

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAPHAEL BIGIO, BAHIA BIGIO, FERAL *
SALMA BIGIO AND B. BIGIO & CO., *

Plaintiffs, *

v. * 97 CIV. 2858 (BSJ)

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

Defendants. *

**MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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The defendants, The Coca-Cola Company and The Coca-Cola Export, both U.S. corporations headquartered in Atlanta, Georgia, submit this memorandum in opposition to the plaintiffs' motion for summary judgment and in support of judgment in their favor.

PRELIMINARY STATEMENT

The plaintiffs assert that their claims derive from the view that a thief cannot convey good title to land or personal property and that these defendants aided and abetted or conspired with a thief to deprive them of property that once belonged to them. However, in their scenario the "thief" was the Government of Egypt, which nationalized their properties in the 1960s and transferred them to two Egyptian Government-owned entities. The nationalizations have never been overturned. And these defendants' sole alleged wrongful act was to purchase through intermediaries a minority interest in the stock in one of those Government-owned entities in a lawful public sale when it was privatized by the Egyptian Government thirty years later despite the plaintiffs' assertion of rights to the nationalized property.

The recently amended complaint alleges claims "under the law of nations," for common law trespass and conversion, for "aiding and abetting" and "conspiracy," and for equitable unjust enrichment. Am. Comp. ¶¶ 46, 50, 53, 56, 66. It alleges that the Government of Egypt nationalized real property belonging to them near Cairo, Egypt, and transferred it to a Government-owned company called MISR Insurance ("MISR"). *Id.* ¶¶ 11, 17, 23. It alleges that Egypt also nationalized business assets belonging to them and transferred them to another Government-owned company, El Nasr Bottling Co. ("ENBC"). *Id.* ¶ 17. It alleges that the nationalizations occurred because of their religious beliefs. *Id.* ¶ 10. However, the plaintiffs admit they are not claiming that the defendants had any role in the nationalizations and that they

are not suing the defendants for any acts before 1994. The complaint does not allege religious discrimination by the defendants.¹

The factual record presented by the plaintiffs on this motion consists of (1) the complaint and exhibits and (2) affirmations by Mr. Raphael Bigio, one of the plaintiffs; by a professor of international affairs; and by one of the plaintiffs' lawyers. There has been no discovery except the defendants' 2002 answers to interrogatories dealing with the doctrine of international comity.

A summary judgment motion requires proof by admissible evidence that the material facts are not disputed and the movant's legal right to relief on those facts. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The plaintiffs have not established either requirement. Their motion papers do not establish elements of any viable claim by admissible evidence, and the defendants are entitled to discovery into the facts in any event.² The law does not entitle the plaintiffs to relief. However, the facts admitted in the complaint and motion papers, binding them by judicial estoppel, conclusively defeat all their claims.

Thus, the plaintiffs' admission that the property at issue was nationalized by the Government of Egypt eliminates the predicate for their argument that the property was "stolen" from them.³ Other admissions disprove additional elements of all their claims. The starkest proof lies in their admissions that their realty was nationalized and has since been owned by

¹ The plaintiffs say: "The Bigios are not suing Coca-Cola in this case for conduct before 1994 or for any participation by Coca-Cola in the illegal conduct of the Egyptian Government in the 1962-65 period. They are suing Coca-Cola because from 1994 to the present day Coca-Cola has trespassed upon and occupied property that belongs to the Bigios." Pls. Summ. J. Mem. at 10.

² This court stayed discovery except for the plaintiffs' comity interrogatories.

³ See Am. Comp. ¶¶ 17, 26 and Exs. 6, 7, 9, and 12 (at 6, ¶1); Bigio Aff. dated Sept. 11, 2009 ("Bigio I Aff.") ¶¶ 16, 19, 20; Pls. Summ. J. Mem. at 3. The translations of Arabic language documents provided in Exhibits 6 and 7 to the amended complaint are incomplete and inaccurate. In addition, the document provided as Exhibit 9 to the amended complaint is not accompanied by its Arabic original and is, on its face, incomplete. More complete and accurate translations are attached as Exhibits A-C to the Declaration of Richard A. Cirillo dated October 11, 2009 ("Cirillo Dec."). Exhibit 12 is also incomplete.

MISR and that their personalty was nationalized and thereafter transferred to ENBC. Am. Comp. ¶ 29; Pls. Rule 56.1 Statement ¶¶ 29-30. Even if the defendants had not purchased their interest in ENBC stock in 1994, ownership of the land would still be held by MISR and ownership of the personalty, if it still existed in 1994, would still rest with ENBC. The plaintiffs' recourse is not against the defendants but against non-defendants Egypt and MISR.

The plaintiffs have not shown that the defendants are trespassers. They admit the defendants are not themselves occupying the land but are shareholders in ENBC, MISR's tenant or permittee and a separate corporation from the defendants.⁴ They admit that the defendants did not obtain possession of the personalty but instead bought a minority interest in shares of ENBC. The plaintiffs have not alleged or established any facts to make the defendants liable for ENBC's presence on the land with the permission or lease of MISR, the owner, or to obligate them to exercise influence to compel ENBC to return any assets it received through the nationalization in the 1960s. Indeed, as to the business assets, the plaintiffs have not even established their existence in 1994 since they last account for them in 1979.⁵

The plaintiffs also have not establish facts sufficient to "pierce the corporate veil" between ENBC and its indirect shareholders, the defendants, or to make these defendants liable as aiders and abettors, conspirators, or principals in an agency relationship. All that the plaintiffs

⁴ The plaintiffs contend that they have never alleged ENBC's occupancy of the property was under a lease from MISR. Dism. Opp. at 15-16. That is not so, as the attachments to the complaint supply that allegation. However, the distinction is without a difference: whether ENBC's occupancy is by lease or permission, the owner remains MISR unless its ownership through nationalization is overturned. As relevant here, if ENBC vacated the property today, the plaintiffs would still face MISR's claim to superior rights to the realty, which the plaintiffs' "decades-long efforts" failed to overturn.

