

*To Be Argued By:*  
PHILIP L. GRAHAM, JR.

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# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

—♦♦♦—  
RITA MARIA SANCHEZ DE HERNANDEZ, ET AL.,

*Plaintiffs-Appellants,*

—against—

BANK OF NOVA SCOTIA a/k/a SCOTIABANK,

*Defendant-Respondent.*

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**BRIEF FOR DEFENDANT-RESPONDENT**

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## INTRODUCTION

Defendant-Respondent Bank of Nova Scotia (“BNS”) submits this brief in opposition to the appeal of Plaintiffs-Appellants Rita Maria Sanchez de Hernandez, et al. (“Plaintiffs”). This Court should affirm the lower court’s decisions (1) granting BNS’s motion for summary judgment on Plaintiffs’ contract claim, (2) dismissing Plaintiffs’ claim for unjust enrichment under Mexican law, and (3) denying Plaintiffs’ motion for leave to file a Fifth Amended Complaint to add a cause of action for unjust enrichment under Mexican law.

In the alternative, this Court should affirm the lower court’s grant of summary judgment on grounds raised below but not reached by the court, namely that (1) BNS is not a party to the Cleanup Guidelines—the only agreement Plaintiffs actually allege was breached<sup>1</sup>; (2) BNS undertook no duties to Plaintiffs under the Cleanup Guidelines; (3) there is no evidence that BNS engaged in the conduct alleged to be a breach; and (4) when corrected for two plain errors in her work, the analysis of Plaintiffs’ own expert demonstrates that Plaintiffs were not entitled to recovery.

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<sup>1</sup> The Cleanup Guidelines has also been referred to by the parties as the “Existing Shareholder Agreement” or “ESHA.”

## **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

### **On Plaintiffs' Appeal:**

1. Was the lower court correct in holding that Plaintiffs' contract claim accrued at the time of the alleged breach in March 2000, at which time at least nominal damages would have been available to Plaintiffs and thus all of the elements necessary to maintain a cause of action were present?

This Court should answer this question in the affirmative.

2. Was the lower court correct that BNS's failure to correct allegedly false loan collection information provided in March 2000 is properly viewed as a failure to cure and not an "ongoing" or "continuous" violation?

This Court should answer this question in the affirmative.

3. Should this Court permit Plaintiffs to characterize the March 2000 conduct as an anticipatory repudiation for statute of limitations purposes where (i) Plaintiffs did not raise the argument below, (ii) Plaintiffs have repeatedly elected to treat the conduct as a breach, and (iii) the alleged conduct, if proven, would constitute a breach as of March 2000 and not merely a repudiation?

This Court should answer this question in the negative.

4. Was the lower court correct in holding that Plaintiffs failed to state a cause of action for unjust enrichment under Mexican law and in

subsequently denying them leave to amend their Complaint because the issue had already been fully briefed and rejected on the merits?

This Court should answer this question in the affirmative.

**On BNS's Alternate Grounds for Affirmance:**

5. Should this Court hold that Plaintiffs' contract claim fails under applicable Mexican law because (i) BNS was not a party to the Cleanup Guidelines, the only agreement alleged to have been breached, and (ii) BNS had no duties to Plaintiffs under the Cleanup Guidelines and no legal liability for the alleged conduct of employees of Grupo Financiero Inverlat ("GFI")<sup>2</sup>?

This Court should answer these questions in the affirmative.

6. May the Court affirm on the following alternate grounds: (i) that there is no evidence that BNS engaged in the conduct alleged to have constituted a breach, and (ii) the analysis of Plaintiffs' own expert demonstrates that Plaintiffs were not entitled to a recovery and therefore can have suffered no injury?

This Court should answer these questions in the affirmative.

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<sup>2</sup> Except where otherwise noted, the term "GFI" refers to both the parent company, Grupo Financiero Inverlat, and its commercial bank subsidiary, Banco Inverlat.

## COUNTER STATEMENT OF THE NATURE OF THE CASE

Plaintiffs' statement of the nature of the case is misleading and incomplete. Although BNS will correct some of their misstatements here and elsewhere in this brief, we also show that the facts actually necessary to decide this appeal are established in the present record, principally by a plain reading of the written contracts before this Court.

### A. Factual Background

#### 1. GFI and the Mexican Financial Crisis

In 1992, BNS acquired about 5% of the shares of GFI as part of the Mexican Government's program to privatize the commercial banking industry. (Record on Appeal ("R.") 3668.) The remaining shares were purchased by substantial Mexican investors. (R.3798.)

Beginning in December 1994, a steep devaluation of the Mexican peso and sky-rocketing interest rates led to the deterioration and in many cases the failure, of banks across Mexico.<sup>3</sup> (R.2891, 5237.) The capital position of Banco Inverlat deteriorated so significantly that it needed substantial new capital in order to survive. (R.2891, 5237.)

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<sup>3</sup> Several Mexican Government agencies referred to in this brief played key roles during the Peso Crisis. The *Comisión Nacional Bancaria y de Valores* ("CNBV") was responsible for the day-to-day supervision of Mexican financial institutions. The *Fondo Bancario de Protección al Ahorro* ("FOBAPROA") was designed to protect the savings of bank depositors, to support distressed Mexican financial institutions, and to manage the affairs of insolvent banks. In 1999, the *Instituto para la Protección al Ahorro Bancario* ("IPAB") succeeded to all the rights and obligations of FOBAPROA. (R.5237-38.)

**2. BNS and the Mexican Shareholders Negotiate with the Mexican Government on Separate Tracks and Conclude Separate Agreements.**

In December 1995, the Mexican Government lent GFI 6.5 billion Mexican pesos (approximately USD \$857.5 million) through FOBAPROA.

(R.3872.) At about the same time, BNS agreed to resume previously terminated negotiations and to propose terms for a further investment in GFI. (R.5156, 5158, 5110-11.) Those negotiations, in which the Mexican shareholders did not participate, ultimately led to a “Commitment Letter,” dated February 15, 1996 (“February 1996 Letter”), pursuant to which BNS agreed to invest US \$175 million in exchange for securities ultimately convertible into a 55% interest in GFI. (R.3948, 5554-55.)

Contrary to Plaintiffs’ suggestion (Brief for Plaintiffs-Appellants (“Pl.”) at 5 n.1), the February 1996 Letter was not a binding operative agreement. Among other things, it was subject to BNS Board approval and to a series of conditions that had to be met to the satisfaction of BNS. (R.5488-89.) The letter contemplated that before BNS made its investment, a series of formal binding agreements would be entered among interested parties setting out their respective rights and obligations. In any event, contrary to Plaintiffs’ claims, the February 1996 Letter does not contain an undertaking by BNS to manage GFI. (*See* pp. 49 & n.24, *infra*.)

Also in this time period, the Mexican shareholders were negotiating separately with the Government for the right to regain a portion of their former GFI equity. (R.3104-05, 5170, 5172, 5174.) These separate negotiations, in which BNS did not participate (R.5238, 5091, 5093), led to the Cleanup Guidelines agreement (R.4029) discussed in Section 4 below.

**3. The July 1996 Transaction: All the Shares of GFI Are Cancelled and the Bank Is Recapitalized by the Mexican Government.**

In late July 1996, all outstanding GFI shares were cancelled, thereby eliminating the equity interest of the existing shareholders of GFI. (R.4111.) As part of the subsequent recapitalization of GFI, BNS then made the investment in GFI contemplated in the February 1996 Letter, entering into the July 24, 1996 Securities Purchase and Sale Agreement (the “SPA”) with the Mexican Government, acting through FOBAPROA and CNBV. (R.4190.) Under the SPA, BNS invested \$175 million in GFI, receiving in return common stock representing 10% of the equity of GFI and bonds convertible into an additional 45%. (R.4198.)

The SPA appended and referred to a number of other agreements executed in July 1996 in connection with the recapitalization of GFI. (R.4196-97.) Each of these agreements had its own detailed provisions setting out the rights and obligations of the contract parties. (R.7627-29.) BNS signed and was identified as a party to only three of these agreements: (i) the SPA (R.4190), (ii) the July 26,

1996 Shareholders Agreement (which governed the shareholder relationship between BNS and the Government and is not at issue here) (R.3698), and (iii) the Technical Services Agreement (the “TSA”) (R.4371).

The TSA was an agreement among BNS, GFI and Banco Inverlat in which BNS agreed, among other things, to second a number of BNS employees to provide administrative assistance to GFI. (R.4373-74.) Plaintiffs wrongly contend that the terms of the TSA constituted an agreement by BNS to manage GFI, and to do so for the benefit of Plaintiffs. (Pl. at 5-6.) As discussed in detail at pages 46-50, *infra*, the claim that BNS was to manage GFI is rebutted by a careful review of the terms of the TSA.

#### **4. The Cleanup Guidelines**

On July 18, 1996, a few days before the agreements described above were executed, GFI, the CNBV and FOBAPROA entered into the Cleanup Guidelines, which set out the terms on which the former shareholders of GFI (the “Former Shareholders”) might receive new GFI shares. (R.4029.) BNS did not sign this agreement and is not identified in it as an obligor of any kind.

