

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RAPHAEL BIGIO, BAHIA BIGIO,	:
FERIAL SALMA BIGIO and B. BIGIO & CO.,	:
	:
<i>Plaintiffs,</i>	:
	:
- against -	:
	:
THE COCA-COLA COMPANY and	:
THE COCA-COLA EXPORT CORPORATION,	:
	:
<i>Defendants.</i>	:
	:
	:
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97 Civ. 2858 (BSJ)

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF SUMMARY JUDGMENT
ON LIABILITY**

Plaintiffs hereby move, pursuant to Rule 56(d)(2) of the Federal Rules of Civil Procedure, for summary judgment on liability and submit this Memorandum of Law in support of their motion.

INTRODUCTION

Even after a dozen years of litigation and two defeats in the Court of Appeals, Coca-Cola professes ignorance of the venality of its conduct in exploiting, for immense profit, property that was robbed, by blatant religious governmental bigotry, from an Egyptian Jewish family. Instead of acknowledging – as the Egyptian government itself has done – that the Heliopolis property rightfully belongs to the Bigios, and that Coca-Cola should compensate them for the occupancy and use of these properties, Coca-Cola hides behind artificial and inapplicable legalisms to avoid basic fairness and justice.

Coca-Cola is not, as it likes to portray itself, a trusting and guileless American corporation that in 1994 innocently purchased a “minority interest” in some remote business entity that utilizes the Bigios’ property. The undisputed evidence establishes that Coca-Cola witnessed how the Bigio family – with which it was intimately bound in a mutually profitable business relationship between the 1940s and 1962 – was victimized by Nasser’s ethnic-cleansing policy of taking Jewish property and expelling Jews from Egypt. Years later, after the Egyptian government took minimal steps to remedy the religiously discriminatory brutality of the Nasser regime, Coca-Cola happily took control – through entities which it now claims cannot be “pierced” – of property that Coca-Cola knows was immorally and illegally plundered from the Bigios.

The legal theory underlying this Motion for Summary Judgment is stark and simple. Coca-Cola is, we submit, the occupier of stolen property. If this case concerned personalty that had been taken in violation of international law from the Bigios and Coca-Cola knowingly received and used that personal property in order to make enormous profits in Egypt, there would be no doubt that Coca-Cola would be civilly – and possibly even criminally – liable.

The rule of law is no different when the stolen goods that are being used by the defendant are land and businesses. The receiver and user of such stolen merchandise cannot claim immunity on the ground that the entity that is directly using the stolen goods is only a subsidiary or an affiliate. Principles governing the tort of trespass and of aiding-and-abetting liability make all who partake in the illegal exploitation – and particularly the head of the entire enterprise – liable to the victims.

Coca-Cola is comparable to a person who witnesses the rape and murder of a next-door neighbor and watches while the murderer strips the corpse of distinctive jewelry that the victim

has been wearing. A short while later, the witness learns that the murderer – who has escaped justice by fleeing to a foreign jurisdiction – is selling the distinctive jewelry that he pillaged from the corpse. Acting through a foreign agent, the witness purchases the distinctive jewelry.

Coca-Cola ignores the undisputed facts that make this case parallel to the above hypothetical. But its civil liability to the Bigios – the heirs of the victim in the hypothetical and the true owners of the property that parallels the victim’s distinctive jewelry – rests on the same moral and legal theory. To be sure, this case concerns land located in Egypt, not personal property like jewelry, and the plaintiffs cannot in this jurisdiction gain possession of their land. And rather than involving a homicide, this case concerns the economic execution of the Bigio family (which was a wealthy Egyptian Jewish family before it fell prey to the Nasser policies).

The basic principle is, however, the same. In both 1962 and 1994 Coca-Cola knew that the land, buildings, business, and machinery involved in this case had rightfully belonged to the Bigio family and were taken from that family by brutal and internationally condemned acts of religious bigotry. Coca-Cola committed tortious acts vis-à-vis the Bigios when, through entities it controlled or with which it was affiliated, it occupied, trespassed upon, used, and profited from those properties from and after 1994. For these reasons, the undisputed facts establish that Coca-Cola is liable to the Bigios.

ARGUMENT

I.