⁵ Mr. Bigio submitted an affirmation in opposition to the defendants' motion to dismiss. Bigio Aff. dated Sept. 17, 2009 ("Bigio II Aff."). Even treating it as a supplement to the plaintiffs' motion for summary judgment, it confirms that the plaintiffs did not satisfy the conditions set forth in the Ministry of Finance ("MOF") directive. *Id.* ¶¶ 3, 4, 5. Unsuccessful attempts to satisfy conditions do not excuse or eliminate the conditions. Mr. Bigio refers in that affidavit to a "Legal Notice" by an Egyptian attorney that "recited the critical facts." *Id.* ¶ 7. In reality, that notice is nothing more than the plaintiffs' lawyer giving Egypt and MISR notice of their claims.

have established is that the defendants, through intermediaries, bid and paid value for shares of stock in a public sale in 1994.⁶ In that sale, these defendants were not unjustly enriched by an unconscionable act at the plaintiffs' expense; they lawfully bought and paid substantial value to the seller of the shares. Any unjust enrichment was by Egypt.⁷

As to the law, this court dismissed the plaintiffs' "law of nations claim," Amended Memorandum Opinion and Order at 9, and the dismissal was affirmed by the Second Circuit, *Bigio v. The Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2001). It is no longer part of this action. The defendants have moved to dismiss all claims alleged in the complaint for failure of the state a claim upon which relief can be granted. *See* Defs. Dism. and Reply Memos. If the court grants the defendants' motion to dismiss, it need not reach the plaintiffs' summary judgment motion. But if it does reach the summary judgment motion, it should deny the plaintiffs' motion and enter judgment in the defendants' favor.

STATEMENT OF THE FACTS ON THIS MOTION

A. The Plaintiffs' Evidence Is Inadequate To Support Their Motion

The three affirmations submitted by the plaintiffs are not sufficient to prove the essential elements of their claims by admissible evidence, a fundamental requirement of Rule 56(e). The critical assertions of each affirmation are not made on personal knowledge and do not satisfy the Federal Rules of Evidence. Most of the exhibits are not authenticated or self-authenticating. The plaintiffs do not even establish the threshold issue of whether these plaintiffs have the legal rights to the property they contend the defendants "stole" from them.

⁶ The plaintiffs concede that the defendants paid their minority share of \$96 million on closing and of an additional \$148 million investment in ENBC over ten years. Pls. Dism. Opp. at 21. Notably, the plaintiffs have not sued the majority share purchasers or claim they are trespassers, converters, aiders and abettors, or conspirators, or unjustly enriched.

⁷ Evidence shows that the Egyptian Government did award compensation for the property at issue in this case. Am. Comp. Ex. 6, Arts. 2,3; Ex. 7, Arts. 8, 9; Ex. 9; Abou Ali Dec. dated Aug. 19. 1997 ¶ 19.

1. Raphael Bigio's Affirmation: Plaintiff Raphael Bigio's affirmation does not establish who is entitled to claim superior rights to the real and personal property at issue. He refers vaguely and unspecifically to what he says "the Bigio family" did and to inheritances of property by "heirs" of various Bigios. *See* Bigio I Aff. ¶¶ 5, 8, 9, 16, 27, 30, 32, 35; Abou Ali Dec. dated Aug. 19, 1997 ¶ 18. His affirmation does not identify who within the "family" and who among the putative "heirs" he is referring to, and he admits that there are Bigio "family members" and "heirs" who are not plaintiffs in this action. *See id.* ¶¶ 9, 27; Abou Ali Dec. dated Nov. 11, 1997 ¶ 5; Am. Comp. Ex. 7, Art. 9. Mr. Bigio also does not prove a chain of lawful transfers by deed, will, intestacy, or otherwise vesting in the named plaintiffs the rights they allege.

Although Mr. Bigio may properly attest to events within his personal knowledge, his affirmation is not made on personal knowledge⁸ and recounts events of which he could not have personal knowledge. *See, e.g., id.* ¶¶ 22, 28, 30, 34, 36, 37, 38, 39. He does not explain the source of his statements or his testimonial competency to describe events he did not witness or participate in. The court may not accept Mr. Bigio's inadmissible assertions as sufficient evidence to support summary judgment. Fed. R. Civ. P. 56(e)(1) ("A supporting . . . affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.").

2. Professor Rubin's Affirmation: The professor's affirmation admits that it is based on his reading of a "draft" of Mr. Bigio's affirmation (although he does not provide a copy of the draft he read). Barry Rubin Aff. dated Sept. 9, 2009 ¶ 4. He does not attest to any other

⁸ Mr. Bigio does not make his affirmations on personal knowledge but only provides "the best of my knowledge and recollection." Bigio I and II Affs. at p. 1. The basis for that "knowledge and recollection" is not stated and it is evident that he is offering multiple level hearsay, conjecture, and belief in place of personal knowledge for many of his critical assertions. *See, e.g.,* Bigio I Aff. ¶¶ 5, 6, 13, 14, 22, 34, 36-39; Bigio II Aff. ¶¶ 6, 7.

knowledge of the plaintiffs or their claims. To the extent Professor Rubin's area of study allows him to describe general conditions in Egypt during the period from the 1950s to date, his particular views differ from those of other scholars and observers,⁹ and they have not been tested by deposition.

But the most important fact is that Professor Rubin has absolutely no basis to comment on anything concerning these particular plaintiffs, their particular assets, or their personal situation *vis à vis* the Egyptian Government except what Mr. Bigio wrote in his draft affirmation. All his affirmation really says is that he believes Mr. Bigio's claims, but that is not evidence on which the court may rely on a summary judgment motion. The professor's affirmation is not admissible as either percipient or expert testimony under Rules 602 or 702 of the Federal Rules of Evidence and cannot support the plaintiffs' motion.