Under the Cleanup Guidelines, Former Shareholders who were “eligible” were to receive 9% of their prior shareholdings. The term “eligible” is defined by reference to three criteria relating to a Former Shareholder’s prior conduct and the repayment status of his or her loans from Banco Inverlat. (R.4030

at 2.1-2.2, 2.29-2.41.<sup>4</sup>) Former Shareholders who were “eligible” could also receive up to an additional 36% of GFI equity in proportion to the extent that the debt owed by GFI to FOBAPROA was reduced over a period that ended on July 31, 2000. (R.4031 at 3.9-3.32.)

Plaintiffs assert (*e.g.*, Pl. at 4) that in the Cleanup Guidelines BNS “agreed that the process of cleaning up the bank was, in part, for the benefit of the Existing Shareholders.” Nothing on the cited page or anywhere else in the agreement, however, says any such thing—and of course BNS was not even a signatory to the agreement. Plaintiffs also assert that they “agreed to relinquish their GFI stock, but only in return for Scotiabank’s agreement to manage the bank, in part for their benefit.” (Pl. at 4-5.) But they provide no record cite for this claim, and none exists.

## **5. The KPMG Report**

Even before the July 1996 closing, BNS and the Mexican Government had begun discussing an Alternate Plan, mentioned in the Cleanup Guidelines (R.4034 at 6.20), whereby Banco Inverlat would retain all of its assets, instead of transferring certain non-performing loans to a Recovery Trust provided under other agreements. (R.5089-90.) These discussions about the Alternate Plan, referred to

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<sup>4</sup> To facilitate citation to the Cleanup Guidelines, line numbers have been added to the certified translation. The translation is cited in decimal form (*e.g.*, page 1, line 3 of the translation is cited as “R.\_\_\_ at 1.3”).

as Model B, continued after the July 1996 closing and extended over several years. (R.4454, 4465.) Finally, in March 2000, after IPAB succeeded FOBAPROA as the responsible government agency, IPAB voted to approve the switch to Model B and a discussion paper was then signed by IPAB and BNS memorializing their decision. (R.4562-64, 4600.)

Under the Cleanup Guidelines, the Government needed the consent of the Chairman of GFI in order to proceed under Model B. (R.4034 at 6.28-6.29). This in turn required an analysis of whether that switch would “decrease[] the rights of the eligible shareholders.” (R.4034 at 6.27-6.28.) To determine this, in March 2000, Alberto Miranda of GFI asked the accounting firm Cárdenas Dosal Peat Marwick (“KPMG”) and KPMG partner George (Rae) Scanlan to finalize what is referred to as the KPMG Report.<sup>5</sup> (R.5242, 5104.) Mr. Scanlan then updated a spreadsheet he had developed in 1997 using new information supplied by GFI employees. (R.5116, 5147, 5242, 4584.) There is no claim—and nothing in the record indicates—that in this time period Mr. Scanlan spoke with anyone from BNS about these matters.

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<sup>5</sup> KPMG had originally been selected by the CNBV in September 1997 to analyze prospectively the likely effect of Model B on the Former Shareholders’ rights to additional shares under the Cleanup Guidelines. (R.4505, 5167-68, 5175, 5178.) Mr. Scanlan’s draft report in 1997 had stated that under the “most probable” projections, the Former Shareholders would not recover any additional shares. (R.4482, 5147.)

On March 27, 2000, KPMG issued its final report finding that, under the Cleanup Guidelines formula, the Former Shareholders were not entitled to receive any portion of the 36% of GFI equity owned by IPAB. (R.4613; *see also* R.5135-36.) Also on March 27, 2000, as provided in the Cleanup Guidelines (R.4034 6.27-6.29), the Acting Chairman of GFI, Carlos Muriel, approved the change to Model B (R.4628, 5127, 5129, 5241) and the following day reported his approval to GFI's Board of Directors (R.4635.)

Plaintiffs assert that loan collections during the cleanup period were highly successful and that BNS breached a supposed obligation to the Plaintiffs under the Cleanup Guidelines by participating in providing understated loan collection information to KPMG in March of 2000. (Pl. at 7-10.) Plaintiffs' claims regarding loan collections are hotly contested factual issues that need not be reached to decide any of the issues before this Court. We note nonetheless that Plaintiffs' assertions about the unqualified success of the collections effort are plainly wrong. GFI's audited financial statements—the accuracy of which was accepted by Plaintiffs' expert (R.5023-24)—confirm that GFI suffered losses in every quarter during the relevant period (1996-2000) (R.7680 ¶ 31; R.7679-80). Because under the Guidelines, the debt to FOBAPROA was defined under Model B as the sum of these growing losses (R.5284 at 6.16-25), it was not possible for GFI to have reduced its debt to the Government—which was the essential

condition to a recovery by Plaintiffs under the Guidelines. (R.4031 at 3.9-3.11.)

And in fact GFI's debt to the Government was never substantially reduced.

(R.7680 ¶ 31.)

**6. GFI Converts Its GFI Debt to Equity and Subsequently Purchases an Additional 36% of GFI Equity at Public Auction.**

On November 29, 2000 BNS entered into an agreement (the "2000 Agreement") with IPAB, GFI and Banco Inverlat by which BNS exercised its right to convert its bonds, increasing its equity stake in GFI to 55%. (R.4703.) IPAB then decided to sell its remaining 36% equity interest in GFI through a public bid process. (R.4771.) On April 28, 2003, IPAB declared that BNS was the successful bidder (R.4773-74), and on April 30, 2003, BNS purchased the 36% block of GFI's equity from IPAB for \$325 million (R.4784).

**B. Proceedings Below**

Plaintiffs filed suit against BNS on May 1, 2006 asserting claims for breach of fiduciary duty, fraud, negligent misrepresentation, conversion and for imposition of a constructive trust. (R.152-55 ¶¶85-108.) They amended their complaint in August 2006 to add a claim that BNS tortiously interfered with the Mexican Government's obligations under the Cleanup Guidelines. (R.182 ¶175.)

On March 23, 2007, the lower court dismissed three of the claims—fraud, negligent misrepresentation and tortious interference with contract—as time-

barred. (R.900.) With regard to the tortious interference claim, the lower court also concluded—without benefit of briefing or argument from either party—that BNS could not, in any event, be charged with having tortiously interfered with the Cleanup Guidelines because it should be deemed a party to that agreement. The court reached this conclusion even though BNS was not a signatory to the Cleanup Guidelines and was not identified in the contract as party to it, on the basis that the agreement was incorporated by reference and appended to the SPA, to which BNS was a party. (R.899-90.)

While discovery proceeded, BNS moved to dismiss the remaining claims. (R.928, 2478.) The parties then completed discovery, and on May 15, 2008, Plaintiffs filed their Note of Issue. (Pl. at 13.)

On August 8, 2008, the lower court dismissed all the remaining claims—breach of fiduciary duty, constructive trust and conversion—for failure to state a cause of action under applicable Mexican law.<sup>6</sup> Rather than dismiss the case, however, the court *sua sponte* permitted assertion of a new claim for breach of contract. (R.53, 59.)

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<sup>6</sup> Plaintiffs assert that prior to this motion both parties had “relied upon” New York rather than Mexican law. (Pl. at 12.) This assertion is misleading. Although BNS had properly relied on forum statute of limitations law, it had also served a notice of intent to rely on Mexican law on May 8, 2007 (R.3142), and when it moved to dismiss for failure to state a cause of action, it did so under Mexican law (R.928, 2478). Plaintiffs responded with Mexican law expert submissions (R.1534, 3024), and they do not appeal the lower court’s finding that Mexican law applies to their claims (R.45).

On October 22, 2008, Plaintiffs then filed their Fourth Amended Complaint (the “Complaint” or “FAC”) to assert a contract claim. The FAC alleges that BNS was a party to the Cleanup Guidelines and the Plaintiffs were either parties or third-party beneficiaries. It is alleged that BNS breached that agreement by “providing false information the Mexican Government with respect to the collection of troubled loans and allowing the Mexican Government to act on the false information Scotiabank provided.” (R.2900-01 ¶¶150, 154.)

Plaintiffs also requested leave to amend their complaint a sixth time to add a claim for unjust enrichment under Mexican law. The court below denied the request, agreeing with BNS that it had already ruled as part of its consideration of their constructive trust claim, that Plaintiffs had failed to state a claim for unjust enrichment under Mexican law. (R.3559.)

In December 2008, BNS moved for summary judgment on the newly pleaded contract claim on the grounds that (1) the claim is untimely because the only alleged breach occurred more than six years before even the original complaint in the action; (2) BNS is not a party to the Cleanup Guidelines; (3) BNS had undertaken no duties under the Cleanup Guidelines; (4) there is no evidence that BNS engaged in the alleged breach, namely the making of false statements to the Mexican Government; and (5) when corrected for two plain errors, the analysis

of Plaintiffs' expert demonstrates that Plaintiffs were not entitled to recovery under the Cleanup Guidelines. (R.3585, 7286.)

Finding that the only breach alleged by Plaintiffs—the “supplying of false information” to KPMG—occurred in March 2000 and thus more than six years prior to the filing of the original complaint, the court below held that Plaintiffs' contract claim was untimely and dismissed the Complaint. (R.7727.) The court did not reach BNS's other grounds for dismissal. (R.7729.)

## **ARGUMENT**

### **I. The Lower Court Correctly Decided that Plaintiffs' Contract Claim Was Untimely.**

On appeal, Plaintiffs argue that the lower court's decision on statute of limitations should be reversed for three reasons.