THE UNDISPUTED FACTS ESTABLISH COCA-COLA’S LIABILITY UNDER THE SECOND CIRCUIT’S STANDARD FOR SUMMARY JUDGMENT

There are, we submit, no disputed issues of fact relating to (1) the Bigios’ ownership of the Heliopolis properties before the Egyptian government’s sequestration and nationalization; (2)

Coca-Cola's knowledge of that ownership; (3) the illegality under international-law standards of the Nasser government's religiously discriminatory taking of the properties; (4) the notification to Coca-Cola in 1994 that the Egyptian government recognized the Bigios as the legal owners of the Heliopolis property that Coca-Cola was intending to exploit through subsidiaries and affiliates; and (5) Coca-Cola's knowing and deliberate occupancy and use of that property – albeit through subsidiaries and affiliates – from 1994 to this date. There is, at this juncture of this case, no question of subjective intent or any question of fact on which liability depends. If the law regarding receipt of stolen property and trespass is applied to the undisputed facts, Coca-Cola must be held liable.

A District Court should enter summary judgment for the plaintiff if, “after reviewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Brown v. C. Volante Corp.*, 194 F.3d 351, 354 (2d Cir. 1999). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Global Network Communications, Inc. v. City of New York*, 562 F.3d 145, 150 (2d Cir. 2009); *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 334 (D. Conn. 2009); *Virga v. Big Apple Construction & Restoration, Inc.*, 590 F. Supp. 2d 467, 471 (S.D.N.Y. 2008) (McMahon, D.J.).

The legal standard for entry of summary judgment on liability only (under the present Rule 56(d)(2)) is the same as for entry of summary judgment on all claims in a complaint. *E.g.*, *EMI Entertainment World, Inc. v. Karen Records, Inc.*, 603 F. Supp. 2d 759 (S.D.N.Y. 2009); *American Nat'l Red Cross v. Vinton Roofing Co.*, 2009 U.S. Dist. LEXIS 54001 (D.D.C. June 25, 2009). *See also Thoresen v. Roth*, 351 F.2d 573 (7th Cir. 1965); *Leasing Service Corp. v.*

Graham, 646 F. Supp. 1410 (S.D.N.Y. 1986) (Leisure, D.J.); *Hahn v. U.S. Airlines*, 127 F. Supp. 950 (S.D.N.Y. 1954).

II.

COCA-COLA IS LIABLE FOR TRESPASS BY ITS SUBSIDIARIES AND AFFILIATES ON THE BIGIOS' PROPERTY

A. Coca-Cola's Reliance on Egyptian Records Is No Defense.

Coca-Cola does not deny that in 1994 it purchased an interest in the El Nasr Bottling Company ("ENBC"), which was occupying the Bigios' property since 1962. Nor does Coca-Cola deny that the Coca-Cola Bottling Company of Egypt was thereafter operated by the entities that had joined with Coca-Cola in purchasing ENBC. Coca-Cola's only defense is that it purchased only a "minority interest" and that there was no indication in Egyptian public records that ENBC had any liability to the Bigios.

Even if Coca-Cola's management team subjectively believed that Egyptian law permitted it to occupy the Heliopolis properties and business, that reliance is not a valid defense. Regardless of the subjective beliefs of Coca-Cola's officers, the Bigios are entitled to damages for trespass by the entities affiliated with Coca-Cola that have been occupying the Bigios' properties since 1994.

Under New York law, a defendant is liable for trespass if he enters upon the land of another without permission, even if innocently or by mistake. *Curwin v. Verizon Communications (LEC)*, 35 A.D.3d 645, 827 N.Y.S.2d 256 (2d Dep't 2006); *Augeri v. Roman Catholic Diocese of Brooklyn*, 225 A.D.2d 1105, 1106, 639 N.Y.S.2d 640, 641 (4th Dep't 1996); *Wen Ying Ji v. Rockrose Development Corp.*, 21 Misc.3d 1104, 873 N.Y.S.2d 238 (N.Y. County 2008). See generally *Restatement (Second) Torts*, § 158 (2009).

Coca-Cola's assertion that it purchased its "indirect minority interest" in the belief that the Bigios had no valid legal claim – contrary to what Raphael Bigio demonstrated to its management and counsel in 1994 and what Coca-Cola knew from having been engaged with the Bigios before 1962 – is also no defense. In *Chlystun v. Kent*, 185 A.D. 2d 525, 586 N.Y.S.2d 410 (3d Dep't 1992), a punitive-damage award was affirmed even though the defendants claimed that they believed that the road they used in trespassing on the plaintiff's property was a public roadway.

