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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 56

Justice

Rita Maria Sanchez de Hernandez et al

-v-

Bank of Nova Scotia

INDEX NO. 601578/06

MOTION DATE 11/15/07

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: 8/8/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

RITA MARIA SANCHEZ DE HERNANDEZ, ET AL

Plaintiffs,

Index No. 601518/06

-against-

BANK OF NOVA SCOTIA a/k/a SCOTIABANK,

Defendant.

----------X

Hon. Richard B. Lowe, III:

Defendant Bank of Nova Scotia a/k/a Scotiabank ("BNS") moves pursuant to CPLR 3211 to dismiss the second amended complaint. Specifically, BNS argues the claims are barred by the Act of State Doctrine and principles of International Comity. Alternatively, BNS argues the claims should be dismissed for failure to state a cause of action. The plaintiffs' cross move to strike portions of declarations of Joan Marie Prior and Jose Maria Abascal.

Background

The claims in this action allegedly arose out of events occurring approximately between 1994 and 1995. In December 1994, Mexico devalued the peso which caused its Central Bank to raise interest rates and generated widespread default among borrowers with variable rate loans. In partial response to the crisis, the Mexican government thereafter enacted legislation that allowed Mexican banks to be foreign owned. The crisis gave an opportunity to foreign banks to acquire controlling interests in Mexico's largest financial institutions.

BNS is a Canadian based international banking conglomerate. The 91 plaintiffs are Mexican citizens who were shareholders in a Mexican financial holding company, Grupo Financiero Inverlat (GFI). In 1992, GFI purchased Mulitbanco Comermex a/k/a Banco Inverlat

(Inverlat) and plaintiffs thereafter became shareholders in Inverlat.

In 1994, during the economic crisis in Mexico, Inverlat was unable to collect on loans and to repay those loans. The defendant, seeking an investment opportunity, began in June 1995 to discuss with GFI, Inverlat, and the Mexican government how it could relieve Inverlat through a large investment. Ultimately, an agreement was reached in July of 1996 and three agreements were entered into between GFI/inverlat, BNS, and the Mexican government: a Shareholders Agreement, a Securities and Purchase Agreement, and the Existing Shareholders Agreement, all dated in July 1996.

In its May 23, 2007 decision on the defendants' prior motion to dismiss, this court discussed the claims plead in the complaint. The following discussion of the claims is taken directly from the prior decision:

As part of the agreement to reinvigorate Inverlat, the Mexican government became the owner of most of Inverlat's shares. Under the plan, the shareholders, including plaintiffs, lost their equity interest in GFI/Inverlat, and the Mexican government underwrote nearly all of the shares. Officers from defendant took seats on the boards of directors of GFI/Inverlat and its subsidiaries, where they constituted the majority of the members. The complaint alleges that defendant became GFI/Inverlat's manager.

The Mexican government caused GFI/Inverlat to issue some of its equity in mandatory convertible bonds. Defendant purchased the bonds and some shares for $175 million. The notes had to be converted into GFI/Inverlat shares on June 30, 2004, and could be converted sooner, on July 31, 2000, at defendant's discretion. Upon conversion of the bonds, defendant, together with the shares it already owned, would own 55% of GFI/Inverlat.

GFI/Inverlat's new board of directors would separate the bank's assets into "bad" and "good" assets. The bad assets, such as loans that seemed unlikely to be collected, would be put in a Recovery Trust. The process of transferring the bad debts was the "clean-up," which would take 12 months. The shareholders' interests were handled in this manner. Upon the completion of the clean-up, or on July 31, 2000, the Mexican government would distribute shares equal to 9% of GFI/Inverlat's equity to eligible shareholders. Eligible shareholders could increase their equity interest above the 9% allocated to them by as much as 36% for a total of 45%, so long as the debts in the Recovery Trust were paid off or otherwise disposed of by July 31, 2000. How much of the 36% to be distributed to the shareholders would be determined as of July 31, 2000, by use of a formula that took into account the original debt of the Recovery Trust, the balance of the debt existing on July 31, 2000, interest rates, and other figures. Under certain conditions, if all of the 9% and 36% allocated to eligible shareholders was not distributed, eligible shareholders who had already received their part of the 9% or 36% could purchase the shares that were not distributed.

The agreements also provided that defendant could add to its 55% by purchasing more shares. If defendant converted its bonds on July 31, 2000, the Mexican government would offer all its GFI/Inverlat shares for sale on July 31, 2003. Defendant had the option of buying these shares.

In July 1996, the GFI/Inverlat shareholders approved the final agreement. Defendant attended the meeting at which the shareholders voted. Plaintiffs allege that the shareholders were not shown actual copies of the agreements. Instead, defendant presented the terms to them. The shareholders created a committee charged with the responsibility of following defendant's

handling of the bank. Defendant's executives were nominated to serve on the committee, and they promised to act as fiduciaries for the shareholders in carrying out their duties.

Plaintiffs also allege that throughout the discussions on how to save Inverlat, defendant repeatedly represented to the shareholders that Canadian regulations required it to obtain at least 51% of GFI/Inverlat. Defendant reportedly could not invest in the company unless it acquired a controlling interest. However, defendant told the Mexican government that Canadian regulations allowed it to own as little as 10%. The alleged purpose of the misrepresentation was to prevent the shareholders from increasing their investment in Inverlat, although they wanted to do so.

Plaintiffs allege that during the process of settling on the structure of defendant's investment in Inverlat, the shareholders' trust and reliance on defendant grew. The shareholders realized that the ultimate value of their stake in GFI/Inverlat would be directly tied to defendant's performance as manager and operator.

Some years later, defendant converted its bonds and became owner of 55% of GFI/Inverlat stock. On April 30, 2003, as indicated by its securities registration, defendant purchased an additional 36% of GFI/Inverlat equity. Plaintiffs allege that this was the 36% earmarked for the shareholders. They claim that the book value of the 36% was $150 million in 2000, that defendant paid $325 million for it in 2003, and that it is worth much more today.

