To be Argued by:
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(Of the bar of the District of Columbia)
By Permission of the Court

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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.

REPLY BRIEF FOR INTERVENORS-APPELLANTS

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Petitioner Swezey's argument makes no attempt to deny the extraordinary nature of her claims. She avowedly would have a New York court, in the Republic's absence, determine the ownership of assets that the Republic maintains were stolen by its former President – even though the U.S. Supreme Court has flatly held that such an adjudication would improperly override basic principles of sovereignty and international comity. Proceeding to the merits, Swezey embraces a rule that would displace fundamental policies of repose by allowing dilatory claimants to circumvent any limitations period on the enforceability of a judgment though the simple expedient of seriatim registrations of the judgment in other jurisdictions. Both aspects of this argument are insupportable.

I. THE REPUBLIC IS A NECESSARY AND INDISPENSABLE PARTY TO THE TURNOVER PROCEEDING.

Swezey appears to recognize that a ruling for her would effectively override the Republic's sovereign immunity, leading the trial court to determine the ownership of assets claimed by the absent sovereign. But she and her *amici* maintain that this consideration is entitled to virtually no weight under CPLR 1001(b) because New York courts should not "be under the thumb of a foreign sovereign" (Swezey Br. 28-29); our rule, they continue, would allow rogue foreign governments to veto New York litigation by the simple expedient of asserting unsupported claims to the assets at issue. *Id.* at 39, 44-45. It should be manifest, however, that these arguments are aimed at the flimsiest of straw men.

Whatever the proper outcome might be in the unlikely case imagined by Swezey and her *amici*, in *this* case (1) a Philippine court already has held that the disputed assets belong to the Republic; (2) those assets were found to have been stolen from the Philippine people by its former President; (3) repatriating the stolen assets is a matter of fundamental importance to the Republic; and (4) both the United States and Swiss governments have expressed the view that the Republic is entitled to establish ownership of Arelma *in its own courts*. In light of these considerations, it is difficult to imagine a stronger or more compelling case for dismissal under CPLR 1001(b).

A. The CPLR 1001(b) Inquiry Must Be Conducted In This Case.

We begin with two preliminary matters. *First*, Swezey is wrong in asserting that the joinder requirements of CPLR 1001(b) have no application to special proceedings. Swezey Br. 26-28. By its plain terms CPLR 1001(b) governs joinder in all "actions" and, under CPLR 105(b), the "word 'action' includes a special proceeding." It therefore is unsurprising that courts routinely apply CPLR 1001(b)'s standards in special proceedings, as did the trial court below (R. 16). *See, e.g.*, *Ferrando v. New York City Bd. of Standards and Appeals*, 12 A.D.3d 287, 288 (1st Dept. 2004) (affirming dismissal of special proceeding for "failure to join a necessary party" because "proceeding in his absence would potentially be highly prejudicial"); *Amodeo v. Town Bd.*, 249 A.D.2d 882, 884 (3d Dept. 1998).

In arguing to the contrary, petitioner replies upon *Ruvolo v. Long Island R. Co.*, 45 Misc.2d 136 (Sup. Ct. Queens County 1965). But although it may be true that "other *judgment creditors* or potential *creditors*" of the Marcos Estate would not be necessary parties to this proceeding—because Article 52 contemplates a "race of diligence" among creditors (*id*. at 148)—that principle has no application here. The rights of someone "who possesses an *actual, current interest* in the property in question" are 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). As the court explained in *Bergdorf*, when "any decision on the merits … would necessarily involve a determination of the rights" of a party that asserts a direct interest in the subject matter of the action—as does the Republic here—that "present interest … renders [the individual] a necessary party" that must be joined. *Id.* at 313; *accord 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").

Second, Swezey also is incorrect in suggesting that the Republic is not a necessary party to this litigation within the meaning of CPLR 1001(a). Swezey Br. 31. In fact, the Pimentel class conceded before the U.S. Supreme Court that the Republic's participation *is* "necessary" (*Pimentel*, 128 S. Ct. at 2189) and Swezey did not dispute the point before the trial court. (R. 16.) It is not fairly debatable: we showed in our opening brief (at 15-17) that a ruling for Swezey on the merits of her claim would both have an obvious adverse affect on the Republic and subject Merrill to the risk of duplicative liability.