The knowledge that Coca-Cola had in 1965 through its Egyptian employees that the Bigios' properties had been confiscated in violation of international law only because the Bigios were Jewish was brought home to Coca-Cola again in 1994 by the letter and oral statements of Raphael Bigio to Coca-Cola's general counsel, and by what was, by that date, common knowledge regarding the policies of the Nasser regime. As early as 1892 the Supreme Court of the United States in *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 438-439 (1892), approved of the following rule of law regarding a claim of bona fides by a purchaser:

[W]hatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice.

The Supreme Court then quoted the holding by Lord Hardwicke in *Le Neve v. Le Neve*, 3 Atk. 646, 1 Ves. Sen. 64 (1747): "[T]he taking of a legal estate, after notice of a prior right, makes a person a mala fide purchaser." 142 U.S. at 438. In this case, Coca-Cola had ample notice when the properties were taken and that notice was repeated in 1994, before it purchased

what it claims to be a “minority interest” in the occupiers of the Bigios’ properties. It is doubly a mala fide purchaser.

B. Coca-Cola Is Liable for Trespass by Aiders and Abettors and Co-Conspirators.

Coca-Cola’s claim that it cannot be held liable because the trespass and occupancy in Egypt was actually done by other entities in which Coca-Cola held a “minority interest” or which are separate corporations that may not legally be “pierced” is simply wrong. A defendant is liable for trespass if he advises or directs another, even an independent contractor, to enter on the land. *Ketcham v. Newman*, 141 N.Y. 205, 36 N.E. 197 (1894); *Axtell v. Kurey*, 222 A.D.2d 804, 634 N.Y.S.2d 847 (3d Dep’t 1995). If the entry on land is unlawful, a defendant “would be equally accountable with the actual perpetrator, if he incited, promoted, aided, or abetted the doing of such unlawful act.” *Oatka Cemetery Ass’n v. Cazeau*, 242 A.D. 415, 275 N.Y.S. 355 (4th Dep’t 1934). The relevant legal test is whether trespass was “substantially certain to result” from the defendant’s conduct. *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep’t 1997).

Defendants who do not personally enter on a plaintiff’s land can be held liable for trespass if they “caused or directed another person to trespass.” *Golonka v. Plaza at Latham*, 270 A.D.2d 667, 669, 704 N.Y.S.2d 703,706 (3d Dep’t 2000); *Spellburg v. South Bay Realty, LLC*, 49 A.D.3d 1001, 1002, 854 N.Y.S.2d 563, 564 (3d Dep’t 2008), *Morrison v. Wescor Forest Prods. Co.*, 28 A.D.3d 1225, 1226, 814 N.Y.S.2d 474 (4th Dep’t 2006). In the present case, it is undisputed that Coca-Cola satisfied this standard.

A principal’s liability under New York law for trespass committed by agents or co-venturers was succinctly summarized in *State of New York v. Fermenta ASC Corp.*, 166 Misc. 2d 524, 536, 630 N.Y.S.2d 884 (Suffolk County 1995) (citations omitted):

Where a trespass is committed upon the rights or property of another, one who advised or directed the act to be committed may be held equally liable with the actual perpetrator of the trespass. Similarly, one who incited, promoted, aided, or abetted the commission of a trespass may be held equally liable with the actual perpetrator of the trespass.

The incontestable purpose of the purchase in which Coca-Cola participated in 1994 was to facilitate the marketing of Coca-Cola products in Egypt. Coca-Cola well knew that ENBC was using the Bigio properties, as well as other facilities, to deliver Coca-Cola to the Egyptian market. Coca-Cola's own literature and its filings with the SEC make clear its purpose to exploit for Coca-Cola's own profit whatever property ENBC was using.

In its 10-K report to the SEC for the year in which it purchased an interest in ENBC Coca-Cola explained (Affirmation of Nathan Lewin, Exhibit 2, pp. 159-160):

Over the last decade, bottling investments have represented a significant portion of the Company's capital investments. The principal objective of these investments is to ensure strong and efficient production, distribution and marketing systems in order to maximize long-term growth in volume, cash flows and share-owner value of the bottler and the Company.