Although the July 1996 agreement provided that the Mexican government would distribute shares to the shareholders in 2000, this event did not take place until late 2003. Why is not indicated. In late October 2003, the Mexican government published a notice inviting the shareholders to apply for their guaranteed 9%. Beginning in January 2004, the government

began informing individual shareholders as to their eligibility regarding the guaranteed 9%. Neither the October nor the January notices contained any information about the shareholders' right to acquire the 36%.

The complaint alleges that at the time the 36% was sold, plaintiffs had no reason to suspect that it was the same 36% that was promised to them. At that time, plaintiffs had not been informed about their guaranteed 9%. Plaintiffs believed that the 36% was not theirs, because they had been advised that they would not learn about the 36% until after they were advised of their status regarding the 9%. Plaintiffs allege that there was no way for them to discover that their right to purchase the 36% was extinguished until 2005 or later.

The shareholders' rights to the 36% were dependent upon certain financial conditions prevailing at the bank. Specifically, the eligible shareholders could receive the additional 36% if the Inverlat's obligations were reduced by more than 20%. On March 27, 2000, the accounting firm KPMG issued a report finding that Inverlat's debt had been reduced by no more than 18.11%, anhd therefore, the shareholders were not entitled to receive any portion of the 36% of GFI's equity. Plaintiffs allege that defendant, in its capacity as GFI/Inverlat's manager, manipulated company books so that they showed that the shareholders had no right to the 36%.

After buying the 36%, defendant purchased more shares from some shareholders and now owns most of GFI/Inverlat. The gravamen of the complaint is that defendant prevented the 36% from being offered to the shareholders. Plaintiffs assert causes of action for breach of fiduciary duty, fraud, negligent misrepresentation, conversion, and tortious interference with contract, and seek the imposition of a constructive trust on the 36% of stock and the profits issuing therefrom.

In the prior decision, this court then went on to grant the defendants' motion to dismiss to the extent that the causes of action for fraud, negligent misrepresentation, and tortious interference with contract were deemed time barred. The causes of action for breach of fiduciary duty, constructive trust, and conversion remain.

The defendant now moves pursuant to CPLR 3211(a)(7) to dismiss the remaining causes of action on the grounds that (1) the doctrines of act of state and international comity bar this c ourt's consideration of Plaintiff's claims; and (2) the complaint fails to state a cause of action under applicable Mexican law.

The plaintiffs argue the doctrines of act of state and international comity do not bar their claims. Specifically, the act of state doctrine does not bar their claims because the facts as alleged do not call into question the conduct of the Mexican government which would require this court to declare any of its acts invalid. Furthermore, the acts complained of are not sovereign acts protected by the act of state doctrine. Lastly, plaintiffs argue that even if the act of state doctrine were applicable, dismissal would be inappropriate because this case would not have an impact on foreign relations.

Discussion

Act of State Doctrine

BNS argues the Plaintiffs' claims are precluded by the act of sate doctrine because the court would be asked to review whether the Government of Mexico acted improperly when it sold its GFI shares to BNS, rather than to the Plaintiffs (Memo of Law p 2). In particular, the propriety of the Government's sale of a 36% equity stake in GFI to BNS would be at issue (Id at 20).

The plaintiffs argue the act of state doctrine does not apply because the complaint does not seek to review the legality of the Mexican government's action or undo or disregard the governmental action. Rather, it asks this court for relief against BNS who allegedly procured the Mexican government's transfer of 36% shares of GFI stock.

The act of state doctrine prevents a court from examining the validity of an official act of a sovereign state taken on its own soil (*Banco Nacional de Cuba v Sabbatino*, 376 US 398 [1964]). It is meant to preserve the interests of the Executive branch of the United States government by maintaining an appropriate domestic separation of powers between it and the judiciary branch of the government (*W.S. Kirkpatrick & Co. v Environmental Tectonics Corporation, Int'l*, 493 US 400, 404 [1990]). The doctrine is intended to prevent interference with the conduct of foreign affairs that "may result from the judicial determination that a foreign sovereign's acts are invalid" (*Id).* The act of state doctrine is applicable where the relief sought requires a United States court to declare invalid the official act of a foreign sovereign performed in its own territory (*Id* at 405).

The act of state doctrine is not one which will strip a United States court of its power to hear a case or controversy before it necessarily because a foreign government's action is implicated. Rather:

> The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

(*Id* at 409).

In *Kirkpatrick*, the petitioner was alleged to have bribed Nigerian officials to obtain a construction contract from the Nigerian government. Nigerian law prohibits the exchange of such bribes. The respondent argued that had the bribes not been given, it would have been awarded the contract and brought the action. The petitioner raised the act of state doctrine arguing that the claim required the court's review of the Nigerian government's act of awarding the contract to the petitioner and therefore should be dismissed because to prevail, the respondent had to prove the Nigerian government acted unlawfully when it awarded the contract. The court disagreed because act of state issues only arise when a case turns on the effect of official action by a foreign sovereign (*Id* at 406). The court found that in matter before it the legality of the Nigerian contract was "simply not something to be decided in the present suit, and there [was] no occasion to apply the rule of decision that the act of state doctrine requires (*Id*). Furthermore, act of state did not apply because the respondent was not "trying to undo or disregard the governmental action, but only to obtain damages from private parties who procured it" (*Id* at 407).

The defendant relies upon *Oetjen v Central Lumber Co*, where the plaintiffs sought to obtain title to animal hides confiscated by Mexican revolutionary forces (246 US 297, 299-300 [1918]). The hides had been confiscated from the plaintiff by the revolutionary forces and later sold to a Texas company. The plaintiff sought to recover the hides from the Texas purchaser. The court applied the act of state doctrine after the revolutionary forces were recognized by the United States as the *de jure* government of Mexico, concluding that to hold otherwise would be to pass judgment upon the act of the sovereign state of Mexico in taking the hides and selling them to defendant (*Id* at 300-301, 304).