*First*, Plaintiffs argue that the lower court misapplied the rule laid down in *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402-03 (1993), that contract claims accrue upon breach. Plaintiffs claim that because they had not yet been found eligible to receive shares, they could not have sued at the time of the alleged breach in March 2000 and that their claim was tolled until 2004 when eligibility determinations were made by the Mexican Government. (Pl. at 24-25.) This argument is virtually *identical* to that *rejected* by the Court of Appeals in *Ely-Cruikshank*. As the Court held in that case, “[s]ince nominal damages are always available in breach of contract actions, all of the elements

necessary to maintain a lawsuit and obtain relief in court were present at the time of the alleged breach.” *Ely-Cruikshank*, 81 N.Y.2d at 402. Similarly here, there was nothing to stop Plaintiffs from suing BNS at any time after March 2000. All they had to do was allege that they were entitled to shares, plead the supposed breach and, if they were unable to identify other damages, assert a claim for nominal damages.

*Second*, Plaintiffs assert that the lower court erred in holding that they had alleged only a single breach of contract occurring in March 2000. Plaintiffs argue instead that BNS continuously breached an ongoing “duty to clean-up GFI and Banco Inverlat” up until 2004 when it “allow[ed] the Mexican Government to act on the false information” it had provided. (Pl. at 28, 29.) Plaintiffs, however, point to no contractual undertaking—and none exists—by which BNS owed Plaintiffs any duties whatsoever, let alone any that could fairly be characterized as “ongoing” or “continuous” duties to “clean-up” GFI. Plaintiffs’ claim that BNS “continuously failed” to correct the information given to KPMG and “allowed” the Mexican Government in 2004 to act on false information also misapprehends the well-established distinction between a breach and the failure to cure a breach, the latter of which does not toll the limitations period.

*Finally*, Plaintiffs present a third basis for reversal, which was not argued below—that their contract claim did not accrue until BNS’s time for

performance under the Cleanup Guidelines had expired, which, they argue, occurred sometime after July 2000. On this basis, they then argue that the alleged false statements regarding loan collections were not a breach of contract after all, but an “anticipatory repudiation” of BNS’s supposed obligation of continuing performance through July 2000. (Pl. at 34-37.) As this argument presents new issues not raised below, it cannot be asserted for the first time on appeal. In any event, the argument fails on the merits, first because Plaintiffs cannot elect in this Court to characterize as an anticipatory repudiation an act that they have until now consistently labeled a breach of contract; and second, because neither the allegations of the Complaint nor the underlying facts permit characterizing the supposed conduct in March 2000 as an anticipatory repudiation. In addition, this theory fails because BNS did not owe Plaintiffs a duty of performance through July 2000 (or any other time). Finally, Plaintiffs’ contract claim, first asserted in 2008, does not “relate back” to its earlier pleadings, thus barring a claim for a breach allegedly occurring in July 2000.

**A. The Lower Court Correctly Held that Plaintiffs’ Contract Claim Accrued at the Time of Breach.**

**1. In *Ely-Cruikshank*, the Court of Appeals Rejected the Same Argument Presented Here by Plaintiffs.**

In *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, the Court of Appeals held that the statute of limitations for contract claims accrues at the time of the breach, not at the time of discovery of injury or the occurrence of damages. 81

N.Y.2d at 402-03. Plaintiffs do not challenge that well-established rule, but argue instead that because they were not found “eligible” in a Mexican administrative process until 2004, their contract claim falls within a supposed exception for cases in which a plaintiff is unable to enforce his or her claim in court until some point after the alleged breach. Plaintiffs’ argument, however, relies on the *same* reasoning and the *same* case law that the Court of Appeals *rejected* in *Ely-Cruikshank*.

In *Ely-Cruikshank*, the plaintiff real estate broker alleged that the defendant bank had secretly negotiated the sale of a building prior to terminating its contract with the plaintiff, thus depriving the plaintiff of the right to a sales commission. *Id.* at 402. The Court of Appeals held that the contract claim accrued at the time of the secret negotiations, even though the plaintiff was unaware of the breach at that time and even though no damage occurred until the sale of the building. *Id.* at 402-03.

Similarly to what Plaintiffs argue here, the dissent argued:

Plaintiff’s action for the recovery of a commission obviously could not have been maintained until the commission was due. . . . [P]laintiff’s right to a commission under the “exclusive right to sell” clause remained intact and ripened into a cause of action for breach of contract when the commission came due on the sale of the building. Prior to that time any claim to sue for commission would clearly have been subject to dismissal.

*Id.* at 406-07 (Hancock, Jr., J. dissenting). The majority expressly rejected the dissent’s position, holding that “all of the elements necessary to maintain a lawsuit and obtain relief in court” were, in fact, “present at the time of the alleged breach” because even though plaintiff’s right to a commission had not yet arisen, “nominal damages are always available in breach of contract actions.” *Id.* at 402.

Like the plaintiff in *Ely-Cruikshank* whose right to a commission depended on a further future event—namely the sale of the building in question—Plaintiffs here argue that they could not have sued in 2000 when the alleged breach occurred because the shares to which they lay claim were not really owed to them until the Mexican Government determined in 2004 who was eligible to receive them.<sup>7</sup> (Pl. at 24.) Just like the plaintiff in *Ely-Cruikshank*, however, Plaintiffs’ argument fails because, upon the alleged manipulation of loan collection records in March 2000, Plaintiffs could have sued for breach of contract for which nominal

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<sup>7</sup> Plaintiffs rely upon (Pl. at 18-19) many of the same cases relied upon by the Appellate Division and the dissent in the Court of Appeals, but whose applicability was rejected by the majority: *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169 (1986); *Jacobus v. Colgate*, 217 N.Y. 235 (1916); *Cary v. Koener*, 200 N.Y. 253 (1910); and *Roldan v. Allstate Insurance Co.*, 149 A.D.2d 20 (2d Dep’t 1989). Plaintiffs also rely heavily on *Edlux Construction Corp. v. State of New York*, 252 A.D. 373 (3d Dep’t 1937), *aff’d* 277 N.Y. 635 (1938), which they say was cited approvingly in *Ely-Cruikshank*. (Pl. at 19.) However, *Edlux* was cited by the majority in *Ely-Cruikshank* merely for the well-accepted proposition that contract claims accrue at breach. 81 N.Y.2d at 402. The proposition in *Edlux* on which Plaintiffs seek to rely here—that contract claims do not begin to run until a plaintiff is first enabled to bring his action—was only cited in the dissenting opinion in *Ely-Cruikshank*, *id.* at 408, and has not been relied on by any New York court since then.

damages, at a minimum, would have been available.<sup>8</sup> The date in 2004 on which the eligibility determinations were made is more properly characterized as the date on which Plaintiffs allegedly felt their injury (*i.e.*, failed to receive the shares) and is therefore not the date from which the limitations period should be measured.

*Ely-Cruikshank*, 81 N.Y.2d at 402.<sup>9</sup>

**2. Plaintiffs Could Have Sued BNS Any Time After the Alleged Breach in March 2000.**

Nothing in the Cleanup Guidelines—the agreement upon which Plaintiffs base their claim—makes a declaration of eligibility by a government-appointed administrator a condition of suit against a third party. It simply states that “eligible” Former Shareholders will receive shares. (R.4030 at 2.1.) The agreement then sets out the factual predicates of eligibility, all of which relate to the status of the Former Shareholders’ loans and their prior conduct in relation to Banco Inverlat, and all of which are to be measured as of November 30, 1996. (R.4030 at 2.28-2.41.) None of these factual predicates is dependent upon

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<sup>8</sup> In addition to seeking nominal damages, under applicable Mexican law, once an obligor has breached a duty, an aggrieved party to a breached contract has the immediate right to demand that another person perform the required acts at the obligor’s expense. (Federal Civil Code of Mexico (“FCC”) Article 2027.)

<sup>9</sup> The 2004 date may represent the moment when the Mexican government agency, IPAB, breached an alleged obligation to Plaintiffs to deliver shares, but such a breach, if it occurred, is wholly distinct from any supposed breach by BNS, which indisputably had no duty to *deliver* shares to anyone. Any allegation that BNS *caused* or *allowed* the Government not to deliver the shares in 2004 is nothing more than a claim of tortious interference with contract, a claim that was previously dismissed as time-barred by the lower court (R.899) and which Plaintiffs do not challenge on appeal.

adherence to any particular administrative determination; and nothing in the agreement prevents immediate recourse to the courts to seek redress as against BNS for any alleged breach.

There was thus nothing to stop Plaintiffs from suing BNS at any time after March 2000; all they had to do was allege that they were entitled to shares and then plead the supposed breach. And indeed, when Plaintiffs did sue, they did not allege that they had been *declared* eligible—or even that they *were* eligible—but simply that they were entitled to recover shares and that BNS was somehow at fault for preventing them from achieving that recovery. (R.155 ¶¶107, 108.)

That there was no need for Plaintiffs to plead a finding of eligibility in order to commence litigation is further demonstrated by the fact that by the time they brought suit, nearly half the plaintiffs who sued BNS in New York (and who remain parties to this appeal) had already been found in Mexico not to be entitled to receive shares. This did not deter them in the slightest; indeed, sixteen plaintiffs who had been barred in Mexico from receiving any GFI shares answered interrogatories and then appeared for deposition in this case, all of them insisting they were entitled to shares despite those determinations. (SR.16-17, 158, 164.) It was only when Plaintiffs needed an excuse for not having sued within six years of the alleged breach in 2000 that it became useful to them to claim that a finding of eligibility by the Mexican government was a prerequisite to suit.