When considered appropriate, the Company makes equity investments in bottling companies. Through these investments, the Company is able to help focus and improve sales and marketing programs, assist in the development of effective business and information systems and help establish capital structures appropriate for these respective operations. For example, the joint venture known as the Coca-Cola Bottling Companies of Egypt was formed in the second quarter of 1994 following the privatization of the Egyptian bottler, which was previously government-owned. The Company is a minority shareholder, with MAC Investments of Egypt as a majority shareholder.

In light of this very candid statement of its intention to exploit the Egyptian bottler to improve "production, distribution and marketing systems" in order to maximize profits and share values of Coca-Cola and to "improve sales and marketing programs" for Coca-Cola, it cannot

possibly deny that the parent corporation “advised or directed” ENBC and the Coca-Cola Bottling Company of Egypt to occupy and use the property on which trespass was committed.

Nor can Coca-Cola deny that it “caused or directed” the affiliated entities in Egypt to occupy and exploit the Bigios’ property from and after the purchase of ENBC in 1994. Directions given from the Coca-Cola headquarters in Atlanta, Georgia, surely contemplated use of the Heliopolis properties. Coca-Cola’s Answers to Interrogatories in this case (Exhibit 1 to the Affirmation of Nathan Lewin, Esq.) describe the high-level deliberations that preceded the submission of bids when ENBC was privatized (Answer to Interrogatory 8) and the involvement of Coca-Cola officials in the operation of the Coca-Cola Company’s business in Egypt (Answer to Interrogatory 11). Group Presidents responsible for Egypt resided in Atlanta, Georgia until 1999.

C. Coca-Cola Is Civilly Liable If It Currently Occupies the Bigios’ Property Even If It Was Not Involved in the Initial Illegal Confiscation.

Coca-Cola apparently believes that it cannot be held liable for trespass and for its illegal occupation of the Bigios’ property if it did not participate in the Egyptian government’s confiscation of the Bigios’ property in the 1962-1965 period. It relies heavily on the recent Eleventh Circuit decision in *Sinaltrainal v. The Coca-Cola Co.*, No. 06-15851 (SHB), 2009 U.S. App. LEXIS 17764 (11th Cir. Aug. 11, 2009), which involved claims against Coca-Cola that, it says, were “analytically similar” to the claims in the Amended Complaint in this case. Memorandum of Law in Support of Defendants’ Motion To Dismiss Plaintiffs’ Amended Complaint, p. 10.

In fact, the *Sinaltrainal* claims differed substantially from the claims made in this case. In *Sinaltrainal* the plaintiffs alleged that Coca-Cola employees had participated in the illegal

conduct committed by Colombian paramilitary forces at Coca-Cola bottling facilities, and the Eleventh Circuit held that the complaint had failed to allege facts that plausibly established a conspiracy between the perpetrators of the criminal acts and Coca-Cola's personnel. The *Sinaltrainal* case did not concern property that was currently being illegally held or occupied by Coca-Cola; it concerned illegal conduct that had been performed in the past.

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 1962-1965 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.

A more relevant – and, indeed, even more recent – judicial precedent that supports the Bigios' claim that Coca-Cola is liable is the decision of the Court of Appeals for the Ninth Circuit in *Cassirer v. Kingdom of Spain*, Nos. 06-56325, 06-56406, 2009 WL 2857188 (9th Cir. Sept. 8, 2009) (Exhibit 5 to the Affirmation of Nathan Lewin). The *Cassirer* case concerns a highly valuable painting that was illegally confiscated from a Jewish owner by the German Nazi government. The painting passed through the hands of a number of art collectors who purchased it at auction or from dealers. It was ultimately bought by a Swiss resident who was one of the world's foremost private art collectors. His entire collection was then purchased for \$327 million by the Government of Spain.

After the purchase, the heirs of the original Jewish owner sued Spain to recover the painting. Spain claimed – just as Coca-Cola is arguing in this case – that it was not a participant in the German Nazi government's illegal seizure of the painting. The Ninth Circuit rejected this defense. See Exhibit 5 to the Affirmation of Nathan Lewin, pp. 12703-12707. It held that

notwithstanding Spain's non-participation in the illegal expropriation, it could be required to return the painting to the plaintiff.