Oetjen is distinguishable because the claim in this matter is against a third party who allegedly caused the Mexican government to act in a way harmful to the plaintiff. It is the acts of the third party which are at issue, not the acts of the Mexican government. The effects of any decision by this court do not run the risk of attempting to undo the Mexican government's actions. Specifically, the complaint pleads:

> Although obligated to do so by both the July 1996 and the February 1996 Agreements, [BNS] never separated Inverlat's loans/assets into a Good and Bad bank (Complaint ¶ 179).
>
> [BNS] also never provided an accounting. Such an accounting would have allowed the Shareholders to understand the amount of equity beyond the 9% to which they were entitled at no additional cost to them. (Complaint ¶ 180).
>
> Upon information and belief, [BNS] retained KPMG to prepare an analysis of the Shareholders' rights to GFI equity . . .[BNS] manipulated the numbers provided to KPMG, along with the underlying process, so that the calculation to be performed by KPMG would result in the Shareholders only being eligible to receive the guaranteed 9% . . .had [BNS] not manipulated the numbers and process, the Shareholders would have been entitled to more than 9% without having to invest additional capital (Complaint 181).
>
> Although, [BNS] knew the Shareholders had a right of first refusal to purchase the earmarked 36%, and had assured them they would not interfere with that right, Scotiabank purchased that 36% . . .[b]y virtue of [BNS] purchasing the 36% that had been earmarked for the Shareholders, [BNS] caused the Shareholders to suffer significant economic damage (Complaint ¶¶ 184, 185).

In this case the matter can be decided without making a determination as to the validity of the Mexican government's transfer of the 36% GFI shares to BNS. It is the acts of BNS in causing the government to transfer the shares which is at issue. It is not the actual transfer nor the legality of it which this court is asked to review. Specifically, the plaintiffs complain of the defendants handling of the Recovery Trust and their acts which prevented the plaintiffs from

recovering the additional 36% interest of GFI. Therefore, this court will not be called to invalidate the Mexican government's acts, but rather review the defendants' acts which led to a failure to reduce Inverlat's debt by 20% and therefore cause the government to sell the 36% interest in GFI to BNS.

In a letter dated October 26, 2007, the Institute for the Protection of Bank Savings ("IPAB")[1] stated its view that its sale of the GFI shares at issue was part of the Government's bank rescue plan and was "valid and had "full legal effect," and "should not be subject to review by the foreign courts" (Declaration of Phillip L. Graham, Jr., Ex 1). However, the defendants' argument that a holding by this court that plaintiffs' properly had an interest in the 36% would contradict IPAB's declaration that the shares belonged to BNS, is unfounded. In proceeding with this action, it will be the acts taken by BNS which caused the Mexican government to declare the sale to BNS valid. As already discussed, the allegations surround BNS' actions in a deliberate attempt to deprive the plaintiffs of their addition 36% interest in GFI. It will not be the government action itself which will be called into question, but those of BNS. The act of state doctrine does not apply to claims in which the plaintiff is "not trying to undo or disregard governmental action, but only to obtain damages from private parties who procured it" (*Kirkpatrick*, 493 US at 407). Therefore, the motion to dismiss is denied on this ground.

International Comity

The defendants also ask this court to dismiss the plaintiff's claims in deference to international comity. International comity is "the recognition which one nation allows within

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[1] The *Instituto para la Proteccion al Ahorro Bancario* or the Institute for the Protection of Bank Savings is the government agency responsible for protecting the savings of depositors, providing financial support to Mexican banks, and managing insolvent banks.

its territory to the legislative, executive or judicial acts of another nation . . ." (*Hilton v Guyot*, 159 US 113, 164 [1895]; *In re Maxwell Communications Corp.*, 93 F3d 1036, 1047 [2d Cir. 1996]). The primary purpose of the international comity doctrine is to avoid adjudication that would frustrate a foreign sovereign's efforts to formulate and execute its own national policy (*See Canada S. Ry. Co. v Gebhard*, 109 US 527, 539 [1883]).

When applying the international comity doctrine, a court should analyze a number of factors, including the United States government's interest in the lawsuit, the foreign government's interest, and the adequacy of the alternative forum (*See, e.g., Jota v Texaco*, 157 F3d 153, 160 [2d Cir 1998]); *Pravin Banker Assocs. v Banco Popular del Peru*, 109 F3d 850, 854-855 [2d Cir 1997]; *United Feature Syndicate, Inc. v Miller Features Syndicate, Inc*, 216 F.Supp. 2d 198, 212 [SDNY 2002]). Other factors considered by courts have also included fairness to litigants and efficient use of scarce judicial resources (*Daewoo Intern. (America) Corp. Creditor Trust v SSTS America Corp.*, 2004 WL 830079 at 8-9, FN 10 [SDNY 2004]).

Many of the defendants' arguments in support of dismissal based on international comity are repetitive of those in support of their act of state grounds for dismissal. Namely, that the court should refrain from adjudicating the instant suit in deference to international comity because the United States has a strong interest in maintaining a positive working relationship with Mexico. Defendants argue that allowing this lawsuit to proceed "would place the courts of New York in the position of second guessing the regulatory decisions made by the Government of Mexico in the course of restructuring its banking system and in furtherance of its national policy of protecting bank depositors from the loss of their savings (Memo of Law p 24).

Again, the court reiterates that this is not a matter where the plaintiff is challenging the

acts of the Mexican government when denying the shareholders their alleged 36% interest. Rather, at issue is a matter between two private parties whereby it is the defendants' acts which caused the Mexican government to act which are called into question. Furthermore, as to the matter of separation of powers, because it is the acts of BNS, a Canadian bank, which are at issue, there is no danger that this court will in some way interfere with the Executive Branch's conduct of foreign policy with Mexico.