Swezey's only response to these points is to repeatedly assert that the Republic "has not presented evidence of its claim to the Assets." Swezey Br. 5-6, 30-31. But this argument cannot be advanced seriously. In fact, the U.S. Supreme Court already has held that the Republic's claim to Arelma is a substantial one (128 S. Ct. at 2191) 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).) The Republic thus does in fact have an interest in Arelma that would be adversely affected by the continuation of litigation in its absence.

B. The Republic And PCGG Are Indispensable Parties.

Having dispensed with these preliminaries, Swezey's principal argument is that this Court should depart from the U.S. Supreme Court's ruling in *Pimentel* and hold that the Republic is not an indispensable party. But there is no basis for such an extraordinary contention. Insofar as is relevant here, the New York and federal joinder rules apply precisely the same principles. The factors that moved the U.S. Supreme Court in *Pimentel* therefore should lead this Court to the same conclusion here: a New York court should not determine ownership of specific assets that an absent sovereign claims were stolen in that nation by its former President and that currently are the subject of a suit in that nation's courts.

1. We explained in our opening brief (at 36-38) that, as a general matter, Fed. R. Civ. P. 19 is the federal analogue of CPLR 1001. And because "a decision of the Supreme Court of the United States … is entitled to great weight by this court in considering a similar situation" (*Jewett v. Commonwealth Bond Corp.*, 241 A.D. 131, 133 (1st Dept. 1934)), *Pimentel* must inform the application of CPLR 1001(b) – especially when, as in this case, the dispute involves the claim of a foreign nation, a matter that implicates concerns of international comity and

threatens to have a significant impact on the foreign relations of the United States. Swezey makes no direct response to these points.[1]

2. A closer examination of the particulars of New York joinder law confirms that it is identical to the federal rule in relevant and controlling respects – and that this Court accordingly should follow the lead of *Pimentel*. As we noted in our opening brief (at 8), *Pimentel* held that, in a suit over assets claimed by a sovereign, "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. And as we also showed (at 26-28, 36-37, 40), the New York courts have long applied the *same* rule, holding that, when "the real dispute [is] between the plaintiff and [a foreign nation]" over assets held in New York, the "action should not proceed in

[1] Swezey does contend that New York law differs from the federal standard because CPLR 1001 contemplates dismissal when jurisdiction over a necessary party can be obtained only by consent, while federal law permits dismissal when joinder is not "feasible." Swezey Br. 32. But this distinction, if it is one, is immaterial here because jurisdiction over the Republic *is* available only by consent. Swezey's related reliance (*id*. at 32-33) on *Wilbur v. Locke*, 432 F.3d 1101 (9th Cir. 2005), for the proposition that the federal and state joinder standards differ also is misplaced; the party opposing dismissal in *Wilbur* cited state cases only for the proposition that dismissal was barred by the U.S. Constitution's Petition Clause, meaning that the federal court had no occasion to give detailed attention to state joinder rules. *See id*. at 1115-16. Perhaps the most striking indication of the oddity of Swezey's attempt to distinguish *Pimentel* is her contention that the U.S. Supreme Court's holding is "undermined" by a Singapore decision that predated *Pimentel*. Swezey Br. 36-37. It would seem obvious that this Court should follow the guidance of the U.S. Supreme Court, rather than that of the Singapore Court of Appeal.

the absence of [that foreign nation]." *Oliner v. Canadian Pac. Ry. Co.*, 34 A.D.2d 310, 315 (1st Dept.), *aff'd*, 27 N.Y.2d 988 (1970). Swezey has literally nothing to say about this dispositive point: although she maintains that New York courts give little weight to an absent sovereign's immunity (Swezey Br. 44), she fails even to mention, let alone attempt to distinguish, any of these New York rulings.

In nevertheless arguing for a different rule, Swezey echoes the trial court by relying on *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y. 2d 801 (2003). Swezey Br. 29-30. But we noted in our opening brief (at 38-40) that *Saratoga County* involved considerations quite different in character from those at play here: it presented, not a dispute over particular assets claimed by a foreign nation, but a challenge to the Governor's regulatory authority, where dismissal would have insulated asserted violations of the State Constitution from judicial review. Other New York courts have found those considerations central to *Saratoga County*'s holding. And it is easy to see why that is so. On the one hand, the considerations favoring adjudication were at their most powerful in *Saratoga County* because dismissal would preclude "review of [a] constitutional question" and undermine the State's "system of checks and balances" (100 N.Y. at 820-21); on the other, any decision would have only an indirect, regulatory effect on the absent Indian tribe. Swezey does not even attempt to explain why the balance

struck in *Saratoga County* should apply in the same way to the very different circumstances of this case.[2]

The other decision Swezey quotes at length (at Br. 30-31), *Lamont v. Travelers Insurance Co.*, 281 N.Y. 362 (1939), offers her no support at all, for several reasons. Most obviously, the Court there declared that "[t]he courts of this State *cannot* adjudicate any controversy to which a foreign sovereign government is a necessary party" (*id*. at 367 (emphasis added)) – and here, as we have noted, 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.