This case – which concerns a private defendant and not a foreign sovereign – follows *a fortiori* from the *Cassirer* case. If a foreign government, over which there is very limited jurisdiction in United States courts, may be required to return property that was confiscated in violation of international law although the defendant was totally uninvolved in the initial illegal seizure, it surely follows that an American corporation in the same position cannot claim immunity because it did not participate in the unlawful confiscation. And if the foreign government can be held liable although it was clearly a bona fide purchaser when it bought the entire collection that included the seized painting and had no reason to believe that the collection contained an unlawfully expropriated piece of art, a private domestic defendant that knew when the property was initially seized and was reminded again before it purchased a “minority interest” in the property that it had been confiscated in violation of international law is *a fortiori* liable to the true owner of the property.

D. Under the Law of Corporate Agency Veils Need Not Be “Pierced” To Hold Coca-Cola Liable for the Acts of Its Affiliates and Subsidiaries.

Coca-Cola seeks refuge in the doctrine that the active trespassers on the Heliopolis property were separate corporations and the separate identity of such corporations are not “pierced” in ordinary claims based on *respondeat superior*. Coca-Cola overlooks, however, that in this case its liability is not dependent on the doctrine that a passive principal is liable for the tortious conduct of its employees because of *respondeat superior*. In this case Coca-Cola was an active principal that is responsible for the trespassory acts that subsidiary and affiliated

corporations performed on the specific direction and encouragement of their parent and principal.

The leading recent discussion of vicarious liability under the law of agency for allegedly tortious acts committed in foreign countries by corporate “subsidiaries, indirect-subsidiaries, or affiliates” of American mega-corporations is in District Judge Scheindlin’s opinion in *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 270-276 (S.D.N.Y. 2009). The District Court held in that case that even if the corporate veils of the active foreign entities could not be “pierced,” the parent corporations could be liable on “corporate agency” principles if the acts of the subsidiaries were ratified by the parent corporation. Judge Scheindlin said (617 F. Supp. 2d at 273):

The acts of an agent are imputed to the principal “if the principal adopts the unauthorized act of his agent in order to retain a benefit for himself.” Even mere acquiescence is sufficient to infer adoption of wrongdoing. “Ratification may also be found to exist by implication from a principal’s failure to dissent within a reasonable time after learning what had been done.” (footnotes omitted).

In the present case, the trespassory acts of Coca-Cola’s corporate subsidiaries and affiliates were not merely ratified after the fact; they were fully authorized in advance. Hence Coca-Cola is responsible for those acts not because the corporate veil is “pierced” but because the parent corporation was an active principal that directed its foreign “subsidiaries, indirect-subsidiaries, and affiliates” (617 F. Supp. 2d at 270) to perform the acts that implemented Coca-Cola’s tortious trespass on the Bigios’ property.

E. Coca-Cola's Conduct Would Render It Criminally Liable If the Property Involved Were Personalty.

Although this is a civil lawsuit in which the Bigios are seeking damages from Coca-Cola, it is relevant to consider whether Coca-Cola's defenses would relieve it of liability if, as we hypothesized, the case had concerned personal property rather than real-estate and other property located in Egypt. We submit that on the undisputed facts, Coca-Cola could be subject to criminal liability in light of the knowledge it had of the circumstances under which the property was taken from the Bigios and its own use of that property to produce enormous profits by the sale of Coca-Cola products in Egypt.

One may be criminally liable as a receiver or concealer of stolen property even without ever having the stolen property in one's possession. *E.g.*, *Corey v. United States*, 305 F.2d 232 (9th Cir. 1962); *United States v. Miller*, 552 F. Supp. 827 (N.D. Ill. 1982) Under the standard famously applied by Judge Learned Hand in the landmark case of *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), Coca-Cola clearly associated itself with the venture, participated in it as something it wished to bring about, and sought by its action to make it succeed. Compare 100 F.2d at 402. That standard was applied by the Second Circuit to a defendant accused of aiding and abetting the possession of stolen merchandise in *United States v. Curiale*, 414 F.2d 744, 748 (2d Cir. 1969).