The defendants also argue that Mexico provides an adequate forum for the resolution of the claims at issue. They argue the plaintiffs have had several opportunities to challenge their eligibility status, both in administrative processes set up to deal with their claims in Mexico and in Mexican courts (Id at 26).

Dismissal on comity grounds requires that such a forum be available (*Jota v Texaco, Inc.*, 157 F3d 153, 160 [2d Cir. 1998]). An adequate alternative forum does not exist if the defendant is not subject to jurisdiction in the foreign country (*Id).*

As part of its scheme to rescue Banco Inverlat, the Mexican Government developed a mechanism to determine the shareholders' rights to recover a portion of their former equity interest in GFI (Frankle Dec'l Ex 15). There was a determination by IPAB that the shareholders' conditional rights to 36% were not triggered and they thereafter sold the 36% to BNS pursuant to a public auction (Prior II Dec'l Exs 17, 21; Murray Dec'l Ex E at 5-6). The Mexican Government set up an administrative process to make the proper determinations and provided a means for the shareholders to challenge any decisions regarding their right to receive shares through both an administrative appeals process and subsequently in the Mexican courts (Prior II Dec'l Ex 13 at 7). The plaintiffs have sued other parties in Mexico including BNS's

Mexican subsidiary Grupo Financiero Scotiabank Inverlat (Ayala Dec'l ¶ 15).

While there may be an administrative process to challenge the Mexican Government's determination of the plaintiffs' entitlement to the 36% interest in GFI, this does not preclude the claims against BNS. BNS is not a party to those proceedings[2] and as this court has discussed, the issues in this matter do not relate to the Mexican Government's determinations and its process, but rather the actions taken by BNS as a fiduciary to the shareholders.

Furthermore, the defendants' do not challenge the plaintiffs claim that BNS is not subject to jurisdiction in Mexico. The plaintiffs assert BNS is not subject to jurisdiction in Mexico and there is not reason to believe that they will as is necessary under Mexican law.[3] (Loperena Dec., ¶ 45). Because there is no evidence before this court that BNS would submit to jurisdiction before a Mexican court, there is presently no adequate forum available which would support the dismissal of this action based on international comity and in favor of the Mexican courts.

Lastly, the defendants do not respond to the plaintiffs' argument that the motion to dismiss based on international comity is untimely. As the plaintiffs point out: This case was filed on May 1, 2006 (Leyendecker Dec. ¶ 2). A special master has been appointed, several

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[2] Mexican counsel for all of the plaintiffs in this instant action states "I have filed four lawsuits in Mexico on behalf of thirteen of the plaintiffs in the [instant] case. The Bank of Nova Scotia a/k/a Scotiabank is not a party to any of these lawsuits" (Gomez Decl ¶ 3). "All of the lawsuits seek relief related to the '9%' that was guaranteed to eligible shareholders pursuant to the Cleanup Guidelines" (Id ¶ 4).

[3] "Under Mexican law, a court must have territorial competence over a case in order to hear it. A judge in Mexico does not have territorial competence over a particular case unless the parties have expressly or tacitly submitted themselves before him . . .The parties have not expressly submitted to jurisdiction in Mexico . . .To obtain jurisdiction over Scotiabank through tacit submission, Scotiabank would either have to answer the complaint in Mexico or fail to timely raise the objections to venue within the period so provided" (Loperena Dec., ¶45).

conferences held, and a scheduling order put into place (Id). This court has already issued an order granting dismissal of some claims and denying others (Id). Extensive discovery has been conducted and BNS has deposed over 20 plaintiffs in New York (Id). Almost all of the plaintiffs have produced documents and answered interrogatories and BNS has produced close to 100,000 pages of documents (Id).

Where fairness to litigants and use of judicial renounces are relevant when deciding whether to dismiss an action based on international comity, it would be inappropriate to dismiss this instant action where it has been proceeding, BNS has actively engaged this court's jurisdiction for over a year, and this court has already ruled on the plaintffs' claims based on statute of limitations (*Daewoo Intern. (America) corp. Creditor Trust v SSTS America Corp.*, 2004 WL 830079 at 8-9, FN 10)(declining to dismiss the case on grounds of comity where it had been pending for over a year and the court had devoted sufficient resources to its resolution by issuing a prior written opinion). Therefore, for the foregoing reasons, the motion to dismiss based on international comity is denied.

Failure to State a Cause of Action - Choice of Law

The first step in a choice of law analysis is determining whether an actual conflict of law exists between the jurisdictions involved (*K.T. v Dash,* 37 AD3d 107, 111 [1st Dept 2006]). Once the court determines that there is a conflict between the laws of the jurisdictions, the court must consider which jurisdiction, "'because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation'" (*id.*, quoting *Babcock v Jackson,* 12 NY2d 473, 481 [1963]; *see also Padula v Lilarn Properties Corp.,* 84 NY2d 519, 521 [1994]). Under New York's choice of law rules, the place where the tortious

conduct occurred is deemed to have the greater interest in having its laws applied as it has the greater interest in regulating behavior within its borders (*Cooney v Osgood Mach., Inc.*, 81 NY2d 66, 72 [1993]). Also considered are the domiciles of the parties (*Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 197 [1985]). When the parties have different domiciles, the law of the situs of the tort generally applies, because that is the only place with which both parties have purposefully associated themselves in a significant way (*Cooney,* 81 NY2d at 74).

The court also inquires whether the purpose of the allegedly violated laws or rules is to regulate conduct or allocate loss (*Padula,* 84 NY2d at 521-522). When the rules concern the appropriate standards of conduct, the law of the place where the tort occurred will generally apply (*id.* at 522).