3. Attorney Lewin's Affirmation: This affirmation only introduces several documents into the record: namely, interrogatory answers; press and SEC reports; and several "articles" and "reports" commenting on Egypt's political and religious history. Nathan Lewin Aff. dated Sept. 11, 2009 ¶¶ 3, 4, 5. The "articles" and "reports" are not writings by neutral, unbiased observers and neither the articles and reports themselves nor Mr. Lewin's affirmation provide any basis for their admissibility even for general background purposes.¹⁰ In addition, and more importantly, these materials shed no light at all on the claims of these plaintiffs, their property, their interactions with the Egyptian Government, or their claims in this lawsuit.

⁹ See Cirillo Dec. Exs. D-H.

¹⁰ Several articles appeared in the "Jerusalem Letter" of the "Jerusalem Center for Public Affairs" and "Historical Society of Jews from Egypt," and another in "Middle Eastern Studies," the publisher and perspective of which do not seem to be available in the public domain. They are not broadly accepted publications of known journalistic objectivity and excellence, unlike, for example, the *New York Times*, *Wall Street Journal*, and *Foreign Affairs Quarterly*, and are not admissible under Federal Rule of Evidence 803(18). Other writers have reached different views. See Cirillo Dec. Exs. D-H.

In addition, virtually none of the exhibits to the complaint and Mr. Bigio's affidavits are authenticated or self-authenticating as required by Fed. R. Civ. P. 56(e) and the Federal Rules of Evidence. *See also* Abou Ali Dec. dated Nov. 19, 1997. ¶ 5.

The plaintiffs, therefore, have completely failed to make a record through admissible evidence of the facts that would establish *prima facie* the elements of any of their claims. Missing from the record is admissible evidence concerning, among other crucial subjects: (i) the legal basis for the plaintiffs' claimed interest in the property at issue through descent, devise, or other transfer; (ii) the facts surrounding the Egyptian Government's nationalization of the plaintiffs' alleged property and the Government's awards of compensation for nationalizing that property;¹¹ (iii) the rights allegedly conferred on the plaintiffs through the Egyptian Ministry of Finance directive,¹² the plaintiffs' satisfaction of the express conditions for the directive's effectiveness,¹³ and their "decades-long" administrative and judicial efforts to obtain the property under the directive; (iv) the facts surrounding MISR's continuing ownership and ENBC's occupancy of the realty; and (v) whether the personalty still existed in 1994.¹⁴ Having failed to adduce admissible evidence establishing essential elements of their claims, the plaintiffs are not entitled to judgment.

B. The Plaintiffs' Admissions Establish the Defendants' Right to Judgment

However, the court may search the record and, on the basis of uncontroverted evidence, including admissions, grant judgment to the non-moving party. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167-68 (2d Cir. 1991) (a court may grant summary judgment *sua*

¹¹ *See* note 7 above regarding evidence of compensation awarded to the plaintiffs for the nationalizations.

¹² Am. Comp. Ex. 11.

¹³ *See* note 5 above regarding the plaintiffs' failure to satisfy conditions to the MOF directive.

¹⁴ The plaintiffs' latest mention of its whereabouts is 1979. *See* Bigio I Aff. ¶ 28.

sponte to the nonmoving party provided the record is fully developed; the moving party has not suffered procedural prejudice; and where the decision is based on the same issues as in the original motion.). In this case, the complaint and exhibits and Mr. Bigio's affirmations and exhibits make critical admissions and establish key undisputed facts that dispose of all the plaintiffs' claims. The plaintiffs face no procedural prejudice since the defendants' motion for judgment is based on the same issues and materials raised by the plaintiffs' motion.

1. The first critical admission is that the Egyptian Government nationalized the property at issue in this case, transferring ownership of the realty to Government-owned MISR and the personalty to Government-owned ENBC. *See* note 3 above. The plaintiffs admit that from the nationalization in the 1960s until the privatization in 1994 ENBC was administered by the Egyptian Government's Ministry of Industry and Administration of Foodstuffs Department. Am. Comp. ¶ 17; Bigio I Aff. ¶ 26. They further admit that the sale of the ENBC shares in the 1994 privatization transaction was made by the Egyptian Government. Am. Comp. ¶ 34; Bigio I Aff. ¶ 31.

Assuming without conceding that the plaintiffs owned the property prior to nationalization, the nationalizations transferred ownership to the Government and its owned entities, MISR and ENBC. The plaintiffs admit this transfer of ownership to the Government. Nationalization it is not unlawful; it is a lawful exercise of governmental power, and any claim for improper nationalization lies against the government that nationalized the property. The plaintiffs admit that the defendants were not involved in the nationalization of their property. *See* note 1 above. Therefore, the nationalizations ended their ownership rights and gave the plaintiffs a claim for compensation against the Egyptian Government.

The plaintiffs argue that their property was seized and nationalized by Egypt because of their religious beliefs. Am. Comp. ¶ 10. Accepting the truth of the assertion for present purposes,¹⁵ the plaintiffs have not overturned the Egyptian nationalizations and cannot do so in this case. The Court of Appeals already has affirmed dismissal of the plaintiffs' "law of nations" claim, which arises under the Alien Tort Claims Act, on the basis that, if the nationalizations violated the plaintiffs' rights, it was Egypt and not the defendants, that is responsible. *Bigio v. The Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2001). Violation of religious conscience is not alleged against the defendants, and it is not an element of any of the plaintiffs' remaining claims for trespass, conversion, aiding and abetting, and conspiracy. For these reasons, the Egyptian Government's motives do not affect the plaintiffs' claims against the defendants.

2. The plaintiffs admit that ENBC has occupied the real property since before nationalization and continues to do so. Am. Comp. ¶¶ 17, 24, 29. They also admit that MISR is still the owner of the realty. *Id.* at ¶ 32.¹⁶ ENBC's occupancy of the property under lease or with the permission of the owner, MISR, is not a trespass. *See* Defs. Dism. Reply Mem. at 5-6. Further, the plaintiffs do not claim that they were deprived of tenancy rights, which is all ENBC has ever had; rather, they claim they were deprived of ownership rights, which they admit ENBC never had. It is indisputable that, if ENBC had never been a tenant or its tenancy ended now, the

¹⁵ Objective reports show that the nationalization program carried out in Egypt by the Nasser regime was directed to accomplish the goal of socialization of the Egyptian economy when that Government was closely aligned with the Soviet Union and affected most segments of the Egyptian citizenry. *See* Cirillo Dec. Exs. D-H.