### Avoiding analysis of the language of the Cleanup Guidelines

Plaintiffs argue instead that BNS has itself said that eligibility is a “*sine qua non*” of recovery (Pl. at 22)—which of course it is: if a plaintiff was ineligible, he or she could not have recovered shares from the Government under the Guidelines, and, as a consequence, no conduct of BNS in regard to the cleanup of GFI can have caused that plaintiff injury or compensable damage. At most, however, all this means is that to commence litigation, Plaintiffs had to allege that they met the factual criteria set forth in the Cleanup Guidelines. By doing this, they would have met the standard that Plaintiffs themselves identify—that an action may be commenced (and the statute therefore begins to run) when “all the elements of a cause of action may truthfully be alleged.” (Pl. at 18 (citing *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 26 (2d Dep’t 1989).) Any plaintiff claiming to be eligible could have met that standard in March 2000.

### **3. The Cases on which Plaintiffs Rely Are Inapposite.**

Plaintiffs’ reliance (Pl. at 19-20, 22-24) on cases involving claims brought against state or federal government entities is misplaced. Because such entities are generally immune from suit, they may only be sued once they have given their consent, and even then, only on the conditions and in the court provided. *See Edlux Const. Corp.*, 252 A.D. at 375. Until these conditions

precedent to suit are satisfied—for example, an audit by the state comptroller<sup>10</sup> or a final decision on a claim by a federal administrative body<sup>11</sup>—no court possesses jurisdiction over the case. This is not analogous to the situation here. BNS is not immune from suit, and this Court has jurisdiction over the claims asserted.

Furthermore, Plaintiffs’ cases involve exhaustion of administrative remedies regarding the *same* claim against the *same* entity that subsequently became the subject of the suit. The suits addressed in those decisions were to overturn a prior administrative decision, not to assert a separate cause of action against a different party. Obviously, the plaintiffs in those cases could not have sued to overturn a prior administrative decision until that decision had been made—which was precisely the rationale of the cases cited.<sup>12</sup> Here, Plaintiffs are not suing a governmental entity that had a mandated procedure for claims against the government, nor are they suing to overturn a prior administrative decision.

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<sup>10</sup> *City of New York v. State*, 40 N.Y.2d 659, 668 (1976); *Edlux Const. Corp.*, 252 A.D. at 375.

<sup>11</sup> *Chambers v. United States*, 417 F.3d 1218, 1225 (Fed. Cir. 2005); *Friedman v. United States*, 310 F.2d 381, 395-96 (Cl. Ct. 1962); *Lankster v. United States*, 87 Fed.Cl. 747, 755 (Fed. Cl. 2009).

<sup>12</sup> *See Chambers*, 417 F.3d at 1225 (suit against Government did not accrue until military board rendered decision on same claim); *Friedman*, 310 F.2d at 395-96 (same); *Lankster*, 87 Fed. Cl. at 755 (suit against Government did not accrue until Department of Education took action on student’s application involving same claim).

Rather, they have sued BNS, a private party, for an alleged independent breach of contract.<sup>13</sup> The cases cited by Plaintiffs are therefore irrelevant.<sup>14</sup>

**B. The Lower Court Correctly Held that the Statute of Limitations Was Not Tolled by any Supposed “Ongoing” or “Continuous” Contractual Obligations or Breaches.**

**1. BNS Owed No “Ongoing” or “Continuous” Duties to Plaintiffs.**

Throughout their brief, Plaintiffs assert, without record support, that BNS had ongoing duties to (1) “clean-up GFI and Banco Inverlat, in part, for the benefit of the eligible shareholders,” (2) “provide accurate records and to act in good faith in connection with [Plaintiffs’] stock,” and (3) “record and account for the collections of [ ] loans.” (Pl. at 28, 33, 36.) The reason Plaintiffs cite no operative contractual language for these claims is that none exists. As discussed more fully below, nothing in the Cleanup Guidelines provides that BNS—a non-signatory—had any such duties. And the Plaintiffs were not parties to, or third

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<sup>13</sup> Another of the agreements executed in July 1996—the Banco Union Trust Agreement—sets out an administrative process pursuant to which eligibility determinations were to be made. (R.4046.) Just as administrative exhaustion in the cited New York cases was a condition only to suit against the State on the same claim, so this administrative process was, at most, a condition precedent to a claim against IPAB. For this same reason, it is irrelevant that in its briefs below regarding the act of state doctrine (quoted by Plaintiffs at Pl. 21, 22) BNS pointed out that Plaintiffs’ right to receive shares from the Government was conditioned upon their eligibility. Although Plaintiffs’ right to sue IPAB may turn on establishing eligibility in Mexico, this has nothing to do with whether Plaintiffs could have sued BNS in New York for the independent breach that they allege occurred in March 2000.

<sup>14</sup> Other cases cited by Plaintiffs address tolling the statute of limitations pursuant to CPLR § 204(a) because of a court order or statutory prohibition staying the case. (Pl. at 18-19 (citing *Barchet v. New York City Transit Auth.*, 20 N.Y.2d 1, 5 (1967); *Giblin v. Nassau County Med. Ctr.*, 61 N.Y.2d 67, 74 (1984); *Roldan*, 149 A.D.2d at 32).) Plaintiffs do not assert—nor could they—that any such court or statutory prohibition stayed commencement of this action.

party beneficiaries of, any of the agreements that governed the reorganization of GFI. (See pp. 44, 51-53, *infra*.) Because BNS had *no* contractual duties to Plaintiffs whatever, it cannot have owed any continuing obligation of the sort that would call for application of the narrow exception (section I.B.2, *infra*) to the rule that contract claims accrue at breach.

**2. The Failure to Cure a Breach Does Not Toll the Statute of Limitations.**

Plaintiffs argue that their claim is not time-barred because, after allegedly supplying false information to KPMG in March 2000, BNS continuously breached its obligations by “failing to supply accurate collections information” and “allowing the Mexican Government to act on the false information.” (Pl. at 9, 29.) This argument ignores the well-established distinction between a breach and the failure to cure a breach. Indeed, on Plaintiffs’ theory here, the Court of Appeals in *Ely-Cruickshank* should have said that once defendant Bank of Montreal had had secret negotiations in violation of the brokerage contract, the statute was tolled by its continuing duty not to take advantage of those secret negotiations by selling the building and failing to pay a commission. The Court of Appeals rejected any such notion and this Court should do likewise.

Here, the only actual breach that Plaintiffs plead is manipulation of loan collection information provided to KPMG, which they concede in their interrogatory answers occurred on or before March 28, 2000. (R.2902, ¶154;

R.5006-07.) The failure thereafter to correct this supposedly false information, or the failure to prevent a third party from acting upon it, is not an independent breach and does not start the statute of limitations running anew. *First American Title Ins. Co. of New York v. Fiserv Fulfillment Services., Inc.*, 2008 WL 3833831 at \*2-3 (S.D.N.Y. Aug. 14, 2008) (under New York law claim accrued when defendant first failed to record mortgages; subsequent continuous failure to record was not a further or continuing violation); *see also Seghers v. Olympia Capital*, 2009 WL 3866338 at \*14 (Sup. Ct. New York Cty. Oct. 28, 2009) (continuing failure to put required insurance in place was not a separate breach of contract). Any supposed failure to cure is merely “the continuing effect[] of earlier unlawful conduct,” which does not toll the limitations period. *Selkirk v. State*, 249 A.D.2d 818, 819 (3d Dep’t 1998).<sup>15</sup>

Because Plaintiffs fail to allege an affirmative breach within the six-year period prior to filing suit, their claim also does not fit within the “continuing contracts” theory articulated in *Airco Alloys Div. v. Niagara Mohawk Power*

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<sup>15</sup> *See also Bullard v. State*, 307 A.D.2d 676, 678 (3d Dep’t 2003) (contract claim accrued at time allegedly unlawful telephone services agreement was entered; calls pursuant to the unlawful agreement were not continuing unlawful breaches); *Welwart v. Dataware Elec. Corp.*, 277 A.D.2d 372, 373 (2d Dep’t 2000) (contract limitations period measured from date defendants first deprived plaintiff of right to shares and began diverting profits; separate cause of action did not accrue each time profits were diverted); *Roslyn Savings Bank v. Nat’l Westminster Bank USA*, 266 A.D.2d 272, 272-73 (2d Dep’t 1999) (contract claim accrued when \$1.3 million discrepancy occurred; “repetition of this discrepancy [in subsequent reports] was not a separate breach that started the claim to accrue anew”).