Plaintiffs maintain causes of action for breach of fiduciary duty, conversion, and the imposition of a constructive trust. The torts of conversion and breach of fiduciary duty are based on allegations of wrongful conduct and are conduct-regulating rules. A cause of action for a constructive trust is also conduct-related, in that it is based on wrongful conduct (*Gimbel v Feldman,*1996 WL 342006, *4, 1996 US Dist LEXIS 20221, *13 [ED NY 1996]). Here, the request to impose a constructive trust is based on conduct-regulating rules related to conversion and breach of fiduciary duty.

The acts complained of took place in Mexico. Nearly all of the plaintiffs in this case are Mexican nationals residing in Mexico. Although defendant is a Canadian corporation, this case is based on actions defendant allegedly took in Mexico. Mexico, therefore, has a greater interest in this case than New York. If there is a conflict between New York and Mexican law, Mexican law must apply.

Plaintiffs argue for the application of New York law. They contend that, since defendant previously moved to dismiss the complaint based on New York's statutes of limitations, it should not now be allowed to make arguments based on foreign law. In common law jurisdictions, such as New York, matters of procedure, such as statutes of limitations, are governed by the law of the forum (*Educ. Resources Inst., Inc. v Piazza,* 17 AD3d 513, 513 [2d Dept 2005]). Matters of substantive law, on the other hand, are subject to a choice of law analysis (*id.*; *see also Marine Midland Bank, N.A. v United Mo. Bank, N.A.,* 223 AD2d 119, 122 [1st Dept 1996]). The application of New York law to determine if plaintiffs' claims were timely was proper. Such application does not prevent the application of substantive Mexican law to determine if plaintiff's claims have any viability.

Plaintiffs question the timeliness of defendant's notice that it would rely upon foreign law. On May 8, 2007, defendant served upon plaintiffs a notice that it would request the application of Mexican law. "[A] court has discretion to apply the law of a foreign country notwithstanding the absence of advance notice or request to do so" (*Burns v Young,* 239 AD2d 727, 728 [3d Dept 1997], citing CPLR 3016 [e], 4511 [b]). Here, defendant has given adequate advance notice that it would request the application of Mexican law.

Defendant submits the affidavit of Jose Maria Abascal and, in response to plaintiffs' opposition, a rebuttal by Abascal and the affidavit of Jorge A Vargas. Appearing as plaintiffs' expert is Carlos Loperena R. All three attest to being highly qualified to give testimony in this matter. Each side attaches copies of Mexican statutes and very few copies of Mexican court decisions.

The construction of foreign law is a legal matter appropriate for summary resolution

(*Harris S.A. De C.V. v Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V.*, 279 AD2d 263, 264 [1st Dept 2001]). Where the parties have submitted expert opinions, "it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed" (*Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 153 F3d 82, 92 [2d Cir 1998]). The court has wide latitude in interpreting foreign law (*Rutgerswerke AG v Abex Corp.*, 2002 US Dist LEXIS 9965, *51, 2002 WL 1203836, *16 [SD NY 2002]). A court may reexamine proffered statutory provisions to determine whether a party's interpretation is accurate or plausible (*see Kashfi v Phibro-Salomon, Inc.*, 628 F Supp 727, 737 (SD NY 1986]). In addition to relying on the parties' interpretation of the foreign law, judges may also conduct their own research (*In re McMahon*, 235 BR 527, 532 (Bankr SD NY 1998]).

A party intending to apply foreign law must prove it different from the law of the forum (*In re Parmalat Securities Litigation*, 383 F Supp 2d 587, 595 [SD NY 2005]; *Stein v Siegel*, 50 AD2d 916, 917 [2d Dept 1975]). Where there is a failure of proof of foreign law, the court may presume that it is the same as local law (*id.*).

Abascal, defendant's expert, states that the facts alleged in the complaint do not constitute any unlawful acts under Mexican law. He emphasizes the difference between New York, a common law jurisdiction, and Mexico, a civil law jurisdiction. He states the following. Mexico does not recognize the fiduciary duty that is alleged in the complaint and the tort of conversion and the remedy of constructive trust are unknown in Mexico. The system of equitable duties and remedies, as established by the common law, is foreign to civil law systems. In Mexico, such duties and remedies are imposed by statute or express contract or they do not exist at all.

Much of Abascal's commentary is supported by *Curley v AMR Corp.* (153 F3d 5, 14 [2d Cir 1998]), in which the Court discussed the differences between New York and Mexican law. "Mexican law is much different, and its sources do not lie in precedent cases. As a civil law jurisdiction, Mexican courts consider the text of the constitution, civil code and statutory provisions as the primary source of law and give them preponderant consideration" (*id.*). "'Civil law codes tend to be much more general and encompass a broader range of circumstances than do common law statutes . . . . A civil code is not a list of special rules for particular situations; it is rather a body of general principles carefully arranged and closely integrated"' (*id.*, quoting Balli and Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 Conn J Intl L 29, 42 [1995]; *see also* Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders,* 35 San Diego L Rev 1053, 1062-1064 [Fall 1998]). The principal rules that govern private law, including the law of torts, are found in the civil codes (*id.*).

Similarly, another commentator has noted that Mexico, as a civil law country is governed by an intricate system of code provisions that attempt to address every conceivable dispute through its broad generalized legal principles (Anderson, *Transnational Litigation Involving Mexican Parties,* 25 St. Mary's L J 1059, 1061-1062 [1994]). "Since codes in civil law countries are drafted in a highly general, abstract and logical fashion, there is a gap between the general and abstract rules in the code and the factually complex case before the courts or arbitral tribunals. This gap must often be bridged by court decisions or, more frequently in Latin America, by the writings of legal commentators ..." (Maestroni, *Overview of the Study Undertaken by the National Law Center for Inter-American Free Trade,* 20 Ariz J Intl & Comp

Law 1, 2 [2003]).

"Judge-made law is nearly nonexistent and the Mexican judiciary perceives itself as having little discretion to stray from the literal text of the applicable codes. The pervasive reluctance of the judiciary to stray from the code provisions differs from the [common law] legal system in which courts hesitate to accept the preeminent role of statutory provisions when the results are perceived as inequitable" (Anderson, at 1061-1062).

