EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RAPHAEL BIGIO, BAHIA BIGIO, FERIAL SALMA BIGIO and B. BIGIO & CO.,

Plaintiffs,

- against -

THE COCA-COLA COMPANY and THE COCA-COLA EXPORT CORPORATION,

Defendants.

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97 Civ. 2858 (BSJ)

PLAINTIFFS' SUR-REPLY
IN FURTHER OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs submit this sur-reply brief to respond to Defendants' misstatements of the record in this case in their Reply Brief.

Defendants repeatedly and incorrectly insist throughout their reply brief that the Bigios' property had been lawfully nationalized by the nation of Egypt. In effect, they claim they are entitled to dismissal on the pleadings because they claim they can prove that they have a valid defense that appears nowhere in the Complaint, and which they have made no attempt to prove. The Complaint does not allege any lawful nationalization, and indeed, states that the Bigios' property was not lawfully nationalized, but **unlawfully taken**. The Egyptian government's own rulings, embodied in documents attached to the Complaint, support the plausibility of these

allegations: The property belonging to Bahia Bigio was never sequestered or nationalized, (Amended Complaint Exhibit 8) and the property belonging to Josias Bigio (and later inherited by Plaintiffs) had never been the subject of any lawful sequestration decree, as the Egyptian government recognized in annulling the purported sequestration order (Amended Complaint Exhibit 7). Defendants simply ignore well-pled facts that undermine their argument. Since the Complaint alleges that the Bigios' property was never lawfully sequestered or nationalized, neither Coca-Cola nor its predecessor could have obtained a lease or permission to occupy the property from any source other than the Bigios. A purported lease or grant from MISR, a company wholly owned by the Egyptian government, to a Coca-Cola affiliate (which is not alleged in the Complaint in any event) will not extinguish Defendants' liability. Neither Egypt, nor MISR, had a legal right to the Bigios' property and factories. Defendants cannot simply assume the lawfulness of their occupancy to gain dismissal.

Defendants also repeatedly refer to what they call the "undisturbed nationalization" of the Bigios' property. Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss ("Mem.") Mem. at 3, 5. The Complaint alleges that to the extent any nationalization of real property occurred, it was in violation of the law of nations and furthermore, was annulled by decree of the Egyptian government. See Amended Complaint ¶¶ 19, 31. The characterization of the nationalization as "undisturbed" is contrary to the plain language of the Complaint, yet without it, defendants have no basis to seek dismissal.

Defendants also falsely assert that they are not alleged to have conducted business with the Bigios. Mem. at 4 n.2. In fact, the Complaint alleges that defendants licensed R. N. Bigio & Co. to supply advertising and promotional materials, ¶¶ 12 and 13, leased property from B. Bigio & Co. on which a bottling plant was located, ¶ 13, and also purchased bottle caps from B. Bigio

& Co. ¶¶ 14-16. Thus, Coca-Cola was a supplier, a customer, and a tenant of Bigio family businesses for several decades until 1962. The multi-faceted, ongoing relationship between Coca-Cola and the Bigios make the allegation that Coca-Cola was aware of the Bigios' forced dispossession from their property by Egypt entirely plausible.

Defendants' assertion that the exhibits to the Complaint "acknowledge a lease," Mem. at 5 n.7, unaccompanied by any reference to any particular document, **is simply false**. None of the exhibits to the Complaint state that Coca-Cola or any affiliated entity entered into a lease with MISR or any other entity (other than the lease with the Bigios entered in the 1940's, on which the Coca-Cola Bottling Company and its predecessors ceased making payments in the early 1960's ¶ 13).

Defendants also misrepresent the unjust enrichment allegations. The Defendants' wrongful act giving rise to an unjust enrichment claim is not their purchase of stock in the Coca-Cola Bottling Company of Egypt, Mem. at 9, but their trespassing on, and profiting from, Plaintiffs' real property, and their conversion of and profiting from Plaintiffs' personal property. Because the Plaintiffs' property was never legally nationalized, profits from the use of the property rightfully belong to the Bigios, not to Coca-Cola or its affiliates. Such profits will be determined through the discovery process.

