SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION – FIRST DEPARTMENT

OSQUGAMA F. SWEZEY,	:	No. 2010-228
Petitioner-Respondent,	:	New York County
– against –	:	Index No. 104734/09
MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,	:	
Respondent,	:	
– and –	:	
PHILIPPINE NATIONAL BANK and ARELMA, INC.,	:	
Intervenors-Appellants.	:	

INTERVENORS-APPELLANTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

MAYER BROWN LLP
1675 Broadway
New York, N.Y. 10019
(212) 506-2500
Attorneys for intervenors-appellants Philippine National Bank and Arelma, Inc.

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Intervenors-appellants Philippine National Bank and Arelma, Inc. respectfully submit this memorandum of law in opposition to the motion of petitioner-respondent Osqugama F. Swezey for leave to appeal to the Court of Appeals.

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 is an indispensable party to a proceeding brought to resolve the ownership of assets to which the Republic asserts a substantial claim and that, in the Republic's absence, the suit must be dismissed. In this

case, this Court reached the same 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*. The motion for leave to appeal presents a challenge to that holding, arguing that litigation over the ownership of the assets should proceed in the Republic's absence.

Leave should be denied. This Court's careful and thorough decision was plainly correct and wholly unexceptional. It was faithful to principles long applied by the New York courts. And it is manifest that 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. Because this Court's decision is consistent with decisions of the Court of Appeals and of other Departments of the Appellate Division, correctly applying long-settled law, review by the Court of Appeals is unwarranted. *See* 22 N.Y.C.R.R. § 500.22(b)(4). The motion for leave to appeal should be denied.

Statement Of The Case

A. Factual Background And Foreign Proceedings

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. 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 (the "Arelma assets"). During his time in office, Marcos caused the incorporation of a corporate entity named Arelma (R. 37 at ¶¶ 6-7), which used assets stolen by Marcos to open a brokerage account with Merrill Lynch, Pierce, Fenner &

Smith ("Merrill") in New York (*id.* at ¶ 8) and maintained its bearer share certificates in Switzerland. R. 38 at ¶ 12.[1]

The assets in this account already have been the subject of judicial proceedings in both Switzerland and the Philippines. After the overthrow of the Marcos dictatorship in 1986, 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)—froze certain Marcos-related Swiss assets, including the Arelma shares. *Id*. at 858-59; R. 230 at ¶ 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." *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 at ¶ 5(b); Joint Appendix, *Pimentel*, 553 U.S. 851 (2008) (No. 06-1204), 2008 WL 177688, at *79. Pursuant to this decision, the Swiss assets "were transferred to an escrow account set up … at the [Philippine National Bank ("PNB")], pending the [Philippine courts'] decision as to their rightful owner." *Pimentel*, 553 U.S. 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 at ¶ 6.

[1] The funds from this account currently are being held by the Commissioner of Finance of the City of New York. Slip op. 5 n.2. If this action is finally dismissed, the funds will be returned to Merrill.

As contemplated by the Swiss Federal Supreme Court's decision, the Republic asserted a claim to Arelma 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." *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 judgment creditor of the Marcos estate.

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, which 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 movant here belongs. R. 230 at ¶ 7. The Republic asserted its sovereign immunity in that interpleader action. 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 863-64. 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 867. As the Court explained, "[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 class judgment against Marcos. Swezey did not attempt to join (or, indeed, even notify) the Republic 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 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, 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 this Court 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)." Slip op. 6-7.

In reaching that conclusion, this Court

> 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 its "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.

Slip op. 8 (citations and footnote omitted). By the same token, the Court 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 11 (citation omitted).

From this starting point, the Court 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)." Slip op. 14-15. "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 15-16. Thus, this Court held, "'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 17 (quoting *Pimentel*, 553 U.S. at 867). The Court noted that this conclusion follows from earlier holdings of the New York courts. *See id*. (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. Co.*, 34 A.D.2d 310 (1st Dept. 1970), *aff'd*, 27 N.Y.2d 988 (1970)).