Nor would the statute of limitations run on such a criminal charge. Although Coca-Cola purchased ENBC and began occupying the Bigios' property in 1994, the legal consequences of that conduct continue to the present day so long as Coca-Cola continues to occupy the Bigio properties. Courts have held that receiving and possessing stolen property is a "continuing offense" for statute-of-limitations purposes. *United States v. Blizzard*, 812 F. Supp. 79 (E.D. Va.

1993); *United States v. Frezzo*, 659 F. Supp. 54 (E.D. Pa. 1987); *State v. Fernow*, 354 N.W.2d 438 (Minn. Sup. Ct. 1984).

III.

COCA-COLA IS LIABLE, AS A MATTER OF LAW, ON ALL CLAIMS OF THE AMENDED COMPLAINT

Although we have heretofore emphasized the Second Claim of the Amended Complaint, Coca-Cola's liability to the Bigios on summary judgment is not limited to trespass. The same legal principles apply to the Third Claim of the Amended Complaint, which concerns the conversion of personalty and is even more analogous to the hypothetical case of stolen distinctive jewelry than the Bigios' claim for damages for trespass to their real property in Heliopolis. And the Amended Complaint's Fourth Claim rests on established tort principles imposing liability on any defendant who aids or abets or engages in a conspiracy with a principal tortfeasor. Trespass law imposes such liability, as we have demonstrated. But it is also an independent basis for tort liability.

It is a well-established principle of tort law that a person who "does a tortious act in concert with the other or pursuant to a common design with him" or "gives substantial assistance or encouragement" to a primary tortfeasor who, he knows, is committing or will commit a tortious act is liable to the injured party for the consequences. *Restatement (Second) Torts*, § 876 (1979). Comments on this section of the *Restatement* note that "[a]dvice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance." Comment on Clause (b) of *Restatement* § 876.

These theories of vicarious liability were exhaustively discussed in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). The D.C. Circuit held that a defendant is liable if he is party to “an agreement to participate in a tortious line of conduct” and the defendant’s engaged in “knowing action that substantially aids tortious conduct.” 705 F.2d at 478. *See also Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring); *aff’d pursuant to 28 U.S.C. § 2109 sub nom. American Isuzu Motors, Inc. v. Nisebeza*, 128 S. Ct. 2424 (2008), *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1017-1021 (7th Cir. 2002); *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1162-1165 (3d Cir. 1986); *National Railroad Passenger Corp. v. Veolia Transp. Services, Inc.*, 592 F. Supp. 2d 86, 94-101 (D.D.C. 2009); *Linde v. Arab Ban, PLC*, 384 F. Supp. 2d 571, 583-586 (E.D.N.Y. 2005).

Coca-Cola cannot dispute the fact that it and the entity in Egypt in which it allegedly held an “indirect minority interest” (called “Coca-Cola Bottling Company of Egypt” notwithstanding this puny “indirect minority interest”) shared a “common design” that involved exploitation of the Heliopolis properties for Coca-Cola’s profit. Nor can Coca-Cola deny that its highest management echelon in Atlanta, Georgia, gave “substantial assistance or encouragement” to the Egyptian entity’s occupation and trespass upon those properties. Under established principles of aiding-and-abetting liability for tortious conduct, Coca-Cola is unquestionably liable.

The undisputed facts also establish liability on the First Claim of the Amended Complaint – Unlawful Taking and Exclusion of the Plaintiffs. Coca-Cola mischaracterizes and obfuscates this Claim in the Memorandum it has filed in support of its Motion To Dismiss. The First Claim does not seek to hold Coca-Cola liable for the Company’s violation of the law of nations, as Coca-Cola now asserts. *See Coca-Cola Memorandum of Law in Support of Defendants’ Motion To Dismiss Plaintiffs’ Amended Complaint*, p. 10. It is, rather, the claim that the Court of

Appeals for the Second Circuit explicitly defined and upheld in its first opinion in this case when it said that the Bigios' trespass claim "would logically follow from and depend on the non-local claim at the heart of the Bigios' complaint, **the allegedly unlawful taking and refusal to return their property and refusal to compensate them for the taking of the property**, all because of their religion." *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 450 (2d Cir. 2001) (emphasis added). The Court of Appeals recognized that Coca-Cola – not the government of Egypt – was allegedly engaging in tortious conduct when it took the Bigios' property in 1994 and refused to return that property, to give the Bigios access to it, or to compensate the Bigios for it.