¹⁶ Mr. Bigio asserts that one of three parcels of property was not properly seized by the Egyptian Government, but he does not dispute that it was nationalized. *Bigio I Aff.* ¶¶ 19, 22; *Abou Ali Dec.* dated Aug. 19, 1997 ¶¶ 4; *Abou Ali Nov.* 19, 1997 Dec. ¶ 6. Mr. Bigio's assertion about the non-seizure of that parcel may, or may not, be correct as Mr. Bigio offers proof to support his views. Nevertheless, because the plaintiffs admit Egypt's nationalization and transfer of the property to ENBC, the distinction does not affect the result.

plaintiffs would still have no claim for their alleged property against anyone but the Egyptian Government and MISR. The plaintiffs' admissions defeat their claims against the defendants.

3. The plaintiffs admit that the Egyptian Government extended an opportunity for them to recover the real property through a directive of Egypt's MOF. Bigio I Aff. ¶ 30; Bigio II Aff. ¶¶ 2-6; Am. Comp. Exs. 6, 7. The legal stature of an MOF directive under Egyptian law is nowhere stated in the plaintiffs' motion papers, but it is clear that the plaintiffs tie their right to recover the real property to that directive. Am. Comp. ¶ 32; Bigio I Aff. ¶ 30. Whatever its legal significance, the MOF directive and plaintiffs' admitted failure to meet its terms defeat the plaintiffs' claims. The document imposed several express conditions and limitations on the return of the realty to the plaintiffs, and Mr. Bigio admits that he was unsuccessful in his efforts to meet the conditions or obtain relief through multiple lawsuits. Bigio I Aff. ¶ 30; Bigio II Aff. ¶¶ 2-6; Abou Ali Aug. 19, 1997 Dec. ¶¶ 14-17 and Ex. A.¹⁷ Furthermore, the MOF directive shows on its face that, even if MISR had turned over the property to them, the plaintiffs would have received it subject to ENBC's tenancy. Am. Comp. Ex. 7, Art. 7. The plaintiffs' admissions establish that neither ENBC and, much less so the defendants, are trespassers.

4. The plaintiffs admit that at the time of nationalization they held only non-exclusive licenses from the defendants to put the defendants' trademarks on bottle caps for manufacture and sale to ENBC. Am. Comp. ¶ 16 and Exs. 4, 5.¹⁸ The plaintiffs do not allege

¹⁷ In addition, Exhibit 11 to the complaint is an MOF document addressed to MISR dated July 31, 1995, saying that the MOF "would urge" MISR to "execute the above mentioned decision." Mr. Bigio reports that, in 1980, MISR (also a part of the Egyptian Government) told him "'We do not recognize the decree'" and "refused to discuss any other compensation issues," and that the family's "decades-long efforts to enforce the Ministry of Finance decree in the Egyptian legal system have unsuccessful." Bigio I Aff. ¶ 30; Bigio II Aff. ¶¶ 4, 5. This is further proof that the MOF directive is neither self-executing nor has compulsory effect under Egyptian law.

¹⁸ Mr. Bigio's December 19, 1997, affidavit in this action states, at ¶ 2, "Our family was engaged in the manufacture of bottle caps."

any supply agreement with ENBC and ENBC was therefore entitled to buy bottle caps from any source it wished, or to make them itself. The plaintiffs' sales of bottle caps before nationalization do not give rise to a legal expectancy of continued business dealings or profits from any lost sales after the nationalization or privatization. In addition, the plaintiffs admit that the Government of Egypt, not the defendants, operated ENBC until the defendants purchased their minority shares in 1994. Am. Comp. ¶ 34; Bigio I Aff. ¶ 26. Decisions about where to obtain bottle caps were not the defendants' to make.

In addition, the plaintiffs have provided no evidence that nationalized bottle cap assets continued to exist after the nationalization. The only reference to them is Mr. Bigio's unsupported reference to learning in 1979 that they had been moved to another city and were being used there. Bigio I Aff. ¶ 28. Given the purchase of the machinery in the 1950s, Bigio I Aff. ¶ 12, its use until nationalization, and the passage of thirty more years after nationalization before the 1994 privatization transaction, there is no evidence to support the assertion that in 1994 ENBC still held any of the bottle cap assets that the plaintiffs last account for in 1979.¹⁹ Business assets are not presumed to have perpetual duration or ownership.

5. The plaintiffs admit that the seller was the Egyptian Government not the plaintiffs, when the defendants purchased their minority shares in ENBC in 1994 and that the defendants paid the purchase price to Government as the seller. Am. Comp. ¶ 34; Bigio I Aff. ¶ 31. The plaintiffs were not entitled to the purchase price for the ENBC shares and they have not established that any portion of the purchase price of the stock related to any assets previously owned by the plaintiffs that ENBC still held in 1994. The plaintiffs also admit that they did not intend to obtain an order preventing the privatization sale from taking place after they were on

¹⁹ However, there is evidence that the Government awarded them compensation for the nationalization of the bottle cap business assets in the 1960s. See Am Comp. Ex. 9 and note 7 above.

notice of the pending sale and did not obtain an order requiring the defendants to pay to them or into escrow any part of the purchase proceeds. Bigio I Aff. ¶ 32; Am. Comp. Ex. 12.²⁰

Buying stock in a public sale is not unlawful, and the plaintiffs' assertion that the defendants purchased a minority interest in ENBC does not support a claim that they aided and abetted or conspired in a wrong against the plaintiffs. *See* Point III(D) below. The defendants' belief that the plaintiffs' still unproven claim of superior right was unfounded vitiates the element of intent or agreement to assist another in committing a known wrong, essential elements of those causes of action. *Id.*²¹

6. The plaintiffs admit that, before and after the privatization, ENBC, a bottler of beverage products, was and remains a legal entity different from its shareholders. Am. Comp. ¶¶ 17, 24, 29, 32, 34, 37; *see also* Abou Ali Dec. dated Aug. 19, 1997 ¶¶ 5-12. Egyptian and US law recognize that separateness, and the plaintiffs have not alleged in the complaint or established any facts that would "pierce the corporate veil" of shareholder non-liability.²² In Egypt as in the U.S., bottlers produce and distribute beverage products under contract and license with the defendants, their affiliates, and other companies, which sell them syrup to make the

²⁰ *See* Bigio Aff. dated Oct. 9, 1997 Ex. J, in this action, a letter from him to the defendants' General Counsel dated February 4, 1994, stating in part, "The purpose of having started the above stated litigation in Egypt is not in fact to prevent the sale of El Nasr bottling but to insure that the payments representing the value of this sale be distributed in such a fashion that the ultimate owners of these assets and factories receive a just and fair compensation share in the acquisition."

