

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

*
*
*
*
*
*
*
*
*
*

97 CIV. 2858 (BSJ)

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ SUR-REPLY
MEMORANDUM ON DEFENDANTS’ MOTION TO DISMISS**

(1) The plaintiffs’ surreply simply evades the main issue in this case: the plaintiffs admit that Egypt nationalized their property. *See* Surreply at 1-2. This court cannot overturn Egypt’s nationalization, which Egypt’s courts and agencies have not overturned despite the plaintiffs’ “decades-long” efforts to do so. It was not “annulled” by the Egyptian government through a conditional Ministry of Finance directive, the legal significance of which is unexplained and which the plaintiffs admit they could not persuade Egypt or MISR to implement. *Id.* Therefore, in 1994 the nationalized property belonged to Egypt, not the plaintiffs when the defendants bought shares in ENBC.

Egypt’s disposition of nationalized property to two state-owned entities was lawful. The defendants’ purchase of minority shares in a company occupying the land with its owner’s permission and putatively using personalty received from Egypt also was lawful. Since the plaintiffs’ admissions establish that they do not own the property, they have not alleged either their superior right to the property or that ENBC’s use and occupancy are unauthorized or unpermitted by the owner. Failure to properly to allege those elements forecloses the trespass

Exhibit A

and conversion claims and, consequently, the secondary liability claims. The plaintiffs' unjust enrichment claim fails for the absence of a proper allegation that the defendants were enriched at the plaintiffs' expense in purchasing ENBC shares for value. If there was enrichment, it was Egypt's.*

(2) The defendants did not do business with the plaintiffs, *see* Surreply at 2-3, ENBC did. The plaintiffs may not rely on lumping juridically separate entities together under the label "Coca-Cola" because to do so violates the basic rule against "group pleading." Further, the plaintiffs know their business dealings were with the Egyptian bottler, first called SICO and later ENBC, not with either of the defendants. They do not allege that either named defendant did business with them, except to grant a non-exclusive trademark license. They cannot escape that fact by mislabels or mischaracterizations about defendants' "false assertions" *Id.*

* To overturn the nationalizations would require, in addition to the presence before the court of Egypt and MISR, a detailed examination of Egypt's Act of State and the laws of Egypt pertaining to the nationalizations. This is exactly what the plaintiffs argued to the Second Circuit was not involved in their simple, common law claim in persuading the Second Circuit to reverse this court's dismissal of the action under the doctrine of International Comity and *forum non conveniens*. Brief for Appellants in *Bigio v. Coca-Cola Co.*, 05-2426 (2d Cir. Nov. 10, 2005) at 29 ("In fact, the plaintiffs have made it clear that they are not suing for title to the Heliopolis property."), at 43 ("The only Egyptian legal issue relates to the enforceability of various governmental decrees affecting the taking and required return of the Bigios' property.") (The plaintiffs have entirely ignored this issue.) The Second Circuit accepted that the case was a simple common law claim and commented, "In its present posture, this is a common law suit for damages primarily between Canadian citizens and a United States company [sic]While adjudication of plaintiffs' common law claims also require some modest application of Egyptian law, the courts of this Circuit are regularly called upon to interpret foreign law without thereby offending principles of international comity." *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178-79 (2d Cir. 2006) (emphasis added, citations omitted). The plaintiffs' representations and the Second Circuit's decision are judicial estoppel and law of the case. There is no "law of nations" claim before this Court. *Bigio v. Coca-Cola Co.* 239 F3d 440, 447-49 (2d Cir. 2001). The plaintiffs cannot attack the legality of the nationalizations through newspaper reports and articles, and they may not change their arguments to suit their needs of the moment. The nationalizations are a fact on the landscape. They have not been overturned and the plaintiffs admit that the nationalizations transferred ownership of the property to Egypt, MISR, and ENBC. The plaintiffs' assertion that the nationalizations of their property were motivated by bigotry directed at them, an unproven assertion, does not erase the nationalizations, and the plaintiffs' bare assertion that the nationalizations were contrary to "law of nations" does not permit this court to undo or ignore them. The plaintiffs have cited no contrary authority.

(3) The plaintiffs did acknowledge that ENBC occupies the premises under either a lease from MISR, Brief for Appellants, *Bigio v. Coca-Cola Co.*, 05-2426 (2d Cir. Nov. 10, 2005) at 9 (“In 1993 . . . [o]ne of the four bottling-plant sites leased by [ENBC] was the Bigios’ Heliopolis factory.”) (emphasis added), although they now deny having done so. Surreply at 2. Whether by lease or otherwise, however, the admitted fact is that ENBC occupies the realty with the permission and authority of MISR, which is the owner of the property.

(4) The defendants have not “misrepresented” the plaintiffs’ unjust enrichment allegations (Am. Comp. ¶¶ 62-67). *See* Surreply at 3. To the contrary, the plaintiffs’ description of the claim is exactly the same as the defendants’ – namely, that the unjust enrichment consists of “trespassing on, and profiting from, the plaintiffs’ real property, and their conversion of, and profiting from plaintiffs’ personal property.” Surreply at 3 (emphasis added). Thus, the unjust enrichment claim merely duplicates the plaintiffs’ trespass and conversion claims, and equity will not intervene when the legal claims are deficient. Separately, the plaintiffs’ admission that the defendants paid substantial consideration to the owner of the ENBC stock (the seller of which they admit was the Egyptian government, not the plaintiffs), eliminates the necessary allegation that the defendants were unjustly enriched at the plaintiffs’ expense.

(5) The defendants did not “abandon” their position that Egyptian statute of limitations expired on the plaintiffs’ claims. *See* Surreply at 3. Rather, they stood, and still stand, on the opinions of Ahmed Abou Ali that the Egyptian statutes of limitations and repose expired before the plaintiffs brought this action. Defendants’ Mem. at 11, 15; Reply Mem. at 9.

(6) Mr. Walker, the New Hampshire lawyer, has no credentials in Egyptian law for the defendants “to attack.” *See* Surreply at 3-4. That is the whole point. This court may look to qualified sources for an expression of Egyptian law, but Mr. Walker is entirely unqualified, and

his affirmation is nothing but a supplemental legal memorandum by a New Hampshire lawyer. Because the declarations of Mr. Abou Ali, a distinguished member of the Egyptian Bar, fully established the correct Egyptian law, there was and is no need for the defendants, or the court, to consider Mr. Walker's comments. Federal Rule 44.1 and the cases cited in the plaintiffs' Surreply (at 5) cannot supply credentials and qualifications that Mr. Walker lacks.

(7) The plaintiffs' relation back argument adds nothing to their prior memorandum. Surreply at 5. Their unjust enrichment claim was barred by laches before they filed the initial complaint in 1997, and it was still barred by laches when they filed the amended complaint in 2009. What the plaintiffs themselves call their "new claims" were barred and do not relate back.

CONCLUSION

The defendants respectfully ask the court to dismiss the amended complaint with prejudice.

Dated: New York, NY
November 2, 2009

RESPECTFULLY SUBMITTED,
KING & SPALDING LLP

By  _____

Richard A. Cirillo
Paul A. Straus
Kristi Jacques

1185 Avenue of the Americas
New York, NY 10036-4003
Telephone: 212-556-2100
Telecopier: 212-556-2222
Attorneys for the Defendants