[2] Swezey is wrong in arguing that intervenors are judicially estopped from attempting to distinguish *Saratoga* by statements they made to the U.S. Supreme Court in *Pimentel*. Swezey Br. 35-36. Although intervenors observed without elaboration in *Pimentel* that CPLR 1001 "differs in its terms from Rule 19(b)," Pet. Reply Br. 5 n.4, *Pimentel*, 128 S. Ct. 2180 (2008), *available at* 2007 WL 1143401 – a point we also noted in our opening brief to this Court (at 36) – they very plainly did not suggest either that the sovereignty and comity principles applied by the federal and New York courts differ, or that a New York court would entertain an action in circumstances like those here.

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 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,[3] when the endorsement of the federal government is no longer required to support a claim of immunity.[4]

In nevertheless urging a departure from the settled rule, Swezey asserts that a New York court's award to a third party of assets that are claimed by a foreign sovereign would not be "an affront" to that nation. Swezey Br. 47. But the U.S. Supreme Court disagrees: it has noted the "specific affront that could result to the Republic … if property [it] claims is seized by the decree of a foreign court."

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[3] 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.

[4] The remaining decisions cited by Swezey (at Br. 33-34) are of no relevance here. *Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals*, 5 N.Y.3d 452 (2005), did not involve an absent sovereign asserting immunity. In *Plaut v. HGH Partnership*, 59 A.D.2d 686 (1st Dept. 1977), the court held that a federal agency was not an indispensable party because its rights would not be affected by an adjudication of the defendant's liability to the plaintiff. *See id*. ("no prejudice is demonstrated"). Finally, *Herald* simply applied *Saratoga County* without elaboration.

Pimentel, 128 S. Ct. at 2190. Indeed, the danger that litigation will disturb U.S. foreign relations is a principal reason courts recognize foreign sovereign immunity in the first place. *See* H.R. Rep. No. 90-1487, at 27 (1976) (noting that attachment of foreign assets can cause "serious friction in the United States' foreign relations" and "significant irritation to many foreign governments"); *De Simone v. Transportes Maritimos do Estado*, 200 A.D. 82, 86-87 (1st Dept. 1922).

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

people," the Republic has "a unique interest in resolving the ownership of or claims to the Arelma assets." *Pimentel*, 128 S Ct. at 2190.

That conclusion is confirmed by considerations of international comity. Although Swezey maintains (at Br. 46) that the Republic is not entitled to comity, here, too, the U.S. Supreme Court has expressly disagreed: "Comity and dignity interests take concrete form in this case," where the Republic has "a comity interest in … us[ing] its own courts" to determine ownership of assets it believes were stolen by its former President. *Pimentel*, 128 S. Ct. at 2190. And as we explained in our opening brief (at 24), this consideration is reinforced by both international law and domestic U.S. anti-corruption policies, which state in the strongest terms that misappropriated assets should be returned to the nation of origin for disposition by *that nation's* courts. That factor, which "underscores the important comity concerns implicated by the Republic … in asserting foreign sovereign immunity" (*Pimentel*, 128 S. Ct. at 2191), is of such importance that it led both the Swiss and United States governments to support deference to the courts of the Philippines in determining ownership of the Arelma assets. Opening Br. 24.

C. Swezey Misapplies The CPLR 1001(b) Factors.

For the reasons set out above, the Republic's sovereign immunity is, at least in the circumstances of this case, entitled to dispositive weight in the CPLR

1001(b) analysis. In contrast, the various factors offered by Swezey for proceeding with the case (at Br. 38-48) have no substance at all.