²¹ The defendants investigated Mr. Bigio's contentions in 1994 and advised him that they found no support for his claims. *See* Bigio Aff. dated Oct. 9, 1997 Ex. K, in this action, a letter from the defendants' General Counsel dated July 19, 1995; Bigio I Aff. ¶ 32; Abou Ali Aug. 19, 1997 Dec. ¶ 13.

²² Abou Ali Dec. dated Aug. 19, 1997 ¶¶ 5, 12; Abou Ali Dec. dated Aug. 23, 2009 ¶¶ 2, 8. The plaintiffs' assertion, Pls. Summ. J. Mem. at 11-12, that the defendants, as remote shareholders, directed or ratified actions by corporate subsidiaries or affiliates does not support their veil-piercing assertion that the shareholder is liable for acts of subsidiaries or affiliates. As with Egyptian law, U.S. law recognizes that shareholders have limited liability and are not liable for the actions of the company either in contract or tort. *See* decisions cited on page 12. Otherwise, the doctrine of juridical separateness and limited liability entities, which is fundamental to the law of corporations recognized in Egypt as in the U.S. as a fundamental basis for national and international commerce, would disappear. Shareholders are not liable for the torts of a corporation absent allegations of active participation.

beverages and license their trademarks for use in reselling the beverages. The separateness of the bottler, ENBC, from its remote minority shareholders precludes the defendants' liability for the contract bottler's acts, and, the absence of facts allowing the court to disregard corporate form, requires judicial respect for corporate form. *See, e.g., Sinaltrinal v. The Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1354 (S.D. Fla. 2003); *Brignoli v. Balch Harvy & Schienman Inc.*, 645 F. Supp. 1201, 1209 (S.D.N.Y. 1986); *Califf v. The Coca-Cola Co.*, 326 F. Supp. 540, 541 (N.D. Ill. 1971); *Noto v. Cia Secula di Armaneto*, 310 F. Supp. 639, 646 (S.D.N.Y. 1970). Therefore, even if ENBC could be shown to be a trespasser or converter, the defendants are not liable for its acts under Egyptian or U.S. law.

7. The plaintiffs admit that the defendants' only allegedly wrongful act was to buy a minority interest in ENBC and to disagree with their contentions. They admit that the defendants had no involvement in Egypt's nationalizations. *See* note 1 above. And they have admitted facts establishing that the defendants did not themselves trespass on or convert any property. What they argue is that the defendants should have acted in 1994 to remedy the impact of what they contend were wrongful nationalizations. The plaintiffs' claim lies against Egypt and MISR, and their admissions prove that, under the governing law, that they cannot establish any claim alleged in the complaint against the defendants. The defendants are entitled to a judgment of dismissal.

C. The Defendants' Rule 56.1 Response

The defendants are submitting their response to the plaintiffs' Rule 56.1 statement to the extent possible without discovery, and they reserve their right under Federal Rule of Civil Procedure 56(f) to conduct discovery if it should become necessary to respond to the plaintiffs' factual assertions. However, if the court grants the defendants' pending motion to dismiss the complaint or grants judgment to the defendants based on the plaintiffs' admissions, the need for discovery in this action will not arise.

ARGUMENT

II. THE STANDARDS APPLICABLE TO THE PLAINTIFFS' MOTION

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A court must “resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment,” here the defendants. *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (internal quotations omitted). “[D]isputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The plaintiffs’ affirmations and exhibits are binding on them as judicial admissions. *E.g., Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) (“A party’s assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.”). In addition, on an appropriate record, the Court may *sua sponte* grant summary judgment to the non-moving party. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991).

III. THERE IS NO “LAW OF NATIONS” CLAIM IN THIS ACTION

When the Second Circuit affirmed this court’s dismissal of the plaintiffs’ “law of nations” claim, it held that there was no federal question jurisdiction. *Bigio v. The Coca-Cola Co.*, 239 F.3d at 449. The Second Circuit held that, even if seizure of the plaintiffs’ property was wrongful, the wrong was committed by the Egyptian Government and Government-owned entities, and can be remedied only by them. *Id.* at 447. The court ruled that the case could proceed under diversity jurisdiction for the plaintiffs’ common law tort claim. *Id.* The Second Circuit’s decision is conclusive of any “law of nations” claim, and is law of the case. These

defendants are not liable for wrongful nationalization or for refusal to compensate them for Egypt's nationalization of their properties.