*Corp.*, 76 A.D.2d 68 (4th Dep't 1980). (See Pl. at 27-28.) That narrow exception permits claims for damages incurred more than six years prior only if the most recent affirmative breach (as opposed to a failure to cure) occurred within the limitations period. 76 A.D.2d at 80; see also *In re MTBE Products Liability Litig.*, 2007 WL 1601491 at \*16 (S.D.N.Y. June 4, 2007) (“continuing wrong” theory not applicable where plaintiffs failed to prove “affirmative representations” within the limitations period). Where, as here, no such separate breach is identified, *Airco* “does not allow [Plaintiffs] to reach back beyond the six-year period to assert a claim for periods before [the limitations period].” *Stahlex-Interhandel Trustee, Reg. v. Western Union Fin. Services Eastern Europe Ltd.*, 2002 WL 31359011 at \*5 (S.D.N.Y. Oct. 21, 2002).<sup>16</sup>

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<sup>16</sup> The other cases cited by Plaintiffs to support their “continuing contract” argument (Pl. at 27, 33 n.10) are also unavailing. *Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606 (1979), and *Kermanshah v. Kermanshah*, 580 F. Supp. 2d 247, 260 (S.D.N.Y. 2008), simply repeat the principle articulated in *Airco* that a subsequent affirmative breach may begin the statute of limitations running anew. *Measom v. Greenwich & Perry St. Hous. Corp.* 8 Misc. 3d 50, 52 (N.Y. App. Term 2005) turned on the defendant landlord having had continuing statutory duties and thus is completely distinguishable. See also *First American Title Ins. Co.*, 2008 WL 3833831 at \*3 n.10 (finding *Measom* “not persuasive” outside this narrow statutory context). *Stalis v. Sugar Creek Stores, Inc.*, 295 A.D.2d 939, 940-41 (4th Dep't 2002) also involved a landlord's continuing duties and is similarly distinguishable. *Lippe v. Genlyte Group, Ltd.*, 2002 WL 531010 at \*4 (S.D.N.Y. Apr. 8, 2002), is inapposite because it involved the right to quiet title, which is a “continuing right.” See also *First American Title Ins. Co.*, 2008 WL 3833831 at \*3 (noting that “the weight of New York authority is against *Lippe*”). Finally, in *Colpan Realty Corp. v. Great American Ins. Co.* 83 Misc.2d 730, 732 (Sup. Ct. Westchester Cty. 1975), the court characterized the defendant insurance agency as “in effect an ‘institutionalized substitute’ for an attorney” and thus subject to the “continuous treatment” doctrine for breaching its duty to defend plaintiff. The “continuous treatment” doctrine applies to toll the statute of limitations in cases of medical or legal malpractice, e.g., *Glamm v. Allen*, 57 N.Y.2d 87, 93 (1982), and is inapplicable here.

**C. Plaintiffs' Newly-Minted Anticipatory Repudiation Argument Is Without Merit and Not Properly Before This Court.**

On appeal Plaintiffs argue for the first time that the statute of limitations on their contract claim did not begin to run until BNS's alleged performance was due under the Cleanup Guidelines, which according to Plaintiffs, was not until "after July 31, 2000," the end of the measuring period for determining losses under the Cleanup Guidelines. (Pl. at 34, 37.) They then argue that BNS's earlier alleged "manipulat[ion] [of] the results of the accounting records furnished to the Mexican Government in March 2000" was not a breach—which is how they had previously characterized it—but a "repudiation of the contract" that gave Plaintiffs the option of suing, but did not start the statute running against them. (*Id.*) Plaintiffs' effort to re-characterize the alleged breach as an anticipatory repudiation both comes too late and is, in any event, inaccurate.

**1. Plaintiffs Waived the Argument by Not Raising It Below.**

This argument should be disregarded because it was raised for the first time on appeal. *E.g., Luby v. Babad*, 166 A.D.2d 391, 391 (1st Dep't 1990). New York courts have refused to consider statute of limitations arguments raising new arguments for the first time on appeal. *E.g., Velaire v. City of Schenectady*, 235 A.D.2d 647, 649 (3d Dep't 1997).

**2. Plaintiffs Cannot Characterize the March 2000 Conduct as Both a Breach and a Repudiation.**

In their attempt to re-characterize BNS's alleged manipulation of the KPMG Report in March 2000 as anticipatory repudiation, Plaintiffs misapprehend the purpose of the doctrine, which is to permit a plaintiff to accelerate his suit despite the general rule that he does not have a right of action until an actual breach occurs. *Rachmani v. 9 E. 96th St. Apt. Corp.*, 211 A.D.2d 262, 266-67 (1st Dep't 1995). Accordingly, the doctrine presupposes that the anticipatory repudiation is not itself a breach. *See id.* ("Once a party has indicated an unequivocal intent to forego performance of his obligations under a contract, there is little to be gained by requiring a party who will be injured to await the actual breach before commencing suit . . ."). It follows that a party cannot simply characterize a present breach as anticipatory in order to toll the limitations period until the last possible date set for performance. If "the breach is not wholly anticipatory because it involves some contractual nonperformance, the statute of limitations begins to run immediately." *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988) (citing 18 Williston on Contracts § 2027B, at 796 (3d ed. 1978) and 4 Corbin on Contracts § 989, at 967 (1951)).

**a. Plaintiffs Are Bound by their Prior Election.**

Plaintiffs have repeatedly characterized BNS's alleged manipulation of the loan records provided to KPMG in March 2000 as a breach of contract.

(E.g., R.2902, FAC ¶154 (“Scotiabank *breached the contract . . .* , which Scotiabank accomplished by providing false information to the Mexican Government with respect to the collection of troubled loans . . . .”) (emphasis added); R.5424 (“BNS *Breached Its Contractual Obligations By Manipulating The Outcome Of The KPMG Report*”) (emphasis added).) Having thus elected in the court below to treat the alleged conduct as a breach, Plaintiffs cannot now re-designate these same acts as an anticipatory repudiation in order to avail themselves of the doctrine’s attendant statute of limitations principle. *See Lucente v. IBM*, 310 F.3d 243, 258 (2d Cir. 2002) (“The non-repudiating party must . . . make an affirmative election [between a present breach and anticipatory repudiation] . . . He ‘cannot at the same time treat the contract as broken and subsisting,’ for ‘one course of action excludes the other.’”) (citing *Inter-Power of New York Inc. v. Niagara Mohawk Power Corp.*, 259 A.D.2d 932, 934 (3d Dep’t 1999)). “Once a party has elected a remedy for a particular breach, his choice is binding with respect to that breach and cannot be changed.” *Lucente*, 310 F.3d at 258-59. Accordingly, having proceeded below on a theory of breach, not anticipatory breach, Plaintiffs are bound to their election.

**b. Neither the Allegations Nor the Record Permits Characterization of the Alleged Manipulation of KPMG in 2000 as an Anticipatory Repudiation.**

Even if Plaintiffs were not bound by their prior election, the characterization of the conduct in their pleadings, interrogatory responses and briefs all make clear that the facts and theory they have alleged would, if proven, constitute a breach, and not merely a repudiation. The essence of repudiation, as opposed to breach, is a communication of *future* intent, rather than a *present* act in violation of a contract. *E.g.*, *Franconia Assoc. v. United States*, 536 U.S. 129, 143 (2002) (quoting Restatement (Second) of Contracts § 250(a) (1981) (“repudiation entails a statement or ‘voluntary affirmative act’ indicating that the promisor ‘will commit a breach’ when performance becomes due)); *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463 (1998) (same).

Here, the fundamental allegation is that in March 2000 BNS intentionally and for its own gain caused false statements to be made to KPMG and, through KPMG, to the Mexican Government. (R.2902, FAC ¶154.) If this conduct had occurred—a proposition that of course BNS rejects—then, on Plaintiffs’ theory that BNS had a duty under the Guidelines to render accurate reports (Pl. at 33), it would have constituted a breach at the time the conduct occurred. Plaintiffs offer no explanation of how BNS can have had the duty they claim it did under the Guidelines without the conduct they allege constituting an

actual breach. If intentionally causing false statements to be made to the Government was not a breach, it is impossible for the supposed breach of contract action to exist at all.

**c. Permitting Plaintiffs' Argument Would Defeat Public Policy.**

As a policy matter, permitting Plaintiffs to re-label an alleged breach as an alleged announcement of an intent to commit a future breach would allow them to evade the statute of limitations at will, and to defeat the vital policy of preventing the prosecution of stale claims. If, for example, Plaintiffs' argument were to be applied to a case where a contract required that a party exercise due care, it would dictate that a negligent act causing injury would not be a breach of that duty, but rather a repudiation of an ongoing obligation to exercise care. On this theory, almost any breach could be re-labeled a renunciation of future performance. No purpose would be served by such sophism other than to defeat the fundamental rule that the statute runs from breach and not from later events chosen by prospective plaintiffs for their own advantage.

**3. BNS Owed Plaintiffs No Duty of Performance, Either Before or After July 2000.**

Plaintiffs also argue that, because the Cleanup Guidelines provide that loan collection data through July 31, 2000 was to be included in the calculation under the Guidelines formula, BNS's performance under the contract must not have been due until some indeterminate time "after July 2000." (Pl. at 36.) Under

Plaintiffs' theory, the performance allegedly owed by BNS through that date was "to record and account for the collections of [ ] loans." (*Id.*)

As discussed more fully in Section III.A.2, *infra*, the Cleanup Guidelines do not oblige BNS to perform the accounting and recordkeeping functions upon which this theory rests. Moreover, Plaintiffs themselves point to BNS's alleged manipulation of loan records in March 2000 as the sole means through which it supposedly provided false information to the Mexican government. (*See* R.5006-07.) The argument that BNS had some future performance due after July 2000 because collections were to be included under the Guidelines formula through that date is thus merely a re-formulation of Plaintiffs' argument that BNS was under a continuing duty to correct the allegedly false collections information previously provided to KPMG. The failure to correct this supposedly false information, however, is not an independent breach and does not start the statute of limitations running anew. (*Supra* Section I.B.2.)