1. To begin with, we most certainly do not concede that Swezey will suffer prejudice if this action is dismissed, as Swezey contends. Swezey Br. 38. Although we noted in our opening brief (at 29) that courts have given the plaintiff's lack of an alternative forum little weight under CPLR 1001(b) when "that result is contemplated under the doctrine of sovereign immunity" (*Pimentel*, 128 S. Ct. at 2194), we also explained that the real dispute here – which concerns the ownership of Arelma – is between the Republic and the Marcos estate. Opening Br. 29-30. Denying Swezey control over that litigation, in which she is essentially an interested bystander, does not cause her prejudice within the meaning of CPLR 1001(b). And that is especially so because, notwithstanding Swezey's vague denials (at Br. 38-39), she *does* have an alternative forum for relief: members of the Pimentel class *currently* have pending in the Philippines a class action that seeks enforcement of the *Pimentel* Hawaii class judgment against the Marcos estate.[5]

[5] Although Swezey complains about delay in resolution of this Philippine claim (at Br. 38-39), proceedings in that case recently were postponed at the request of plaintiffs' counsel. Order, *Mijares v. Estate of Marcos*, Civil Case No. 97-1052 (Regional Trial Court, Makati City, Branch 56 Jan. 27, 2010) (Letter from Michael O. Ware, Attorney for Intervenors-Appellants, to David Spokony, Deputy Clerk, Supreme Court Appellate Division: First Department (Mar. 12, 2010)).

On the other hand, Swezey plainly is wrong in her blithe assertion (at Br. 40) that dismissal could *not* injure Merrill. We showed in our opening brief (at 17, 31-33 & n.16) that, if Swezey obtains the Arelma assets in a proceeding where the Republic is absent, the Republic could bring suit against Merrill, both in New York and elsewhere. Swezey offers no response to this point, other than to quote the trial court's belief that a New York court would not hold Merrill liable in such circumstances (Swezey Br. 40 n.17, 43) – a statement that itself was made without any supporting authority, that is incorrect as a matter of New York law, and that could not possibly provide protection against liability in other jurisdictions where the Republic might sue Merrill. Merrill evidently does not share Swezey's confidence on this point, as it sought dismissal of this action below.

2. Swezey also is wrong in maintaining (at Br. 41-43) that the Republic would not suffer prejudice from continued litigation of this case. As we explained in our opening brief, Swezey's assertion that the Republic has participated in *other* U.S. litigation – an assertion that is itself misleading in significant respects[6] – is

[6] Swezey maintains that the Republic "filed more than a dozen lawsuits in the United States to recover Marcos assets" (Swezey Br. 6, 41, 46), but she provides no support for this assertion. She mischaracterizes the cases she does cite. Although she asserts that "[t]he Republic sued over the Arelma assets in New York in 1986 and obtained an injunction against Merrill Lynch in 1987" (*id.* at 6), the decision she cites for this proposition concerned specific pieces of *real* property, makes no mention of Arelma, and does not list Merrill as a party. *New York Land Co. v. Republic of the Phil.*, 634 F.Supp. 279 (S.D.N.Y. 1986), *aff'd*, 806 F.2d 344 (2d Cir. 1987). Indeed, so far as we are aware, all of the Marcos-related U.S.

wholly immaterial because a sovereign is entitled to determine when and on what terms it will submit to suit. Opening Br. 25-26.

She gets no further with her various arguments (at Br. 41-43) that the Republic could not hope to prevail in its claim to the Arelma assets. We have already answered the contention that her claim to Arelma has priority in time over that of the Republic: the rights of a party claiming original ownership of assets (as does the Republic regarding Arelma) simply are not affected "by the 'race of diligence' among creditors" (*Bergdorf*, 97 Misc. at 314) because, "if a given … asset is unavailable to the debtor, it is unavailable to the creditor." David D. Siegel, *New York Practice* § 488 (4th ed. 2009); Opening Br. 30 & n.15. The U.S. Supreme Court itself offered reasons to doubt Swezey's further assertion that any claim by the Republic would be barred by New York's statute of limitations. *See Pimentel*, 128 S. Ct. at 2191. Her declaration that the Republic could avoid prejudice by waiving its immunity and participating in this suit is circular, as waiver of immunity is *itself* the prejudice that the Republic seeks to avoid.[7] And Swezey's statement that the Republic could satisfy any judgment in its favor rendered by a Philippine court out of Marcos assets located in the Philippines is

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actions in which the Republic participated involved efforts to prevent the dissipation of Marcos assets, which required the involvement of U.S. courts.