IV. THE PLAINTIFFS HAVE NOT ESTABLISHED INDISPENSIBLE ELEMENTS REQUIRED TO PROVE THEIR CAUSES OF ACTION

A. Choice of Law

Normal choice of law principles apply to common law claims in a diversity of citizenship action. *Steinberg v. Sherman*, 07 Civ. 1001 (WHP), 2008 U.S. Dist. LEXIS 37367, at *9-10 (S.D.N.Y. May 8, 2009) (“In diversity actions, . . . the location of the tort generally determines the applicable law.”); *La Luna Enters. v. CBS Corp.*, 74 F. Supp. 2d 384, 389 (S.D.N.Y. 1999). However, it appears that the same result is reached in this case under New York or Georgia law as under Egyptian law. *See* Defs. Dism. Mem. at 11-14.²³

B. Trespass

The elements of trespass under Egyptian law are (1) fault or error, (2) damage to another, and (3) a causal connection between the fault and damage. *See* Abou Ali Dec. dated Aug. 23, 2009 ¶¶ 4-6. Occupation of land under a claim of right, for example, under leasehold or with the owner's permission, is not fault or error and is not considered trespass under Egyptian law. *Id.* Under New York law, a plaintiff must show that the defendant made an unauthorized entry on private property that resulted in wrongful use of that property. *E.g.*, *City of N.Y. v. N.Y. Cross Harbor R.R. Terminal Corp.*, No. 98 CV 7227, 2006 U.S. Dist. LEXIS 4238, at *58 (E.D.N.Y. Jan. 17, 2006); *Woodhull v. Town of Riverhead*, 46 A.D.3d 802, 804 (N.Y. App. Div. 2007) (“Trespass is an intentional entry onto the land of another without justification or permission.”).

²³ The defendants have established Egyptian law by the declarations of an attorney admitted to practice in Egypt. Abou Ali Dec. dated Aug. 23, 2009 ¶¶ 1, 9. The plaintiffs have offered in rebuttal on the pending dismissal motion the affidavit of a New Hampshire lawyer, Philip Walker. That affidavit, however, is not entitled to evidentiary weight to rebut the attested opinions of a member of the Egyptian Bar. *See* Defs. Dism.. Reply Mem. at 9.

In Georgia, a person commits trespass when he knowingly and without authority enters upon the land of another. *Hauf v. HomeEq Servicing Corp.*, No. 05-cv-109, 2007 U.S. Dist. LEXIS 9439, at *16 (M.D. Ga. Feb. 9, 2007).²⁴

A key element of trespass is an entry onto land that is unpermitted and unauthorized by the owner. *N.Y. Cross Harbor R.R. Terminal Corp.*, 2006 U.S. Dist. LEXIS 4238, at *58. First, and obviously, the defendants never occupied the land. They are not trespassers. Second, the owner of the land, MISR, permitted ENBC to enter and remain on it. The plaintiffs cannot prove the essential element of unpermitted or unauthorized occupancy by ENBC. By admitting the nationalization of the land and its transfer of ownership to MISR, the plaintiffs admit that MISR could grant ENBC a lease or permission, just as the plaintiffs had done before nationalization. Only by overturning the nationalization could the plaintiffs argue that MISR's permission was not a lawful basis for ENBC to occupy the land. However, the plaintiffs admit that they tried but failed to overturn the nationalization, and that they are not trying to overturn it in this action, which they cannot do without naming Egypt and MISR as defendants. *See* note 1 above. This issue is not a defense but an essential *prima facie* element of the plaintiffs' trespass claim. The record does not establish that ENBC's presence on the land is disputed by MISR or that the plaintiffs are the owners of the land.²⁵

²⁴ In addition, the defendants are not liable for "causing," "advising," or "directing" ENBC to occupy the land. *See* Defs. Dism. Reply Mem at 5-7.

²⁵ Even though they claim rights to a return of the real property under the MOF directive, the plaintiffs argue that the MOF directive is not relevant to their claims. *Compare* Pls. Summ. J. Mem. at 19 with Pls. Rule 56.1 Statement at ¶ 25, Bigio I Aff. ¶ 29, 30, and Bigio II Aff. ¶ 3. They cannot have it both ways. Without the MOF directive, there is no basis at all for the plaintiffs to claim that the nationalizations were undone by the Egyptian Government and that MISR should have turned over the real property to them. The plaintiffs admit that MISR rejected and disputed the legal effect of the MOF directive and that they have failed to obtain any adjudication of any enforceable rights under it. Bigio I Aff. ¶ 30; Bigio II Aff. ¶¶ 4-5; Abou Ali Dec. dated Aug. 19, 1997 ¶¶ 14-17 and Ex. A. The MOF directive also made MISR's obligation to transfer the property subject to the plaintiffs' obligation to satisfy express conditions, Am.

C. Conversion

The plaintiffs concede that, just as trespass requires evidence of unpermitted presence on real property, conversion requires proof that the defendants “exercised an unauthorized dominion over the thing in question, . . . to the exclusion of the Plaintiffs’ rights.” Pls. Dism. Opp. 18 (emphasis added). Just as ENBC’s presence on land transferred to MISR by the nationalizations was not unpermitted by its owner, ENBC’s acceptance and retention of the plaintiffs’ former business assets from Egypt through the undisturbed nationalization and transfer in the 1960s “authorized” ENBC to retain possession. The defendants’ minority purchase of ENBC shares in 1994 did not change those facts.

Further, the plaintiffs have not even established in their summary judgment papers that there were any assets in 1994 to be converted. The only evidence they have offered is that the business assets were last seen in 1979. Bigio I Aff. ¶ 28. The plaintiffs may not have summary judgment on claims for conversion or unjust enrichment by wrongful possession of assets they have not proved to exist.

D. Secondary Liability for Aiding and Abetting, Conspiracy, or Agency

Under New York law, a person is liable for aiding and abetting when the person knew that a third person’s conduct was a breach of duty and intentionally gave substantial assistance or encouragement to the tortfeasor. *Marine Midland Bank v. Smith*, 482 F. Supp. 1279, 1290 (S.D.N.Y. 1979). Under Georgia law, the plaintiff must prove that the defendant “aid[ed], abet[ted], or incite[d], or encourage[d] or direct[ed], by conduct or words, in the perpetration of a trespass.” *Walls v. Moreland Altobelli Assocs.*, 659 S.E.2d 418, 421 (Ga. Ct. App. 2008). Neither a claim for conspiracy nor for aiding and abetting can be proven without first proving an

Comp. Ex. 6, Arts. 8, 9, which they admit they did not do. Bigio II Aff. ¶¶ 3-5. Finally, the MOF directive made any return subject to ENBC’s continued tenancy. Am. Comp. Ex. 6, Art. 7.

underlying tort. *Stutts v. De Dietrich Group*, 03-CV-4058 ILG, 2006 U.S. Dist. LEXIS 47638, at *55 (E.D.N.Y. June 30, 2006); *Savannah Coll. of Art & Design v. Sch. of Visual Arts*, 464 S.E.2d 895, 896 (Ga. Ct. App. 1995).