Under the Mexican Civil Code, specific common law torts are not recognized (*Curley,* 153 F3d at 14). "Mexico tends to have one law of '"wrongs"' or torts which is codified in one general article in the Mexican Civil Code," namely Chapter V (Liability from Illicit Acts [Torts]) of Book Four (Obligations) (Soltero and Clark-Meachum, *The Common Law of Mexican Law in Texas Courts,* 26 Houston J Intl L 119, 139 [26 HOUJIL 119] [Fall 2003]). That is Article 1910, which provides that "[w]hoever, by acting illicitly or against the good customs and habits, causes damage to another shall be obligated to compensate him/her unless he/she can prove that the damage was caused as a result of the fault or inexcusable negligence of the victim."

Abascal states that there are no precedents in Mexican law for using Article 1910 to create tort liability and that such liability exists only in regard to an identified unlawful act. None of the acts alleged by plaintiff are identified as unlawful under Mexican law. Also, Abascal says that "good custom" has never been the sole basis for imposition of tort liability in Mexico, and that there are no precedents, nor commentary, identifying a single instance in which tort liability has been established, except by reference to an identified unlawful act.

In New York, fiduciary liability is not dependent solely upon the overt agreement between the fiduciary and the beneficiary, but results also from the relationship (*EBC I, Inc. v*

Goldman, Sachs & Co., 5 NY3d 11, 20 [2005]). A fiduciary relationship is created when one party reposes trust and confidence in another and relies upon that person's superior expertise or knowledge (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998]; *P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 386 [1st Dept 1994]). In Mexico, according to Abascal, fiduciary-like duties in Mexico arise as a result of an agreement between parties or a particular statute. He states that there is no concept of an implied fiduciary duty or a duty that arises from a confidential relationship between the parties or from the parties' conduct.

Plaintiffs' expert, Loperena, does not show that such a duty can be created by the parties' conduct. Instead, he argues that a shareholders' Resolution and the Existing Shareholders Agreement created the equivalent of a fiduciary relationship between defendant and plaintiffs under Mexican law. Plaintiffs are some of the shareholders that passed the Resolution approving the "[t]erms and Conditions for the Stabilization of GFI" (Frankel, Ex. 13, at 17, ¶ 4 [all the exhibits are attached to Frankel's affidavit]), also referred to as the clean-up plan. One aspect of the plan was that the shareholders would lose all of their equity in GFI, which would be held in trust by the Mexican government authorities (*id.* at 18, ¶ 4). Depending on the outcome of the clean-up plan and subject to various conditions, the shareholders had a chance to recover up to 9% of their ownership, and up to 36% (*id.*).

Via the Resolution, the shareholders granted "special power of attorney as required by law" to two of defendant's executives (*id.* at 18, ¶ 5). The Resolution recorded that these executives were appointed to the board of directors of GFI. In addition, "[f]or the purpose of carrying out the acts needed to formalize the [recovery] program, it would be appropriate to grant the necessary and appropriate powers to two persons, so that, jointly or individually, these

persons can subscribe the agreements that establish the program in question" (*id.* at 18, ¶ 4, at 28).

The Existing Shareholder Agreement includes details of the clean-up plan of GFI. In the preamble, the agreement recites that, based on conversations between the Mexican government authorities and representatives of the GFI shareholders, a plan for reorganizing GFI has been established (Frankel, Ex. 15, at 1). The preamble further states that "the purpose of this process is to resolve the problems GFI is facing and decrease the costs the [Mexican government] would incur to capitalize [GFI], as well as to establish procedures that would allow the aforementioned shareholders to participate in the capital stock of GFI" (*id.*). Under the plan, officers of defendant or individuals designated by defendant will constitute the majority of the members of the board of directors of GFI (*id.*, at 1, ¶ 2). The "'new' board of directors of GFI ... will proceed to financially clean up" GFI (*id.*, at 1, ¶ 3). Upon completion of the clean up, eligible shareholders would receive up to 9% of the "equity interest they have in GFI's capital" (*id.*, ¶ 4). Eligible shareholders could increase their equity interest in GFI above the 9% under certain conditions pursuant to a formula (*id.*, ¶ 6). The agreement was signed by the Mexican authorities and GFI.

There is also an Agreement to Separate Portfolio between GFI and the Mexican authorities. The section entitled Power of Attorney states that "[i]n order for Scotiabank to be able to exercise its rights under this Agreement ... and perform any acts in representation of [GFI], as provided for herein, [GFI] grants Scotiabank a power of attorney by means of which Scotiabank is authorized to act in representation of [GFI], with powers of an agent, in accordance with Article 2561 of the Civil Code ... , which will include the broadest powers under

Mexican law, for Scotiabank to exercise the power of attorney under this instrument" (Ex. 17, at 17, ¶ 4.10). Article 2561 of the Mexican Civil Code, Title Nine (Agency), Chapter I (General Provisions), provides that if an agent acts in his own name, the principal shall have no claims against the persons with whom the agent has contracted.

Loperena argues that the agreements and the Resolution made defendant the agent of the shareholders and that, as their agent, defendant bears the equivalent of a fiduciary duty towards the shareholders. As indicated above, the Mexican Civil Law has a section devoted to agency, as does the Mexican Commercial Code, Chapter I (Agents). But as Abascal points out, any duty that defendant owed was to GFI. None of the documents expressly creates a fiduciary duty or agency relationship with the shareholders.

Loperena also cites to the following. The Mexican Civil Code, Title One (Origins of Obligations), Chapter I (Contracts), provides that the requirements essential to a contract, or those necessary by virtue of the nature of the contract, must be considered included, even if not expressly set forth by the parties (Article 1839). In addition, "contracts obligate the parties not only to that expressly agreed, but also to the consequences which according to their nature result from good faith, custom and usage or the law" (Article 1796). Loperena argues that defendant played an important part in the clean up of GFI, that this role placed defendant under certain obligations towards the shareholders, and that the duty can be found in the agreements.