Defendants' Reply effectively abandons the claim that Defendants would be entitled to dismissal if the Court applied Egyptian law to the trespass claim and the statute of limitations defense. Instead of addressing the merits of what Egyptian law does or does not say, their only attack is on Plaintiffs' experts' Phillip Walker's credentials.

Defendants' arguments based on Egyptian law in their opening brief contained several misstatements and critical omissions. The Declaration of Phillip James Walker, submitted with

Plaintiffs' Responsive brief, points out the fallacy of defendants arguments. The Walker Declaration makes clear that the Amended Complaint sets forth viable claims for trespass, conversion, and unjust enrichment under Egyptian law; that Egyptian law, like New York and Georgia law, commences the running of the statute of limitations from the Defendants' wrongful act; and that under Egyptian law Defendants may be liable as principals for acts of the entities they supervise, control or give assistance to aid and abet. Thus, on the merits, Professor Walker refutes defendants contentions about Egyptian law.

Unable to refute Mr. Walker's statements about basic Egyptian law, defendants resort to attacking his credentials. Mr. Walker is unquestionably an expert in Egyptian law, as his curriculum vitae and Declaration attest: he regularly consults on Middle Eastern legal affairs and has taught a course on comparative law of the Arab world at Cornell Law School. He studied Islamic law at Harvard Law School, has extensive experience with the Egyptian legal system, was employed as director of a USAID Family Justice Project in Cairo, where he directed efforts to overhaul a portion of the Egyptian court system, and has proficiency in Arabic. He is also a practicing lawyer in the United States, with a practice concentrating in Arabic world-related matters.

Defendants' claim that the Declaration is not entitled to any weight because Mr. Walker does not practice law in Egypt, Mem. at 9, is unsupported in the case Defendants cite,[1] and is directly contrary to both the text of Fed. R. Civ. P. 44.1 and to applicable precedent. Rule 44.1 states, "In determining foreign law, the court may consider any relevant material or sources, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." This liberal standard has led several Courts to note

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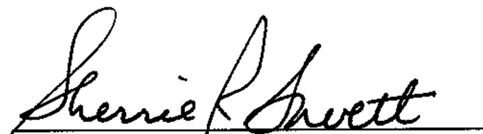
[1] Sea Trade Co. v. FleetBoston Fin. Corp., 2008 U.S. Dist. LEXIS 67221 (S.D.N.Y. 2008) weighs the opinions of all proferred experts on foreign law. Id. at 8 n.4.

> An expert witness [on foreign law] is not required to meet any special qualifications. Indeed he may not even be admitted to practice in the country whose law is in issue.

United States v. First National Bank of Chicago, 699 F.2d 341, 344 (7th Cir. 1983) (quoting Wright & Miller, Federal Practice & Procedure § 2444). See also In re Grand Jury Proceedings, 40 F.3d 959, 964 (9th Cir. 1994) (same quotation); In re Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp., 978 F. Supp. 266, 275 (S.D. Tex. 1997) aff'd, 161 F.3d 314 (5th Cir. 1998) (same). Defendants' failure to reply to the substance of the Walker Declaration may be taken as an admission that the Declaration accurately describes the laws of Egypt.

Finally, Defendants claim that, for statute of limitations purposes, the unjust enrichment and conspiracy claims were not tolled by the filing of the initial Complaint in 1997 because the claim is "not identical" to the previously pleaded claims. Mem. at 10. This is simply a misrepresentation of Fed. R. Civ. P. 15(c), which Defendants cite but do not quote. The test for whether new causes of action relate back is not whether the claims are identical, but whether "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The unjust enrichment and conspiracy claims plainly meet this test.

Dated: October 30, 2009



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