Argument

This case does not present any of the considerations that support review by the Court of Appeals. The motion papers do not even assert a conflict between Departments of the Appellate Division. The challenged decision carefully examined and faithfully applied the precedents both of the Court of Appeals and of the U.S. Supreme Court. And the decision is correct. In such circumstances, the motion for leave to appeal should be denied.

I. The Republic Is An Indispensable Party To This Litigation

To begin with, the leave motion fails at the most fundamental level: it does not even attempt to show that this Court's decision is inconsistent with the settled law of sovereign immunity. 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.[2] This conclusion rested on basic immunity principles:

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[2] 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.* Although Swezey hints in her petition that the Republic is not a (cont'd)

allowing a claim to the Arelma assets 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 of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).[3]

Moreover, the prejudice to the Republic would be 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 … arise from events of historical and political significance for the Republic and its people. The Republic … ha[s] 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 … if property [it] claim[s] 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

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(… cont'd)

"necessary" party (*see* Moving Mem. at 5), that contention cannot be seriously advanced. The trial court 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.

[3] It also, as this Court 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 proceedings (possibly in a foreign country)." Slip op. 18.

Koh, Legal Adviser, U.S. Dept. of State (July 13, 2009), *reprinted in* R. 482-484 (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." R. 482. These considerations, just as in *Pimentel*, dictate dismissal of the action.

Any other 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, 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.[4] 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 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*.

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[4] *See* Br. for the United States, *Pimentel*, 553 U.S. 851 (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*, 553 U.S. 851 (2008) (No. 06-1204).

In nevertheless arguing against dismissal, Swezey maintains that the Republic could avoid prejudice by participating in this litigation. Moving Mem. at 3. 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. By insisting that the mere *ability* to appear makes irrelevant any prejudice that might otherwise accrue from a non-party's absence, Swezey's test would effectively preclude 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. Both the U.S. Supreme Court and the New York courts have rejected the proposition that sovereign immunity offers such chimerical protection from suit.

II. This Court's Decision Is Consistent With The Decisions Of The Court Of Appeals In *Saratoga County* and *Lamont*

In seeking review of this Court's decision notwithstanding *Pimentel*, Swezey's principal argument is that the holding in this case conflicts with two rulings of the Court of Appeals addressing the joinder of absent sovereigns, *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), and *Lamont v. Traveles Ins. Co.*, 281 N.Y. 362 (1939). *See* Moving Mem. at 2-7. This contention is wrong.

1. *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 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 820-21. 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. *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).

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 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.

As this Court observed in distinguishing *Saratoga County* for just that reason (slip op. 22-23), this is one such case: Swezey'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). *Saratoga County* said nothing about the rule applicable in such circumstances.[5]

2. The other joinder decision Swezey invokes (at Moving Mem. at 5), *Lamont*, offers her no support at all, for several reasons also reviewed by this Court. *See* slip op. 13-14 n.9. Most obviously, the Court of Appeals there declared that "[t]he courts of this State *cannot* adjudicate any controversy to which a foreign sovereign government is a necessary party" (281 N.Y. at 367 (emphasis added))—and here, as we have noted (at note 2, *supra*), the Republic *is* a necessary party. Moreover, *Lamont* applied a rule *stated by the U.S. Supreme Court* to govern in cases involving assets claimed by a foreign government (*see id*. at 372)—and here, the applicable rule of the U.S. Supreme Court, declared unambiguously in *Pimentel*, requires dismissal.