Finally, summary judgment on the Amended Complaint's Claim for damages resulting from Unjust Enrichment is also warranted. Quoting from *Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916), Chief Judge Fuld said in *Bradkin v. Leverton*, 26 N.Y.2d 192, 197, 257 N.E.2d 643, 645 (1970), that liability for unjust enrichment "is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which Ex aequo et bono belongs to another." See also, e.g., *Cruz v. McAneney*, 31 A.D.3d 54, 816 N.Y.S.2d 486 (2d Dep't 2006); *Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 460 N.Y.S.2d 552 (1st Dep't 1983).

The Court of Appeals for the Second Circuit applied this principle and affirmed an award based on unjust enrichment in *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631, 634-635 (2d Cir. 1946). And the Second Circuit has frequently reiterated the basic rule that under New York law an award of unjust enrichment is warranted if a plaintiff proves (1) that the defendant was enriched; (2) that the enrichment was at the plaintiff's expense; and (3) that the circumstances are such that in equity and good conscience the defendant should return the money

or property to the plaintiff. *Golden Pacific Bancorp v. Federal Deposit Insurance Corporation*, 273 F.3d 509, 519 (2d Cir. 2001); *Kaye v. Grossman*, 202 F.3d 611, 615-616 (2d Cir. 2000); see also *Indyk v. Habib Bank Limited*, 694 F.2d 54, 57 (2d Cir. 1982) (“there must first be enrichment” and “the enrichment must be unjust”); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block Building I Housing Development Fund Co.*, 608 F.2d 28, 37 (2d Cir. 1979) (“the defendant has at the plaintiff’s expense been enriched and unjustly so”).

On the undisputed facts of this case, Coca-Cola has been unjustly enriched by its use of the Bigios’ real-estate and businesses. That enrichment was at the expense of the Bigios, who have been the rightful owners of these properties during the entire time since 1994 that the properties have been used by Coca-Cola. And the injustice of Coca-Cola’s enrichment at the Bigios’ expense is manifest.

IV.

COCA-COLA IS LIABLE FOR THE LOST USE VALUE OF THE BIGIOS’ PROPERTY

Although we are not seeking summary judgment on the precise quantum of damages and recognize that questions of the value of (a) the Bigios’ properties, (b) benefit to Coca-Cola from its illegal use of the properties, (c) harm caused to the Bigios by excluding them from the properties and preventing their use and (d) other damage questions remain to be resolved, we submit that it is appropriate for the Court now to define the components of the damage remedy to which the Bigios are entitled. The general rule was stated in *Franco v. Piccilo*, 49 A.D.3d 1182, 1183, 853 N.Y.S.2d 789, 790 (4th Dep’t 2008), that a successful trespass plaintiff is entitled to “the reasonable value of the use of the property.”

A plaintiff who proves trespass by the defendant is “entitled to damages based on the lost use value of the property [trespassed upon] and any harm caused by the trespass during the time

of the defendant's occupation." *Durkin Village Plainville, LLC v. Cunningham*, 97 Conn. App. 640, 660, 905 A.2d 1256, 1271 (2006); *Robert v. Scarlata*, 96 Conn. App. 19, 899 A.2d 666 (2006). In *Granchelli v. Walter S. Johnson Bldg. Co., Inc.*, 85 A.D.2d 891, 446 N.Y.S.2d 755, 756 (4th Dep't 1981), the court said that "in an appropriate case," a plaintiff in a trespass action should also receive "damages based upon a duty of restitution for benefits received."

In the present case, Coca-Cola has received very substantial "benefits" from the use and occupancy of the Bigios' property. Following discovery of the full extent of Coca-Cola's benefits, the plaintiffs and the Court will be able to determine the proper "damages based upon a duty of restitution."

V.

**GENERAL COMMON-LAW PRINCIPLES,
AND NOT THE LAWS OF EGYPT,
CONTROL THIS CASE**

In its most recent ruling in this case, the Court of Appeals for the Second Circuit called it "a common law suit for damages . . . which may likely focus on what Coca-Cola knew about the Bigios' ownership rights before it acquired its present interest in the Egyptian bottling plant." *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178-179 (2d Cir. 2006), *cert. denied*, 549 U.S. 1282 (2007). The Court added that adjudication of the case "may also require some modest application of Egyptian law." *Id* at 179. In fact, Coca-Cola was not entitled to participate in the use and exploitation of the confiscated and expropriated Heliopolis properties regardless of what Egyptian law provides. The Bigios' claim that the seizure and occupation of their property was illegal and void because it violated international law did not depend on whether Egyptian law treated it as void. Hence even a "modest" examination of Egyptian law is unnecessary and unjustified.