**4. Plaintiffs' Claim for Breach of an Alleged Duty of Performance Through July 2000 Is Untimely Because It Does Not Relate Back to the Filing of the Original Complaint.**

In their First Amended Complaint, filed on August 4, 2006, Plaintiffs alleged that BNS tortiously interfered with the Mexican Government's obligations to them under the Cleanup Guidelines. (R.182 ¶¶174-176.) This claim was then dismissed as time-barred. (R.899.) Two years later, the court permitted Plaintiffs

to interpose a claim for breach of contract (R.53), which they did in their Fourth Amended Complaint, alleging that BNS was a party to and had breached the Cleanup Guidelines. (R.2897-98, 2900-02, ¶¶142, 151, 154-155.)

Because only a stranger to a contract can be liable for tortiously interfering with it, *Koret, Inc. v. Christian Dior, S.A.*, 161 A.D.2d 156, 157 (1st Dep’t 1990), Plaintiffs’ breach of contract theory is fundamentally at odds with the tortious interference theory articulated in their earlier pleadings. Their contract claim therefore does not “relate back” to their earlier pleadings and is deemed interposed as of the filing of the Fourth Amended Complaint on October 22, 2008. *See* CPLR § 203(f). Accordingly, as BNS argued below (R.3599-00), any claim for alleged breaches occurring prior to October 22, 2002 (six years earlier)—including for alleged non-performance in or around July of 2000—is time-barred.

## **II. Plaintiffs Cannot State a Valid Cause of Action for Unjust Enrichment Under Mexican Law.**

Plaintiffs’ claim of unjust enrichment was properly rejected by the court below. *First*, Plaintiffs are wrong in saying that this fully-briefed argument was decided by the court “*sua sponte*.” *Second*, the court correctly found that Plaintiffs’ effort to replead in order to assert unjust enrichment was nothing more than a motion to reargue, which was properly rejected and is not appealable. *Third*, as a matter of applicable Mexican law a cause of action for unjust enrichment is available only in the narrow circumstances where a plaintiff is

otherwise left without a remedy in tort or contract against *anyone*, and suffered a loss (“impoverishment”) that translated directly into a gain (“enrichment”) of the defendant. On the facts alleged, no such claim is stated because under Mexican law: (i) Plaintiffs’ non-receipt of shares did not “enrich” BNS, which paid \$325 million for those shares in a legal transaction with their lawful owner; (ii) Plaintiffs were not “impoverished,” because they had a contractual remedy for their alleged loss against the Mexican Government; and (iii) even if, as alleged, IPAB’s decision not to give shares to the Plaintiffs was caused by BNS “manipulating” KPMG, that allegation fails to establish the requisite direct link required by Mexican law between Plaintiffs’ “impoverishment” (not getting shares) and BNS’s supposed enrichment.

**A. The Issue of Whether an Unjust Enrichment Claim Was Available to Plaintiffs Under Mexican Law Was Fully Briefed and Argued.**

It is not correct that the lower court denied Plaintiffs’ claim for unjust enrichment under Mexican law *sua sponte*. (Pl. at 37.) The court’s order of August 8, 2008 (R.54-56) reviewed and relied on the extensive argument by the parties (R.969, 1530-31, 2507-08) and their respective Mexican law experts directed to precisely this issue (R.1475 ¶¶77; R.1547-50 ¶¶31-37; R.2548-49 ¶¶50-53; R.2703-04 ¶¶ 64-67). The court then held that Plaintiffs have no cause of action for unjust enrichment under FCC Article 1882—the very article of Mexico’s

Federal Civil Code on which Plaintiffs relied in their arguments below (R.1530-31; R.1547-50 ¶¶31-37) and in this Court (Pl. at 38).

Plaintiffs’ assertion of a claim for unjust enrichment under FCC Article 1882 first arose—as Plaintiffs concede (Pl. at 13 n.5)—in relation to their claim for constructive trust, a necessary element of which is unjust enrichment. Attempting to prove this element, Plaintiffs expressly argued that the “Mexican Federal Civil Code . . . forbids a party who retains the property rights of another from being unjustly enriched.” (R.1530-31.) Plaintiffs’ Mexican legal expert then devoted seven paragraphs of his declaration (R.1547-50 ¶¶31-37) to supporting his opinion that “Scotiabank was unjustly enriched without legal justification as prohibited by Article 1882” when it acquired the GFI shares at issue (R.1548 ¶32).

The lower court rejected Mr. Loperena’s views, deciding that the statements of BNS’s experts, Messrs. Abascal and Vargas, were “more in agreement with the court’s research on Mexican law” and “more persuasive.” (R.55-56.)<sup>17</sup> The court then held that, “applying Mexican law, plaintiffs have no cause of action to impose a trust *or for unjust enrichment by itself.*” (R.56

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<sup>17</sup> It was proper for the lower court to conduct its own research on this subject. *See Cohen v. Gilbert*, 210 N.Y.S.2d 895 (1st Dep’t 1961).

(emphasis added).) In short, the lower court’s decision regarding unjust enrichment was not made *sua sponte*, but on a full record.<sup>18</sup>

**B. The Lower Court Correctly Denied Plaintiffs’ Motion to Amend Their Complaint to Add a Claim for Unjust Enrichment.**

**1. Plaintiffs’ Purported Motion to Amend Was, as the Lower Court Found, Actually a Motion to Reargue, the Denial of Which Is Not Appealable.**

After the lower court held that Plaintiffs had pleaded no Mexican law claim for unjust enrichment (R.55-56), Plaintiffs sought leave to amend their complaint to assert the same cause of action under the same section of the Mexican code—FCC Article 1882—upon which they already sought to rely. (R.2916-18, 3026-33, 3371-73). The lower court rejected this ploy, correctly finding that Plaintiffs were “in effect making a motion to renew and reargue.” (R.70.) The court then denied Plaintiffs’ motion. (R.70) Because the denial of a motion to reargue is not appealable, *e.g.*, *Capellan v. Marsh*, 895 N.Y.S.2d 818, 818-19 (1st Dep’t 2010), the decision below is not properly before this Court.

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<sup>18</sup> Plaintiffs quote out of context colloquy in connection with the lower court’s November 13, 2008 oral order to suggest that the court erroneously found that Mexican law “doesn’t recognize unjust enrichment at all.” (Pl. at 41 (quoting R.70).) The lower court’s actual opinion, however, specifically noted that FCC Article 1882 was the “Mexican statute on unjust enrichment.” (R.54.) In then concluding that “plaintiffs have no cause of action . . .for unjust enrichment by itself” (R.56), the court was simply finding that there was no such claim on the facts pleaded.

**2. Even if Treated as a Proper Motion to Amend, the Motion Was Correctly Denied as Futile.**

Although leave to amend a pleading should be freely granted, the court is not required to permit futile amendments. *Rappaport v. VV Publ'g Corp.*, 223 A.D.2d 515, 516 (1st Dep't 1996). The denial of a motion to amend is reviewed only for abuse of discretion. *Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404 (1st Dep't 2009).

Here, the lower court did not abuse its discretion because the parties had already had a full opportunity to present their arguments regarding unjust enrichment. (*See* R.969, 1530-31, 2507-08; R. 1475 ¶¶77; R.1547-50 ¶¶31-37; R.2548-49 ¶¶50-53; R.2703-04 ¶¶64-67.) While Plaintiffs' motion was accompanied by a new declaration on Mexican law, both that declaration and Plaintiffs' proposed amended complaint sought to assert the very same cause of action under the very section of the Mexican code that the court had already rejected. (R.2916-18, 3026-33, 3371-73.) Because that prior ruling was the law of the case, SIEGEL, NEW YORK PRACTICE § 448, permitting the proposed amendment would have been futile and the motion was properly denied. *Eg.*, *CLP Leasing Co., LP v. Nessen*, 27 A.D.3d 291, 291-92 (1st Dep't 2006).<sup>19</sup>

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<sup>19</sup> Plaintiffs suggestion (Pl. at 12-13) that they deserved another chance because until the lower court's decision made Mexican law applicable, they had been arguing under New York law is unfounded. Plaintiffs fully argued their Mexican law case in the alternative, and, in particular, their Mexican law claim for unjust enrichment. (R.1530-31.)

**C. Plaintiffs Failed to State a Cause of Action for Unjust Enrichment Under Mexican Law.**

Regardless of how Plaintiffs' motion below is characterized, neither their dismissed Second Amended Complaint, nor their proposed Fifth Amended Complaint, states a cause of action for Mexican law unjust enrichment.

**1. Unjust Enrichment Under Mexican Law**

It is undisputed that FCC Article 1882 is the source of any possible Mexican law cause of action for unjust enrichment. (R.1547-48 ¶¶32; R.2548 ¶¶50-51; R.2703 ¶65; R.3026 ¶10; *see also Morris v. LTV Corp.*, 725 F.2d 1024, 1032 (5th Cir. 1984) (applying FCC Article 1882); *Banco de Mexico v. Orient Fisheries, Inc.*, 2010 WL 221530 at \*14 (C.D. Cal. Jan. 21, 2010) (same).) FCC Article 1882 provides (in translation) that

[w]hoever becomes enriched *without justification* at the expense of another shall be obligated to indemnify the other person for his loss in the proportion of the former's enrichment.