The plaintiffs agree that the defendants were not complicit in Egypt's nationalizations. *See* note 1 above. The underlying alleged tortfeasor appears to be ENBC. But ENBC did not commit trespass or conversion and, therefore, there was no underlying tort to aid and abet or conspire to commit. Further, even if this were not so, the defendants did not intentionally assist or conspire to commit a known wrong. The nationalizations have never been overturned, MISR remains the owner of the realty, and ENBC's presence on the land is with ENBC's permission. Acting in derogation of the plaintiffs' unproven claim of right does not prove intentional assistance of a wrong.²⁶ Moreover, the trespass and conversion claims are time-barred. *See* Point III(G) below.

The plaintiffs cannot convert a lawful minority share purchase into a trespass. And they cannot make out a trespass by arguing that the defendants should have exercised their shareholding or business influence with ENBC to compel it to compensate the plaintiffs for the property taken by nationalization in 1962. A shareholder is not an aider or abettor or conspirator, and the plaintiffs have established no evidentiary facts to suggest that the defendants were anything beyond shareholders of and had business dealings with ENBC.

The plaintiffs also assert that the defendants are liable as "principals" for actions of ENBC as its "agent." *Pls. Summ. J. Mem.* at 11. However, they have not established any facts to prove an agency relationship. ENBC was not an agent for the defendants in the purchase of its

²⁶ *See* note 22 above. Further, the plaintiffs concede that the only alleged conspirators are the defendants, their subsidiaries, and their affiliate, ENBC. This cannot establish a conspiracy as a matter of law. *See* *Defs. Dism. Mem.* at 16-18; *Defs. Dism. Reply Mem.* at 6-7.

own shares, it was the object of the purchase, and the share purchase was lawful. ENBC did not hold or use its property before or after the purchase as an agent for its shareholders, but for itself. ENBC was not an agent of the Egyptian Government in the nationalization of the plaintiffs' former property; rather, it was the recipient of the Government's transfer of ownership and use of that property, and the plaintiffs disclaim any argument that the defendants are liable for any acts before 1994. The plaintiffs' mere invocation of the law of agency does not prove an agency or *respondeat superior* relationship. Both the complaint and the summary judgment papers are devoid of facts or law to support an agency theory or to pierce the "the corporate veil" of the separateness of ENBC from its shareholders. *See* Defs. Dism. Reply Mem. at 8. The plaintiffs' agency argument does not link the defendants to the source of the plaintiffs' alleged harm, namely, Egypt's nationalizations of their former property.

The plaintiffs' citation of *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 275 (S.D.N.Y. 2009), Pls. Summ. J. Mem. at 12, does not support a different conclusion. The alleged wrong in that case was the enslavement of human beings. Here, the claim is that the purchase of minority shares of a company failed to award adequate compensation to the plaintiffs for the property nationalized by the Egyptian Government. An analogy here would be an assertion that MISR and ENBC, and through them, the defendants, were agents of the Government of Egypt in the taking of the property through nationalization. However, the plaintiffs expressly state that they make no such claim. The purchase of shares of ENBC thirty years after the undisturbed, sovereign acts of nationalization does not make the new shareholders complicit in those nationalizations, and this case bears no resemblance to the *Apartheid* case.

E. Unjust Enrichment

The defendants were not enriched by their purchase of their ENBC shares. The purchase was lawful, and the plaintiffs have not argued otherwise. There is no claim under Egyptian law

for unjust enrichment different from trespass and conversion. Abou Ali Dec. dated Aug. 23, 2009 ¶ 8. The defendants properly paid the purchase price to the share seller, ENBC's owner. See page 11 above. The plaintiffs were not sellers, and, if anyone was enriched by the sale, it was Egypt, not the defendants. *Id.* Finally, the plaintiffs admit that the defendants paid value for their share interest, see note 6 above, and they have not established any evidence showing that any part of the 1994 purchase price related to their bottle cap assets, last seen in 1979.

The point at which any enrichment came at the plaintiffs' expense was when Egypt nationalized their property. If the compensation Egypt awarded the plaintiffs as Egyptian citizens for taking Egyptian property was inadequate, the party enriched was Egypt, not the defendants.²⁷ The plaintiffs concede they are not suing the defendants for pre-1994 conduct.²⁸ The defendants' purchase and holding of shares in and after 1994 did not enrich the defendants at the plaintiffs' expense.

F. Cassier v. Kingdom of Spain Does Not Support the Plaintiffs

The plaintiffs misstate the holding of *Cassier v. Kingdom of Spain*, No. 06-56325, 2009 U.S. App. LEXIS 20026 (9th Cir. Sept. 8, 2009). Pls. Summ. J. Mem. at 10-11. The court did not hold, as the plaintiffs incorrectly state, that "notwithstanding Spain's non-participation in the illegal expropriation, it could be required to return the painting to the plaintiff." *Id.* at 11. Rather, the court decided only a narrow issue of whether Spain was entitled to sovereign immunity. *Cassier v. Kingdom of Spain*, 2009 U.S. App. LEXIS 20026, at *13 ("The primary issue before us is whether Appellants are entitled to sovereign immunity under the [Foreign Sovereign Immunities Act].").

²⁷ See note 7 above regarding compensation awarded to the plaintiffs for the nationalizations.

²⁸ See note 1 above.

In *Cassirer*, the Ninth Circuit interpreted the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3), limiting foreign nations' immunities. *Id.* at *15. It held that the expropriation exception to sovereign immunity "does not require that the foreign state against whom the claim is made be the foreign state that took property in violation of international law." *Id.* at *20. What the court held was that the Kingdom of Spain was not immune from suit in the United States, *id.* at *41, but it made no judgment as to whether Spain could be required to return a painting allegedly taken by the Nazis during WW II, as the plaintiffs incorrectly assert. Further, the defendants here are not sovereign nations, have never claimed sovereign immunity, and the property at issue was not taken as a war crime. The Ninth Circuit's interpretation of the FSIA has nothing to do with this case.