[7] This answers Swezey's argument (at Br. 33-34) that CPLR 1001(b)'s "focus is on giving the absent party the ability to litigate"; if that were all there were to it, dismissal under CPLR 1001(b) would virtually *never* be permissible.

ridiculous; that the Republic is entitled to obtain *other* assets stolen by Marcos hardly means that it should surrender its right to the different and distinct corpus of Arelma funds.

3. Swezey's contention (at Br. 43-44) that an award of the assets to the Pimentel class would provide an "effective" judgment because it would resolve the litigation "as a practical matter" illustrates the flaw in her position. It doubtless is true that such a judgment could not be undone because the funds, once distributed to a class of almost 10,000 people, could never be recaptured. But that is precisely the problem: as we have explained, such an outcome would harm Republic and invite continuing litigation against Merrill. That resolution "would not further the public interest in settling the dispute as a whole." *Pimentel*, 128 S. Ct. at 2193

4. Finally, Swezey and her *amici* make several vitriolic assertions – consisting largely of attacks on the motives and conduct of PNB and the Republic – that are not relevant to the governing joinder standards. Because these assertions are patently inaccurate, however, we briefly reply.

First, Swezey maintains that PNB, "a partly-owned state run bank of the Republic," is a "stalking horse[] for the Republic," which is "directing this appeal." Swezey Br. 6-7. But every part of this statement is false. The Republic has *no* ownership interest in PNB (*see* http://www.pnb.com.ph/content/view/192/332/) and we can assure the Court that the Republic is not "directing" PNB's conduct of

this litigation. It could not; as we explained in our opening brief (at 5-6), PNB's interest as escrow agent is to deliver Arelma's assets to *whoever* is determined to be the owner by the Philippine courts. The Pimentel class made similarly baseless assertions about PNB in the federal interpleader litigation, where they were rejected by both the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit. *Pimentel,* 128 S. Ct. at 2189; *In re Republic of Phil.*, 309 F.3d 1143, 1152 (9th Cir. 2002) .

Second, Swezey and her *amici* devote considerable space to describing the injuries suffered by members of the class of human rights victims at the hands of the Marcos regime. Swezey Br. 2-4; *Amicus* Br. 1-2, 19-21. Needless to say, we do not dispute the sympathetic position or moral stature of these persons. But that has no bearing on the legal issue before the Court. The question here (if the Court reaches the merits) is whether the Arelma assets *are* a part of the Marcos estate, or whether they instead have at all times belonged to the Republic. If the latter is so – as the Sandiganbayan held – Swezey simply has no claim to those assets, no matter how sympathetic her position: it is fundamental that "[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. County 1997). The sympathy owing to the Pimentel class does not entitle it to take other people's property.

Third, the international law materials and treaties offered by Swezey and her *amici* provide no support for her current claim. Swezey Br. 39-40, 46-47; *Amicus* Br. 14-18. For one thing, none of the cited materials is "self-executing"; they have no effect in the courts of this State. *Cf. Rissew v. Yamaha Motor Co.*, 129 A.D.2d 94, 98 (4th Dept. 1987). But more fundamentally, even if those materials are assumed to apply here, they would not give Swezey either a claim to the Arelma assets or an entitlement to continue this litigation. The point was made expressly by the Swiss Federal Supreme Court: applying the same international law materials relied upon here by Swezey, that court rejected claims to Marcos-related Swiss assets advanced in Switzerland by the Pimentel class. The court explained that the "[v]ictims [of the Marcos regime] 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 Switzerland to U.S. Dept. of State (Apr. 5, 2007), *reprinted in* Pet. Reply. Br., *Pimentel*, 128 S. Ct. 2180 (2008) (No. 06-1204).

By the same token, the criticism of the Republic offered by Swezey and her *amici* is immaterial. We do not have space here to respond to that criticism in detail; we therefore note only that the Republic is a long-standing and close ally of the United States, and that its entitlement to adjudicate ownership of Arelma in its own courts was supported by the United States and upheld by the U.S. Supreme Court in *Pimentel*.[8] In all events, if Arelma is not part of the Marcos estate, there is no legal basis for a U.S. court to deny the Republic its right to "determine[e] if, and how, the [Arelma] assets should be used to compensate" Marcos's victims. *Pimentel*, 128 S. Ct. at 2190.