(R.2612 (emphasis added).) According to the Mexican Supreme Court decisions proffered by Plaintiffs, to prevail under Article 1882, Plaintiffs must demonstrate: (1) that the defendant was enriched "without justification," (2) that the plaintiff was impoverished, (3) that the impoverishment of the plaintiff was a consequence of the defendant's enrichment, and (4) that "the impoverished person has no other means to obtain indemnity." (R.3099-3100, 3103-04; *see also* R.2687.)

**2. The Court Below Correctly Found that Because BNS Had Purchased the Assets at Issue from Their Lawful Owner, Plaintiffs Did Not State a Cause of Action for Unjust Enrichment.**

In rejecting Plaintiffs’ unjust enrichment claim, the court below agreed with the opinions of BNS’s experts that the acquisition of GFI shares by BNS was not enrichment “without justification” as that term is used in FCC Article 1882 because “defendant purchased the shares from their owner.” (R.55.) This conclusion was supported by the opinions of BNS experts and the lower court’s own research. Mr. Abascal provided the court with extensive citations of authority that an acquisition is not “without justification” under Mexican law where there is a legal contract to purchase the property from its lawful owner. (R.2549 ¶ 52.) Professor Vargas (a leading academic expert in Mexican law and the leading translator of the Mexican codes into English) also supported this conclusion. (R.2703-04 ¶66.) As the lower court correctly observed, the declaration of Plaintiffs’ expert addressed the subject in the abstract and did not explain how FCC Article 1882 is applied in the courts of Mexico. (R.54-55.)

**3. Plaintiffs Have No Cause of Action for Unjust Enrichment Because They Have “Other Means to Obtain Indemnity”—Here, through a Claim for Shares from the Mexican Government.**

BNS’s experts also showed that a plaintiff who has recourse to another contractual or extra-contractual cause of action to seek compensation for his alleged impoverishment cannot state a claim for unjust enrichment. (R.2548

¶51, 2687.) Plaintiffs’ claim fails on this point as well, because they are not without another remedy: if they were entitled to shares in GFI, their primary right was (and remains) a claim under the Cleanup Guidelines against the obligor under that agreement, IPAB. As Mr. Abascal explained, the sale of shares to BNS did not relieve the Government of any obligation that it had to deliver shares to the Plaintiffs if the Plaintiffs could prove entitlement to them. (R.1477-78 ¶83, 2549 ¶53.)

Plaintiffs do not dispute that if they were entitled to shares, their claim as against IPAB would continue to exist regardless of whether the shares were sold to BNS. Instead, their expert makes the obvious but irrelevant point that the proper parties to an unjust enrichment action (if there were one) would be the “impoverished” plaintiff and the “enriched” defendant. (R.3028 ¶19.) This undisputed and tautological assertion is irrelevant to the issue of whether a claim for unjust enrichment can exist under Mexican law when the “impoverished” plaintiff has other avenues of redress.

As to that critical point, not only are Plaintiffs’ experts silent, but their own authorities provide powerful support for BNS’s position. Plaintiffs’ new expert proffered two Mexican Supreme Court decisions and excerpts of two scholarly treatises as authoritative explanations of FCC Article 1882. (R.3099-3100, 3103-04, 3105, 3117; *see* R.3026 ¶11 & n.2.) Both of the Mexican Supreme

Court cases recognize specifically that one element of a claim of unjust enrichment is that “the impoverished person *has no other means to obtain indemnity.*” (R.3099-3100, 3103-04 (emphasis added); *see also* R.2687.) In other words, for an unjust enrichment claim to be available, there must be no other contractual or non-contractual cause of action available to the plaintiff. (R.2548, Abascal Decl. ¶51.) The scholarly treatises make the same point. (R.3107 ¶¶603, 3119 ¶5.)<sup>20</sup> Because it is undisputed that Plaintiffs—if they have a right to shares under the Cleanup Guidelines formula and its other terms—do have a valid claim against IPAB (*i.e.*, they do have “other means to obtain indemnity”), these cases and treatises, proffered by Plaintiffs’ own expert, establish that the court below correctly dismissed the unjust enrichment claim.

**4. Plaintiffs’ Unjust Enrichment Claim Fails Because They Do Not Plead the Requisite Link Between the Supposed Enrichment of BNS and the Supposed Impoverishment of Plaintiffs.**

Finally, Plaintiffs also failed to plead facts that if proven would establish the requisite causal link between the “enrichment” of BNS and the “impoverishment” of Plaintiffs. As Plaintiffs’ expert notes, to state a cause of action under Article 1882, “[i]t is necessary for the enrichment of one person to be the direct consequence of the sacrifice or act of the other.” (R.3109; *see also*

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<sup>20</sup> Mr. Lopez did not provide translations of these portions of the treatises. (*See* R.3107 ¶¶603, 3119 ¶5.) Translations have been provided as enclosures with BNS’s April 21, 2010 letter to the Court.

R.3027 ¶16.) BNS purchased the 36% interest in GFI from IPAB through a public auction process (R.4773-74), not through any “sacrifice” or effort of Plaintiffs. The reason Plaintiffs did not get shares was because IPAB determined that they were not entitled to them (*see* pp. 8-11, *supra*), not because BNS subsequently bought them. If BNS had not bought the shares, someone else would have, or the Government would have held them. The Plaintiffs’ alleged “impoverishment” is thus not directly linked to BNS’s alleged enrichment. (R.2549, Abascal Decl. ¶53; R.3109; *see also Morris*, 725 F.2d at 1032 (finding no claim under FCC Article 1882 because plaintiff “conferred no enrichment or benefit upon” defendant where plaintiff “was not the procuring cause of the [enrichment] . . . and that the [enrichment] would have occurred independent of [plaintiff’s] efforts”).)<sup>21</sup>

### **III. The Lower Court’s Dismissal of the Complaint Should Be Affirmed on the Alternate Grounds for Dismissal on Which Defendant Moved Below.**

In the court below, BNS moved for summary judgment on four additional grounds, each of which provides an alternate basis for affirmance. *Am. Dental Coop., Inc. v. Attorney Gen. of New York*, 127 A.D.2d 274, 279 n.3 (1st

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<sup>21</sup> Plaintiffs also argue that BNS purchased the 36% of GFI shares with the knowledge that the shares were owed to Plaintiffs by IPAB, and that purchasing the shares with such knowledge lacked “legitimacy” and therefore was “without justification.” (Pl. at 40.) But to establish a claim for unjust enrichment it is not enough to plead that the defendant has engaged in allegedly “illegitimate” conduct causing injury. The specific requirement for this particular cause of action (as opposed, for example, to a cause of action on the ground that defendant tortiously interfered with a contract) is that the “impoverishment” of the plaintiff must have been the direct consequence of the “enrichment” of the defendant. (R.2549, Abascal Decl. ¶53.) This is subject to the same infirmities discussed above.

Dep't 1987) (appellate court may affirm on any grounds raised by the appellee in the court below).

*First*, Plaintiffs' claim for breach of the Cleanup Guidelines agreement fails under applicable Mexican contract law because BNS was not a party to the contract. (*See* Point A.1 below.) *Second*, Plaintiffs' claim for breach of contract fails because BNS owed no contractual duties to Plaintiffs under that or any other contract. (*See* Point A.2 below.) *Third*, there is no evidence that BNS engaged in the conduct alleged to have constituted a breach of contract. (*See* Point A.3.a below.) *Fourth*, with the correction of two plain errors in her work, the analysis of Plaintiffs' own damages expert demonstrates that Plaintiffs were entitled to no recovery under the Cleanup Guidelines. (*See* Point A.3.b below.)

**A. Plaintiffs Cannot State a Valid Cause of Action for Breach of Contract Under Mexican Law.**

In their Complaint, Plaintiffs claim that the Cleanup Guidelines imposed a duty on BNS to act in good faith to “manage GFI,” “implement the clean up [of GFI and Banco Inverlat]” and use “reasonable care in accounting for and reporting the results of the collection efforts as to the troubled loans [of GFI].” (R.2898, 2901, FAC ¶¶143, 153). In opposing summary judgment, Plaintiffs seemingly abandoned this contention, asserting that it was the TSA that imposed a duty on BNS to “manage GFI and the bank in the clean up” and that the Cleanup Guidelines merely “reflect” such a duty. (R.5421-22.) In their papers before this

Court, Plaintiffs revert to the theory that the Cleanup Guidelines has some operative significance, arguing that BNS agreed in the TSA “to manage the bank” and that BNS then agreed in the Cleanup Guidelines “that the process of cleaning up the bank, which Scotiabank was contractually obligated to manage, was, in part, for the benefit of the Existing Shareholders.” (Pl. at 5-6.) None of these versions is correct or supportable. The plain words of contracts themselves and basic precepts of Mexican law establish that BNS was not a party to the Cleanup Guidelines and that neither the TSA nor the Cleanup Guidelines imposed on BNS the duties to Plaintiffs that they claim.

**1. BNS Was Not a Party to the Cleanup Guidelines Under Mexican Law.**

The Cleanup Guidelines is an agreement among only three parties—GFI, CNBV and FOBAPROA. Neither BNS nor any plaintiff is a signatory, nor are they identified in it as contracting parties. (*See* R.4029, 5250, Abascal Decl. ¶12.) Accordingly, BNS is not a party to that contract and can have had no obligations under it. (R.5251, Abascal Decl. ¶14.)

