no* decision in *any* jurisdiction (other than the trial court's judgment in this case) holding that a *registration* of one state's judgment in a second state may itself be registered and enforced in a third jurisdiction. So far as we are aware, the only other times a claimant has even *attempted* to register and enforce such a registration—the attempts by the Pimentel class itself to enforce its Illinois registration in Texas—the courts denied the claim. This Court, too, should reject petitioner's apparent contention "that a federal judgment is free of state limitations and can be enforced forever." *In re Estate of Marcos*, 536 F.3d at 987.

CONCLUSION

The Supreme Court's decision and judgment should be reversed.

Dated: New York, New York
February 1, 2010

Respectfully submitted,

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Andrew Calica