And *Lamont* has, in any event, been overtaken by a change in statutory law. 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, the Court of Appeals concluded in *Lamont* that the "mere assertion by a foreign government" that property subject to dispute "belongs to th[at] government" need not lead to dismissal of the suit absent any indication that the U.S. government "has recognized and

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[5] Swezey is wrong in contending that this Court's reading of *Saratoga County* would allow foreign sovereigns to "wreak havoc" in New York by willy-nilly precluding the resolution by New York courts of disputes over property located in the State. Moving Mem. at 4. In fact, the rule applied in this case comes into play only in the narrow category of disputes where a sovereign makes a substantial claim to assets located in New York, in circumstances where the ownership of those assets may be determined by the foreign sovereign's courts. Although this rule has always been the law in New York, it has never created the problem imagined by Swezey.

allowed the claim." 281 N.Y. at 37-74. But the FSIA eliminated this case-by-case decisionmaking process, making foreign nations *presumptively* immune from the jurisdiction of the state and federal courts. *Verlinden*, 461 U.S. at 488, 495-96 & n.22. *Lamont* therefore has not been applied in the post-FSIA era,[6] when the endorsement of the federal government is no longer required to support a claim of immunity.

3. In asserting a supposed departure from *Saratoga County* and *Lamont*, Swezey also criticizes this Court for "blindly follow[ing] the decision of the United States Supreme Court in *Pimentel*." Moving Mem. at 6. On the face of it, this is a very odd complaint. 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. That consideration alone 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).

In any event, 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* a half century ago, 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

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[6] Of course, even if the rule of *Lamont* still applied, the United States, through its participation before the U.S. Supreme Court in *Pimentel*, has here supported the Republic's claim. *See* Slip op. 14 n.9.

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).[7]

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 has long been thought to require dismissal under New York law. 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 Swezey 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 real dispute [was] between the plaintiff and the Custodian" (*i.e.*, the Canadian government),"

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[7] 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.

"it [was] clear ... that [the] action should not proceed in the absence of the Custodian." *Id.* at 315. This Court properly drew a like conclusion in this case, where the real dispute over ownership of the Arelma assets is between the Marcos estate (in whose shoes Swezey stands) and the Republic.[8]

III. This Court's Decision Is Consistent With The Decision Of The Court Of Appeals In *Koehler*

Swezey's second ground for seeking leave to appeal (*see* Moving Mem. at 7-8)—an asserted conflict with the Court of Appeals' decision in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009)—is simply mystifying. Swezey appears to read *Koehler* as holding that joinder (and indispensable party) analysis has no application to CPLR 5225 turnover proceedings. But *Koehler* does not stand for, and indeed did not even remotely address, any such proposition.[9] 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 pursuant to CPLR article 52 when the property is located outside New York. *Id*. at 536. Needless to say, that question has nothing to do with the issue presented here.

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[8] Swezey's further assertion that dismissal of this case is inappropriate because the Republic did not appear to assert its immunity before the trial court (Moving Mem. at 5-6) is silly, for the reasons identified in this Court's opinion. Slip op. 14-15 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 this Court 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.

[9] In fact, *Koehler* does not contain the language that the petition purports to quote from the decision. *Compare* Moving Mem. at 7 *with* 12 N.Y.3d at 537-38.

It may be added that, wholly apart from *Koehler*, Swezey's evident submission that joinder analysis is inapplicable to proceedings like the one in this case under CPLR 5225 is flatly wrong. For one thing, "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 to include special proceedings." Slip op. 8 n.5.

Moreover, although it may be true that all *judgment creditors* are not be necessary parties to a turnover proceeding—because Article 52 contemplates a "race of diligence" among creditors (*Ruvolo v. Long Island R. Co.*, 45 Misc.2d 136, 148 (Sup. Ct. Queens County 1965))—that principle has no application in this case because the Republic does not claim the Arelma assets as a creditor of Marcos. Instead, as this Court recognized (slip op. 8), the Republic claims "an *actual, current interest* in the property in question" as the original and sole legitimate owner, and 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). It is this "present interest" in the property that "renders [the Republic] a necessary party" that must be joined. *Id.* at 313. That has long been the law in New York. *See*, *e.g.*, *Erin Capital Mgmt., LLC v. Celis*, 19 Misc.3d 390, 393 (Dist. Ct. Nassau County 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 County 1983); David D. Siegel, *Practice Commentaries*, 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").

IV. Swezey's Remaining Arguments Are Insubstantial

Swezey also offers a hodge-podge of additional arguments in support of her motion for leave to appeal. Moving Mem. at 8-13. All are insubstantial.