In regard to the "good faith" requirement in Article 1796, Abascal states that this provision requires good faith in interpreting contracts so as not to frustrate the parties' intentions as stated in the contract. He states that neither Article 1796, nor Article 1839, can be made to create a fiduciary duty that is not stated clearly in the contract. Abascal points to Article 1851,

which states that "[i]f the terms of the contract are clear and unequivocal on the intentions of the parties it shall be adhered to literally." Defendant's expert is correct that the agreements and the Resolution contain no provision creating a fiduciary duty toward plaintiffs. The tort of breach of fiduciary duty cannot be based on these documents.

The court previously dismissed some of plaintiffs' claims on statute of limitations grounds. That decision stated that defendant was a party to the Existing Shareholder Agreement, although defendant was not a signatory to that agreement. The Securities Purchase and Sale Agreement, by which defendant purchased shares in GFI from the Mexican government, provides the following: "The Appendices indicated below are deemed to be an integral part of this Agreement..." (Ex. 16, at 7). Then there is a list of 29 documents, many of which are agreements, including the Existing Shareholder Agreement. Based on this explicit provision, the court concluded that defendant was a party to the Existing Shareholder Agreement. That decision was based on New York law, but Mexican law would provide the same conclusion, given that the relevant provision is part of a Mexican agreement to be governed by the laws of Mexico (*id.*, at 44, ¶ 10.9).

Loperena contends that the Existing Shareholder Agreement creates some sort of obligation from defendant. It is true, as Abascal contends, that the mere fact of the agreements being an integral part of another agreement does not place any duty on defendant. However, the Existing Shareholder Agreement states that one purpose of the GFI clean up is to benefit the shareholders and it makes defendant responsible for some part of the clean up. It could be argued that defendant is a party to the agreement and that plaintiffs are third-party beneficiaries.

In *Argonaut Partnership, L.P. v Bankers Trustee Co., Ltd.* (1997 WL 45521, *10-11,

1997 US Dist LEXIS 1092, *36-38 [SD NY 1997]), the court determined that Mexican law recognized third-party beneficiary status, and that the beneficiary did not need to be expressly named in the contract as a third-party beneficiary. In that case, the defendant signed the contract. Here, defendant did not sign the Existing Shareholder Agreement. But, as indicated above, the Securities Purchase and Sale Agreement, which defendant signed, indicates that defendant was a party to the Existing Shareholder Agreement.

The contract section in the Mexican Civil Code provides that "[c]ontracts may contain provisions for the benefit of third parties in accordance with the following Articles" (Article 1868). "A stipulation in a contract in favor of a third person creates a right in such person to demand the performance so promised by the promisor, unless otherwise provided in the contract" (Article 1869). Pursuant to Articles 1796 and 1839, cited above, defendant would be obligated to act in good faith in regard to the shareholders' rights to the 36% of GFI shares. The result under New York law would be the same.

Plaintiffs do not explicitly name a cause of action for breach of contract. However, the complaint does allege that the Existing Shareholder Agreement contained terms for the benefit of the shareholders. Those allegations are sufficient to enable plaintiffs to interpose a claim for breach of contract. The date of any breach would be in 2003, when defendant purchased the 36% of shares that plaintiffs claim as their own. Therefore, a claim for breach is timely.

The court notes that the Existing Shareholder Agreement contains no choice of law provision, while both the Securities Purchase and Sale Agreement and the Agreement to Separate Portfolio provide for the governance of Mexican law (Ex. 17, ¶ 7.10). New York recognizes the right of contracting parties to agree to a choice of law (*Roselink Investors, LLC v*

Shenkman, 386 F Supp 2d 209, 225 [SD NY 2004]). A contractual choice-of-law provision governs only a cause of action sounding in contract, not one sounding in tort (*Lazard Freres & Co. v Protective Life Ins. Co.,* 108 F3d 1531, 1540 [2d Cir], *cert denied* 522 US 864 [1997]). In this case, the distinction has no relevance since Mexican law governs tort and contract claims.

To state a claim for the imposition of a constructive trust under New York law, a plaintiff must plead the existence of a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment (*Sharp v Kosmalski,* 40 NY2d 119, 121 [1976]). A constructive trust is not really a trust, but actually an equitable remedy to prevent the unjust enrichment of a party who has acquired property that it may not in good conscience retain (*id.* at 121). The remedy is flexible, and the requirements are not rigidly applied (*id.* at 122-123). Even without an express promise, a court may impose a constructive trust upon property transferred in reliance upon a confidential relationship (*id.* at 122; *see also Simonds v Simonds,* 45 NY2d 233, 241-242 [1978]).

In New York, a claim for unjust enrichment must allege that the defendant incurred a benefit at plaintiff's expense and that equity and good conscience require restitution (*Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592-593 [2nd Dept 2007]). The benefit must be bestowed by plaintiffs (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 111-112 [1st Dept 2005]; *Nakamura v Fujii,* 253 AD2d 387, 390 [1st Dept 1998]).

The Mexican statute on unjust enrichment does not provide that the plaintiff must bestow the benefit on the defendant. Loperena cites to Mexican Civil Code, Title One (Origins of Obligations), Chapter III (Unjust Enrichment). "Whoever becomes enriched without justification at the expense of another shall be obligated to indemnify the other person for his

loss ..." (Article 1882). He does not explain how this statute is treated in Mexican courts. His argument that Mexico recognizes the concept of constructive trust does not convince.