II. PETITIONER LACKS A JUDGMENT THAT IS EFFECTIVE AND ENFORCEABLE IN NEW YORK.

The parties are in agreement on the meaning of the Full Faith and Credit Clause and Statute: one state must give a *judgment* issued in another state just the same effect, no more and no less, as the judgment would receive in the state of original issuance. But the question here is whether the *registration* of a judgment (or the filing of a registration) *is* such a judgment for Full Faith and Credit purposes – whether, that is, a court issuing such a registration would regard it as a

[8] Swezey implies that the Sandiganbayan's procedures are irregular. Swezey Br. 41, 45. But the jurisdiction of a foreign court is presumed and Swezey has not established a "credible challenge" to the Sandiganbayan's competence or jurisdiction. Restatement (Third) of Foreign Relations Law § 482 cmt. a (1987). Certainly, the U.S. Supreme Court expressed no such qualms when it described how the Republic could use a favorable judgment from the Sandiganbayan to acquire the Arelma assets. *Pimentel*, 128 S. Ct. at 2191, 2194.

stand-alone judgment that is itself enforceable elsewhere. We showed in our opening brief that it is not.

Before turning to the controlling statutory language and judicial authority on this point, it is worth pausing to consider why that must be so. All agree that the underlying source of a creditor's rights is the original judgment on the merits (here, the Hawaii *Pimentel* judgment). Registration of that judgment, permitted under 28 U.S.C. § 1963 and corresponding state statutes, provides a mechanism with which to enforce the original judgment elsewhere. But it is impossible to see why Congress or a state legislature would have wanted such a registration to be the sort of rights-creating document that could *itself* be transferred and enforced elsewhere. In fact, it is impossible to see why a judgment winner would *want* to transfer a registration rather than the original judgment – unless the original judgment has become unenforceable (as it did here, because the judgment winner unaccountably allowed the judgment to lapse). That, however, is the very situation when enforcement of the registration is assuredly *inappropriate*: if the original judgment is no longer live and transferable, it would turn Full Faith and Credit principles upside down to evade the policies of the judgment state by allowing transfer and enforcement of a registration.[9] Controlling law does not allow such a result.

[9] It might well be the case that there is no *federal* policy favoring the "rapid demise" of judgments in favor of the federal government. Swezey Br. 24. But it is *Hawaii*'s policies that are relevant here, and Hawaii law "plainly states that all

1. We showed in our opening brief (at 43-45) that, under the plain language of § 1963, a registration has "the same effect as," *but is not itself*, a judgment. This distinction is crucial. As Congress knew, Full Faith and Credit principles apply only to judgments. And as we also showed (at 46-48), Congress chose the language of § 1963 with care.[10] Decisions applying § 1963, including those cited by Swezey, therefore are careful to state only that a registration is the "*legal equivalent*" of a judgment "*as far as enforcement in the registration court's district is concerned*." *Home Port Rentals, Inc. v. Int'l Yachting Group, Inc.*, 252 F.3d 399, 410 (5th Cir. 2001) (emphasis added). The *Home Port* court, for example, did "not address … any effects of registration other than on enforcement *within the geographical confines of the registration court[]*"—including, pointedly, the "portability" of the registration. *Id.* (emphasis added).[11]

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judgments are extinguished after ten years unless timely renewed." *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 987-88 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1993 (2009).

[10] Although Swezey denies that this is so (Br. 22-23), the Congress that enacted § 1963 had before it in a companion provision, and chose not to enact in § 1963, language that that would have made a registration the judgment "of" the registration court. That must be seen as a deliberate choice by Congress. *See* Opening Br. 46-47. On the other hand, that the same Congress also recodified the Full Faith and Credit Statute, 28 U.S.C. § 1738, says nothing at all about whether registrations under § 1963 are judgments entitled to full faith and credit. There is no reason to think that § 1738, which contains no reference to registration, is probative of Congress' intent in the very differently worded § 1963.

[11] *See In re Estate of Marcos*, 536 F.3d at 989 (registration "is the *functional equivalent* of obtaining a new judgment"); *Condaire, Inc. v. Allied Piping, Inc.*, 286 F.3d 353, 357 (6th Cir. 2002) ("registration is the *equivalent* of a new

Notwithstanding Swezey's skepticism on the point (Br. 21), this understanding of a registration's limited character is confirmed by the recognition that "requests for modification under [Federal Rule of Civil Procedure] 60(b) must be presented to the rendering court." *Bd. of Trustees v. Elite Erectors, Inc.*, 212 F.3d 1031, 1034 (7th Cir. 2000). The rationale for this rule, fully applicable here, is that § 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." *Id.* That original "judgment may be registered in many districts, and it would not make much sense to allow each of these districts to modify *the* judgment under Rule 60(b)." *Id.* (emphasis added).[12]