G. Statute of Limitations and Laches

Under Egyptian law, a plaintiff must file a claim for trespass or conversion within three years from learning of the trespass or conversion, or within fifteen years after the trespass began irrespective of knowledge. Abou Ali Dec. dated Apr. 21, 2003 ¶¶ 4, 5; Abou Ali Dec. dated Aug. 23, 2009 ¶ 3. In New York, the "borrowing statute" in C.P.L.R. § 202 makes the claim subject to Egypt's the statute of limitations. *Gorlin v. Bond Richman & Co.*, 706 F. Supp. 236, 239 (S.D.N.Y. 1989). Even without the borrowing statute, New York's statute of limitations is three years. N.Y. C.P.L.R. § 214(4). Georgia, which has no borrowing statute, bars trespass and conversion claims after four years. O.C.G.A. § 9-3-30 (2009). Under all these laws, the statutes of limitations and repose expired on the plaintiffs' claims long before they commenced this action in 1997.²⁹

²⁹ To the extent the plaintiffs rely on a theory of a continuing tort exception to the limitations period, that theory is not available here. *See* Abou Ali Dec. dated Aug. 23, 2009 ¶ 3 (Egypt law does not recognize theory); Defs. Dism. Reply Mem. at 10 n.16 (continuing trespass theory does not apply on these facts).

The plaintiffs' equitable claim for unjust enrichment under U.S. law is governed by the doctrine of laches.³⁰ The plaintiffs could have been alleged this claim in 1997, but, as the plaintiffs admit, they first alleged this "new claim" in 2009. Defs. Dism. Mem. at 23. The claim would have been untimely in 1997 and is no less so in 2009.

The plaintiffs knew of the nationalization of the land and ENBC's presence on it in the 1962-65 period. They knew of the nationalization of their business assets and their transfer to ENBC at the same time. The defendants' purchase of ENBC's shares in 1994 did not alter anything but the ownership of ENBC. In 1994, neither the defendants nor ENBC entered on the land or took any personal property. The stock purchase did not revive the expired limitations period, and all the claims are therefore time-barred.

**V. THE DEFENDANTS ARE NOT LIABLE FOR
THE "LOST USE VALUE" OF ANY PROPERTY**

The plaintiffs argue that the court should "define the components of the damage remedy to which the Bigios are entitled" "based upon a duty of restitution," asserting that the defendants "received very substantial 'benefits' from the use and occupancy of the Bigios' property." Pls. Summ. J. Mem. at 17-18. Because the defendants are not liable under any of the plaintiffs' claims, the plaintiffs have no right to any relief from them. Moreover, the plaintiffs have not established evidence on this motion of any "benefits" to which a restitutionary remedy would apply.

The plaintiffs' argument is limited to the land near Cairo; they make no assertions about the "lost use value" of their alleged personalty. *Id.* But the plaintiffs have not proved that the realty increased in value or would have a higher or better use if they had obtained title to the property from MISR. The only "evidence" they offer is Mr. Bigio's undocumented assertions.

³⁰ Under Egyptian law, there is no claim for unjust enrichment different from the trespass and conversion claims. *See* Abou Ali Dec. dated Aug. 23, 2009 ¶ 8.

See Bigio I Aff. ¶ 38. However, Mr. Bigio does not show any qualifications to value property, any experience as an appraiser of Egyptian realty, or any basis for his speculative opinions. *Id.*

Furthermore, Mr. Bigio fails to take two key, admitted facts into account: (1) MISR is the owner of the property by virtue of the nationalizations, and (2) ENBC paid rent to MISR under its tenancy. The first fact is important because, if ENBC vacated the property, it would still belong to MISR under the undisturbed nationalizations. Even under the MOF directive, which the plaintiffs alternately rely on and eschew, a return of the property would have been expressly subject to existing tenancies. Am. Comp. Ex. 7, Art. 7. The second fact is important because, if ENBC had not paid its rent to MISR as the owner, the tenancy would have reverted to MISR, not to the plaintiffs. Mr. Bigio's opinions are not entitled to any weight and there is no admissible evidence of any benefit for which restitution would be appropriate.

VI. THE DEFENDANTS ARE ENTITLED TO JUDGMENT BASED ON THE PLAINTIFFS' ADMISSIONS

When a party moves for summary judgment, the court may "search the record" and grant summary judgment against the moving party when the record shows that judgment against the movant is proper on the law. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991). The admissions in the plaintiffs' motion demonstrate that the plaintiffs did not have superior legal right to the real property or personalty at the time the defendants bought their interest in ENBC. Rather, they admit that their property, both real and personal, was nationalized by the Egyptian Government and conveyed by the Egyptian Government to Government-owned entities, MISR and ENBC, in the 1960s. They make no argument that the defendants' purchase of ENBC was unlawful.

As a matter of law, the defendants' indirect purchase of shares in ENBC for value does not constitute a trespass, conversion, conspiracy, or an aiding and abetting by the defendants or

an unjust enrichment of the defendants. And, as a matter of law the plaintiffs have not shown that the defendants are legally responsible for ENBC's actions, even if they could show a trespass or conversion by ENBC. The defendants are not liable as aiders and abettors or conspirators, or under an agency or *respondeat superior* theory.

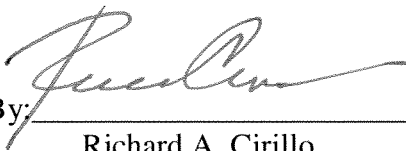
Therefore, on the record before the court, the defendants are entitled to judgment dismissing the plaintiffs' claims.

CONCLUSION

For each of the foregoing reasons, the plaintiffs' motion for summary judgment should be denied and judgment for the defendant should be entered dismissing the plaintiffs' claims and this action with prejudice.

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October 11, 2009

Respectfully submitted,
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