Abascal contends that Mexico does not recognize the concept of equity as in the common law and that, therefore, there is no concept of a constructive trust. In *Perez v Alcoa Fujikura, Ltd.* (969 F Supp 991, 1005 [WD Tex 1997]), the court recognized that quasi contract and tort actions were not recognized in Mexico. Commentators lend support to defendant's assertion that Mexican law does not recognize the concept of a constructive trust. The civil law does not generally recognize beneficial or trust ownership (Drumbl, at 1098). According to one commentator, non-contractual trusts are non-existent in the Latin American civil law world (Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 Ariz J Intl & Comp Law 701, 723-724 [Fall 2007]). Civil law property systems do not generally recognize the idea of beneficial ownership (Rigamonti, *Deconstructing Moral Rights,* 47 Harv Intl L J 353, 369 [Summer 2006]; Townsend, *Tax Treaty Interpretation,* 55 Tax Lawyer 219, 265 [Fall 2001]).

Abascal states that Article 1882 does not apply when the enriched party gains the property according to the law. He says that, since defendants purchased the shares legally from the Mexican government, they were not unjustly enriched at plaintiffs' expense. Vargas, defendant's other expert, states that "without justification" (Article 1882) refers to enrichment resulting from improper, unjust, or criminal conduct. Such conduct is not at issue here, where defendant purchased the shares from their owner. Defendant's experts do not provide any outside opinion on these points. Nonetheless, since their statements are more in agreement with the court's research on Mexican law than the statement of plaintiffs' expert, they are more

persuasive. There is a difference between New York and Mexican laws related to constructive trusts and unjust enrichment and, applying Mexican law, plaintiffs have no cause of action to impose a trust or for unjust enrichment by itself.

Regarding conversion, Loperena cites to Article 1910, the general law regarding wrongs, to argue that Mexico recognizes a claim for conversion. He also says that the Code of Civil Procedure provides a mechanism for recovery of property. Article 4 of the Code provides that a person who is not in possession of his property has a claim against the possessor. Loperena argues that the New York law is not materially different from Mexico's.

In New York, conversion is the unauthorized assumption and exercise of the right of ownership over property belonging to another to the exclusion of the owner's rights (*Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [1st Dept 2006]). The person claiming conversion of property must show that he or she exercised ownership, possession, or control over the property before the conversion (*id.*).

Vargas and Abascal say that Mexico does not recognize a cause of action for conversion. Vargas says that Article 1910 has been limited, in practice, to personal injury cases and does not apply to commercial transactions. Abascal says that the Mexican action to recover property requires that the person making the claim be the legal owner of the property. Here, the Mexican government owned the shares that plaintiffs are claiming should have been transferred to them. They therefore had no ownership rights in those shares so as to claim the shares as their property.

One commentator has noted that the Anglo-American distinction between legal ownership rights and equitable rights is completely foreign to Latin American legal systems (Figueroa, at 725). In Latin American civil law, both legal and equitable rights are consolidated

in an absolute ownership right from the onset (*id.*). Civil law systems "define property more strictly and subjects it to a numerus clausus--such that 'property' exists only when created by law" (Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 NYU. J Intl L & Politics 109, 131 [29 NYUJILP 109] [Fall 1996-Winter 1997]).

Therefore, under Mexican law, although plaintiffs had some contractual rights related to the shares, they did not have an ownership right that would give rise to a conversion claim.

Punitive damages, which plaintiffs are seeking, are also not recognized in Mexico (Soltero, at 146).

Plaintiffs' Cross Motion to Strike

Plaintiffs cross-move to strike portions of the declaration of Joan Marie Prior, general counsel and senior vice president of defendant, and portions of Abascal's affidavit.

Plaintiffs allege that paragraphs 3 through 29 of Prior's declaration are based on second-hand knowledge, and that Prior fails to identify the sources of her information. They argue that Exhibit 11, a translated copy of the Existing Shareholders Agreement, should also not be considered because the translation provided by Prior differs from a translation previously submitted to the court which is attached to defendant's instant motion to dismiss at Exhibit 15. It is alleged that the translation attached by Prior at Exhibit 11 is more favorable to defendant than the previous one attached to defendant's motion at Exhibit 15. Plaintiffs also argue that Abascal's testimony should be stricken because he fails to attach copies of the Mexican laws that he discusses.

Defendant submits a copy of applicable Mexican laws, resolving the cross motion in

regard to Abascal's testimony. In regard to the translation, defendant withdraws the translation attached to the declaration and will cite only to the translation at Exhibit 15 in the future. The motion should be denied in regard to Abascal's testimony and the translation.

Defendant correctly points out that most of the statements in the Prior declaration are supported by citations to the complaint or to the documents attached to the declaration. The court finds that only paragraphs 20, 21, 23, and 30 or portions thereof are unsupported.

Paragraph 20 states that the Mexican government was given ultimate responsibility for determinations regarding the eligibility of the shareholders to receive GFI shares. Paragraph 21 states that the shareholders were ultimately found not eligible. Paragraph 23 states that the accounting firm KPMG issued a report finding that the shareholders were not entitled to receive any portion of the 36% of GFI's equity.

Paragraph 23 is attributed to paragraph 181 of the complaint, but the complaint alleges that defendant manipulated KPMG's figures. The complaint does not agree with the implication that KPMG's report was correct. Paragraphs 20 through 23 raise factual issues regarding whether defendant or another was responsible for determining plaintiffs' eligibility to receive the shares. Since the determination in this case may rest on that very question, the motion to strike paragraphs 20 through 23 should be granted.

Paragraph 30 states that at least 17 of the plaintiffs have brought suit in Mexico against GFI or the Mexican authorities and that all such challenges have been unsuccessful. Plaintiffs take issue with this statement. Defendant does not produce any evidence to the contrary, so paragraph 30 should be stricken.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion to dismiss based on act of state and international comity is denied and it is further;

ORDERED that the motion to dismiss for failure to state a cause of action is granted except for the breach of contract claim, and it is further;

ORDERED that the cross motion is granted to the extent of striking paragraphs 20 through 23 and 30.

This shall constitute the Order and Decision of the Court.

Dated: August 8, 2008

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.

FILED
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