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judgment"); *United States ex rel. Hi-Way Elec. Co. v. Home Indem. Co.*, 549 F.2d 10, 13 (7th Cir. 1977) ("[T]he court of registration is to treat the registered judgment *as if it* were an original judgment.") *Stanford v. Utley*, 341 F.2d 265, 268 (8th Cir. 1965) ("[R]egistration provides, so far as enforcement is concerned, the *equivalent* of a new judgment …."). (All emphases added.) The *Stanford* decision, which is emphasized by Swezey (Br. 18, 22), specifically cautioned that it was not holding that "registration effects a new judgment in the registration court for every conceivable purpose," leaving open whether the registration is "itself subject to registration elsewhere." 341 F.2d at 270-71.

[12] In contrast, the Illinois federal court's revivals of the 1997 registration in 2008 and 2009, cited by Swezey (Br. 21), are immaterial to the analysis because "a revival is not itself a new judgment." Order, *Del Prado*, No. 4:05-CV-234-Y, Dkt. #237, at 4 (R. 213). Similarly, a court clerk's compliance with Fed. R. Civ. P. 79, which governs the maintenance of court records (also relied upon by Swezey, Br. 18-19), adds nothing: A clerk's "ministerial act" cannot transform a registration into a judgment. *C.I.T. Financial Service v. Yeomans*, 710 F.2d 416, 416-17 (7th Cir. 1983).

2. Swezey attempts to escape from this conclusion by pointing to the Uniform Enforcement of Foreign Judgments Act's adoption by 47 states. Swezey Br. 20. But this observation is a *non sequitur*. In fact, Section 2 of the Uniform Act, which 735 ILCS § 5/12-652(a) substantially enacts, was designed to "adopt[] the practice which … is used in Federal courts" for enforcement of out-of-state judgments—*i.e.*, the registration process under § 1963. *Prefatory Notes*, Uniform Act; *Tanner v. Hancock*, 5 Kan.App.2d 558, 562, 619 P.2d 1177, 1181 (1980) (Uniform Act is "akin to … 28 U.S.C. § 1963").

Courts in states adopting the Uniform Act therefore have observed that "registration under the Act does not create a new judgment." *Burshan v. National Union Fire Ins. Co. of Pittsburgh, PA*, 805 So.2d 835, 843 n.5 (Fla. Dist. Ct. App. 2001). Rather, it "endow[s] a filed foreign judgment with the *same effect* as a judgment of the court in which it is filed. It is *not a new action*." *Wright v. Trust Co. Bank*, 219 Ga.App. 551, 552, 466 S.E.2d 74, 75 (1995) (emphasis added; internal citations omitted); *accord TCAP Corp. v. Gervin*, 163 Wash.2d 645, 652, 185 P.3d 589, 593 (2008) (rejecting argument that "a registered foreign judgment 'stands alone as an independent judgment'"); *Tanner*, 5 Kan.App.2d at 562, 619 P.2d at 1181 (rejecting argument that registration "created an independent … judgment").

For this reason, Swezey is wrong in asserting that the "Illinois statute and Illinois case law" show that the Illinois state filing was an "independent judgment[]." Swezey Br. 15. To the contrary, § 5/12-652(a) uses the identical "same effect" language as § 1963. Thus, like a federal registration under § 1963, a filing under § 5/12-652 simply provides an enforcement mechanism for a foreign judgment in the Illinois state courts; it does not make a judgment filed in this manner a plenary judgment *of* the Illinois state court for all purposes.[13] Although the Illinois courts have not yet expressly addressed whether, under Illinois' version of the Uniform Act, the filings of foreign judgments should themselves be characterized as independent Illinois judgments for purposes of transfer or enforcement elsewhere – unsurprisingly, given the peculiar nature of such a claim – there is no reason to doubt that Illinois courts would reach the same conclusion