It appears from its Memorandum of Law in Support of its Motion To Dismiss that Coca-Cola is relying heavily on its claim that Raphael Bigio did not satisfy the “stated conditions” specified by the Egyptian Ministry of Finance in its directive that the Heliopolis property be returned, and this alleged failure would be material under Egyptian law. We will demonstrate, however, in the pleadings responding to that motion and in any trial or evidentiary hearing should one be necessary, that Raphael Bigio **did** satisfy the conditions in the Ministry of Finance directive.

For purposes of this Motion for Summary Judgment on Liability, we assume *arguendo* that his compliance is a disputed issue of fact. Nonetheless, for reasons presented previously in this Memorandum, compliance *vel non* with these conditions is not a “material” issue of fact in deciding this Motion. Consequently, what Egyptian law would say on that subject is irrelevant.

The seizure of the Bigio properties by the Nasser government was a violation of international law because it was based entirely on the Bigios’ religion. Even had Egypt’s Ministry of Finance never issued any directive ordering that the Heliopolis property be returned to the Bigios, they would have the valid legal claims for compensation asserted in their Amended Complaint.

To be sure, the Ministry of Finance directives were an acknowledgment by the responsible agency of the Egyptian government that the sequestration was erroneous and should be revoked. As the Second Circuit observed in its first opinion, that acknowledgment trumps the reluctance that United States courts have to examine acts of state. 239 F.3d at 453 (“[T]he current government . . . has apparently repudiated the acts in question and has sought to have the property or its proceeds returned to the Bigios.”) It was also an additional “red flag” that should

have precluded the top management of Coca-Cola in 1994 from seeking to occupy and exploit property that it well knew had been seized illegally.

The effect of the Ministry of Finance directives is not, for purposes of this Motion, a necessary element of the Bigios' claims. Hence it is irrelevant at this juncture whether Egyptian law would require that all the directives' conditions be met.

Moreover, Coca-Cola's Answers to Interrogatories establish beyond any doubt that the critical decision to purchase the "indirect minority interest" that resulted in Coca-Cola's exploitation of the Heliopolis properties was made in Coca-Cola headquarters in Atlanta, Georgia. That is where the torts were committed against the Bigios. Under Georgia law, a trespass action need not be brought in the location of the property on which the trespass was committed. The Georgia Court of Appeals said in *Norton v. Holcomb*, 285 Ga. App. 78, 86, 646 S.E.2d 94, 102 (2007), "An action for trespass does not involve title to land and venue for such a case is proper in the defendant's county of residence." The generally accepted rule in the United States is that trespass is a "transitory" tort and, for that reason, the location where the tort was committed is the proper site in any conflict-of-laws analysis.

We have, in this Memorandum, focused on New York law because it fairly reflects the common-law liability on which this case should turn. Coca-Cola has not cited any Georgia decisions that conflict with the legal principles articulated in the judicial decisions cited in this Memorandum. Nor has it cited any Egyptian law that conflicts with New York or Georgia law.

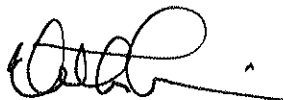
Under the governing conflict-of-laws rule applied in New York courts, the law of the state with the most significant interest in the outcome of the litigation should be applied. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *White v. ABCO Engineering Corp.*, 221 F.3d 293, 301 (2d Cir. 2000); *Gray v. Busch Entertainment Corp.*, 886 F.2d 14, 15 (2d Cir.

1989); *Matthews v. Malkus*, 352 F. Supp. 2d 398, 401-402 (S.D.N.Y. 2004). Since we know of no conflict between New York and Georgia law on any legal issue relevant to this Summary Judgment motion, there is no occasion to decide whether Georgia law should control under an “interest analysis test.”

CONCLUSION

For the foregoing reasons, this Court should grant to the Plaintiffs summary judgment on liability.

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