1. First, Swezey misreads the Court's decision in this case when she says that it "essentially held that factual assertions made on behalf of the Republic … are binding on human rights victims without any hearing." Moving Mem. at 9. In fact, following *Pimentel*, this Court simply 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. Swezey's related contention that the Republic cannot make a substantial claim to the Arelma assets (Moving Mem. at 10) is obviously wrong: the U.S. Supreme Court already has held that the Republic's claim to Arelma is a substantial one (553 U.S. at 867-68) and the Philippine anti-corruption court, 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 at ¶ 5(b).

Swezey also is incorrect in suggesting, without citation, that the Republic has no real interest in confining litigation over the Arelma assets to its courts because "[i]t has litigated claims to Marcos assets in more than a dozen cases in the United States." Moving Mem. at 9. So far as we are aware, all of the Marcos-related U.S. actions in which

the Republic participated involved efforts more than two decades ago to prevent the dissipation of Marcos assets, which required the involvement of U.S. courts. Swezey also asserts, again without citation, 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 the New York courts," "obtained an injunction freezing the assets," and "[t]hen withdrew its claim." *Id.* So far as we are aware, this assertion has no basis in fact.[10]

2. Swezey next contends that this Court erred in stating that the judgment in Philippine proceedings regarding Arelma "would be binding on Movant." Moving Mem. at 10. But here, too, she misreads the import of this Court's decision. The Court's point was simply that Swezey's "claim to the Arelma assets derives entirely from the [Marcos] estate's purported title to the fund" (slip op. 11), a statement that plainly was correct. As a consequence, the precedent question 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 asserting its claims to the assets. 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 is that Arelma belongs to the Republic rather than the estate, Swezey simply will have no basis on which to claim the Republic's property: "A judgment cannot be a

[10] Swezey made the same claim in her merits briefing to this Court, citing as support *New York Land Co. v. Republic of the Phil.*, 634 F.Supp. 279 (S.D.N.Y. 1986), *aff'd*, 806 F.2d 344 (2d Cir. 1987). Swezey Br. 6. As we explained in our merits reply brief, however, the cited decision concerned specific pieces of *real* property, makes no mention of Arelma, and does not list Merrill as a party. Swezey now repeats the baseless claim, but, having been caught out, omits *any* supporting citation.

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).[11]

Swezey is equally incorrect in contending (Moving Mem. at 11-12) that this Court's decision is somehow inconsistent with international law. For one thing, none of the materials cited by Swezey 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] 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, accordingly 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

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[11] *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 him or a property interest he may own, petitioner cannot, however, reach assets in which the judgment debtor has no interest."); *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.")

Switzerland to U.S. Dept. of State (Apr. 5, 2007), *reprinted in* Pet. Reply. Br., *Pimentel*, 553 U.S. 851 (2008) (No. 06-1204).

3. Finally, Swezey asserts that any claim to the Arelma assets that the Republic eventually asserts in New York after the determination of ownership by the Philippine courts would be barred by the statute of limitations. Moving Mem. at 12-13. Whatever its merits, this narrow contention surely does not warrant review by the Court of Appeals. But the argument is, in any event, incorrect on its own terms. Not only this Court, but also the U.S. Supreme Court, recognized that the Republic would have substantial arguments against application of the statute of limitations. *Pimentel*, 553 U.S. at 867-68. And for present purposes—where the question is simply whether the Republic has asserted an interest in the Arelma assets that is "not frivolous" (*id.* at 867; slip op. 17)—that is enough to dispose of Swezey's case.

Conclusion

Swezey's motion for leave to appeal to the Court of Appeals should be denied.

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Respectfully submitted,

MAYER BROWN LLP

By: _____
Michael O. Ware
Andrew J. Calica

1675 Broadway
New York, N.Y. 10019
(212) 506-2500

Attorneys for intervenors-appellants Philippine National Bank and Arelma, Inc.

Of Counsel:

Charles A. Rothfeld
MAYER BROWN LLP
1999 K St., N.W.
Washington, D.C. 20006
(202) 263-3000