[13] *Cf. Logemann Holding, Inc. v. Lieber*, 341 Ill.App.3d 689, 692, 793 N.E.2d 135, 137 (2003) ("such properly authenticated judgment is to be *treated as* any other Illinois judgment") (emphasis added); *Revolution Portfolio, LLC v. Beale*, 332 Ill.App.3d 595, 602, 774 N.E.2d 14, 20 (2002) ("A foreign judgment filed under this section is *treated as* an Illinois judgment.") (emphasis added). *Light v. Light*, 12 Ill.2d 502, 147 N.E.2d 34 (1957), cited at Swezey Br. 15, is not to the contrary. It held that "the vitality of the foreign judgment is to be determined as of the date that it is registered" (12 Ill.2d at 509, 147 N.E.2d at 38), but is silent as to whether the filing of a foreign judgment under § 5/12-652(a) creates a brand-new Illinois judgment. So are *Doctor's Associates, Inc. v. Duree*, 319 Ill.App. 3d 1032, 745 N.E.2d 1270 (2001), and *Meyer v. First American Title Insurance Agency*, 285 Ill.App.3d 330, 674 N.E.2d 496 (1996), which Swezey quotes at Br. 24. Those cases addressed the enforceability of a foreign judgment registered in Illinois under the Uniform Act, not a situation where a judgment creditor attempted to treat a filing of a judgment as if it were *itself* a judgment that could be enforced elsewhere.

as have courts in other states. *See Logemann*, 341 Ill. App. 3d at 693, 793 N.E.2d at 138 (Illinois courts "examine the decisions of sister states" when interpreting the Uniform Act).

3. Swezey reluctantly concedes that her attempt to transfer a registration was squarely rejected in *Del Prado.* Swezey Br. 22. And tellingly, she is unable to identify a *single* case that has endorsed her unprecedented position that a federal court's registration of a judgment may be taken to another state and enforced there.

She offers *Keeton v. Hustler Magazine, Inc.*, 815 F.2d 857 (2d Cir. 1987), as a case endorsing the "sequential application" of § 1963 (Br. 25), but that is a very misleading assertion. The *Keeton* court actually remarked that New York law allowed an out-of-state federal judgment to be enforced in New York through "the *sequential application* of [§] 1963 and *[CPLR] 5018(b).*" 815 F.2d at 859-60 (emphasis added). CPLR 5018(b) provides that a "judgment of a court of the United States rendered or *filed* within the state may be filed in [New York] and upon such filing … [shall have] the same effect as a judgment entered in the supreme court." (Emphasis added.) The italicized word is crucial because it authorizes a New York state court to recognize a New York federal court's registration under § 1963 of an out-of-state federal court's judgment. But it certainly does not authorize recognition of an out-of-state court's *registration* of yet another state court's judgment, as Swezey is trying to accomplish here.

Swezey's citation to *Roche v. McDonald*, 275 U.S. 449 (1928), for the proposition that the Supreme Court has approved "successive transfer" of judgments is equally misleading. Swezey Br. 25. *Roche* involved enforcement of a *new judgment* obtained through an independent action on a judgment. 275 U.S. at 450-51. But registration under § 1963, the course followed by the Pimentel class here, is fundamentally "different from a suit upon a judgment which is a new and independent action." *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 128 F.Supp. 697, 699 (D. Haw. 1955); *see United States v. Kellum*, 523 F.2d 1284, 1288-89 (5th Cir. 1975) ("There was no new judgment as would have been obtained in a plenary action duly filed."); *cf. Home Port*, 252 F.3d at 408 (equating "registration with a new judgment-on-judgment … *for purposes of enforcement within the district of registration*") (emphasis added).[14] Having eschewed the inconvenience of an independent action on the Hawaii judgment and instead availed itself of the streamlined § 1963 registration procedure, the Pimentel class should be held to its choice.

Were matters otherwise, Swezey could take the 2009 Illinois state filing of the 1997 Illinois federal registration of the 1995 Hawaii judgment, file it in Hawaii, and obtain a new Hawaii judgment, even though the 1995 Hawaii judgment

[14] *See Ehrenzweig v. Ehrenzweig*, 86 Misc.2d 656, 662 (Sup. Ct. Kings County 1976) (distinguishing between registration under Article 54, which is based upon the Uniform Act, and bringing a "new and independent action in New York upon an out-of-state judgment").

expired in 2005. This would permit petitioner to circumvent the rendering state's policy choices—including, in particular, Hawaii's presumption that any judgment is "paid and discharged ten years after it is rendered, unless the judgment is extended within that ten-year period." *In re Estate of Marcos*, 536 F.3d at 983. To ground such an outcome on Full Faith and Credit principles, which give primacy to the policy of the judgment state, would be perverse.

CONCLUSION

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

Dated: New York, New York
March 12, 2010

Respectfully submitted,

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