The fact that BNS agreed in the SPA that the Cleanup Guidelines were “an integral part” of that contract does not mean that BNS became a party to the Guidelines. (R.5250, Abascal Decl. ¶13.) There is simply no language in either the SPA or the Guidelines by which BNS undertook to become a party nor by which the actual parties purported to make BNS a party. Absent such evidence,

BNS cannot be deemed a contract party under Mexican law. (R.5250, Abascal Decl. ¶12 (“Under Mexican law, the incorporation of a contract entered among one set of parties . . . into a contract among a different configuration of parties . . . does not transform the parties to the second contract into parties to the first.”), ¶14 (citing FCC Article 1792).)

Plaintiffs’ effort to create a fact issue by asserting that a person may “consent” to a written contract without signing it, for example by agreeing to it orally or by implication (R.7179 ¶11), is beside the point. “Consent” to a contract does not by itself signify an agreement to be bound as a party or to undertake contractual obligations, but is merely an acknowledgement that the contract will operate and may proceed. (R.7329-30, Abascal Decl. ¶25; R.5250 ¶¶12-13.)<sup>22</sup>

In sum, merely agreeing that one contract may be appended to and treated as an “integral part” of another contract is not, without more, an undertaking by a non-signatory to the latter agreement to perform under it. Here there is nothing more, and thus no basis for treating BNS as a party to the Cleanup Guidelines.

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<sup>22</sup> Plaintiffs refer to the fact that in July 1996 BNS, along with the other Former Shareholders, voted to “consent” to the Guidelines. This also was not an undertaking by BNS to become a party to the contract, but merely signified approval of its terms—exactly the same approval that the other Former Shareholders signified by their vote. (See R.7329-30, Abascal Decl. ¶25.)

**2. BNS Had No Contractual Duties to Plaintiffs under Mexican Law.**

**a. BNS Owed Plaintiffs No Duties Under the Cleanup Guidelines.**

Even if BNS were deemed a “party” to the Guidelines, that agreement cannot fairly be read to impose upon BNS any obligations to anyone, much less obligations in Plaintiffs’ favor. (R.5252-53, Abascal Decl. ¶¶18-19.) This issue is ripe for determination by the Court because under Mexican law, contracts are construed strictly and literally. (R.5246-48, Abascal Decl. ¶¶6-8; STEPHEN ZAMORA ET AL., MEXICAN LAW 512 (2004) *see White v. Cont’l Cas. Co.*, 9 N.Y.3d 264, 267 (2007) (“interpretation of [unambiguous contract] provisions is a question of law for the court”).)

No provision of the Cleanup Guidelines obliges BNS to perform the duties that Plaintiffs purport to find there. (R.5252-56, Abascal Decl. ¶¶18-25.) Although the Guidelines refer in paragraphs 2 and 3 to BNS’s right to appoint a majority of the Board members of GFI and its subsidiaries (R.4029 at 1.18-1.29), that provision is phrased as a right, not an obligation—and even if it were treated as an obligation, it would at most obligate BNS to appoint Board members. (R.5252-53, Abascal Decl. ¶19.) There simply is no language anywhere in the contract that can be read as an undertaking by BNS to “implement the clean up,” to “maintain the records” of the clean up, or to “provide information about the clean up to the Mexican Government,” as Plaintiffs allege. (R.2898, FAC ¶143; *see also*

R.2897, FAC ¶141.) And there is no basis under Mexican law for constructing such an obligation out of whole cloth. (R.5246-48, Abascal Decl. ¶¶6-8.)

It is also not true that the Cleanup Guidelines “reflect” a duty by BNS to “manage GFI and the bank in the clean up.” The references to BNS’s right to designate a majority of the Board of GFI that would in turn “proceed to financially clean up the financial group” (R.4029 at 1.18-1.20, 1.22-1.29) do not reflect anything more than BNS’s right to appoint those GFI board members. To read that *right* as a *duty* not only departs from the plain meaning of the contract; it is also inconsistent with Mexican law, under which a board member’s obligations are individual and not the obligations of the entity that appointed him. (R.7321-22, Abascal Decl. ¶9.)<sup>23</sup>

Nor can Plaintiffs overcome the absence of contract provisions in their favor by referring to a general duty of good faith under Mexican law. (Pl. at 11; *see also* R.5422.) Mexican contractual duties of good faith refer at most to an obligation to perform explicit contractual duties in good faith, not to some set of unarticulated duties not set out in contractual terms. (R.5248-49, 5254, Abascal Decl. ¶¶9-10, 20.)

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<sup>23</sup> The actual right to make these appointments is established and agreed in another contract—the July 26, 1996 Shareholders Agreement between BNS, CNBV, FOBAPROA, and GFI. (R. 3972-73.) Under Mexican law, the language in the Guidelines, which merely reflects that right, cannot be interpreted to impose new or different rights or duties than those in the Shareholders’ Agreement. (R. 5253, Abascal Decl. ¶ 19 n.10.)

These conclusions are reinforced by the fact that the Guidelines were entered at the same time as the entire complex of contracts that set out the terms of the recapitalization of GFI. (*See pp. 6-7, supra.*) These contracts include hundreds of pages of detailed provisions specifying the rights and obligations of the various parties. BNS is a signatory to some of those contracts and not others, reflecting the agreements among the parties as to which contractual duties it was assuming and which not. (R.3968, 4153, 4190, 4283, 4338, 4371, 4414.) Although two of the agreements (neither signed by BNS) included loan collection and record-keeping duties, those duties were imposed only on Banco Inverlat (R.4336, 4165-66), and the “sole beneficiary” of those arrangements was expressly stated to be FOBAPROA (R.4289). Nothing in those agreements obligated BNS to carry out these duties and the very fact that the contracts specify in detail who does have such obligations rebuts any inference that they are silently imposed on BNS as well. (R.5254-56, Abascal Decl. ¶¶21-25.)

Nor can Plaintiffs seek to impose Banco Inverlat’s obligations on BNS on a theory that BNS had “management control” of GFI or Banco Inverlat. (R.2897-98, FAC ¶¶141-143; R.5006-07 ¶¶2-3.) As Plaintiffs’ concede, there is no concept of “piercing the corporate veil” in Mexican law (R.7190 ¶40); nor is there any other basis for imposing on BNS the obligations undertaken by subsidiary or affiliated corporations (R.5256-58, Abascal Decl. ¶¶27-30).

**b. BNS Owed Plaintiffs No Duties Under the Technical Services Agreement.**

Improperly departing from the allegations of the Complaint, Plaintiffs contended in their opposition to summary judgment (and in their briefs in this Court) that it was not the Cleanup Guidelines that supposedly imposed a duty on BNS to “manage GFI” and “implement the clean up,” but the TSA, and that the Cleanup Guidelines merely “reflect” that supposed duty. (Pl. at 5-6; R.5414-15, 5421-22; 7185-86 ¶¶23, 27.)

This theory—based on a different contract—should be disregarded both because it was not pleaded, *see, e.g., Rollins v. New York City Bd. of Educ.*, 68 A.D.3d 540, 541 (1st Dep’t 2009), and on its merits. The TSA was a negotiated agreement among BNS, GFI, and Banco Inverlat for BNS to provide specified technical services to GFI and its subsidiaries. Under it, BNS agreed that it would assign to GFI a set number of BNS employees to provide administrative assistance to GFI, including with respect to the management of daily operations. (R.4373-74 §2.1; *see* R.7322-23, Abascal Decl. ¶11.) Not only does this provision say nothing about BNS itself managing GFI, but legally it could not do so, because an undertaking by BNS to “manage” GFI would be null and void under Mexican corporate law. (R.7321-22, Abascal Decl. ¶¶9-10.)<sup>24</sup>

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<sup>24</sup> Plaintiffs have argued that the February 1996 Letter (which they refer to as “Heads of Agreement” (Pl. at 5 n.1)) is proof that BNS agreed to manage GFI for their benefit. This letter, however, was merely the non-binding and conditional precursor to the full set of agreements

That the TSA was not intended to shift management responsibility away from GFI's Board of Directors is confirmed by TSA Section 2.4(a), which states that the BNS employees performing duties for GFI "will be, at all times, subject to the control and management of the Board of Directors of [GFI] . . . and . . . will be considered . . . as representatives of [GFI]" (R.4375-76 §2.4). As Mr. Abascal explains, this provision makes it impossible under Mexican law to impose contract liability upon BNS for any alleged failure of those seconded employees to perform services for GFI or Banco Inverlat. (R.7324-25 ¶13.)<sup>25</sup>

Even if the TSA could be read as an undertaking by BNS to manage GFI, that would not make BNS liable for a failure by GFI or its employees to report collections accurately to KPMG. (R.7326-27, Abascal Decl. ¶¶16-18.) An

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executed by the parties in July 1996. Some of these proposed provisions found their way into the final documents; others did not. Obviously it is the binding contracts that govern, not characterizations in a preliminary letter of intent, which in any event should be excluded from consideration under the complete-agreement clause in the TSA. (R.4387 §6.1; *see* R.7337-38, Abascal Decl. ¶¶38-40.) Plaintiffs also point to a statement by counsel for BNS during oral argument to show that BNS was supposedly "running the books" of GFI. (Pl. at 5 n.1.) What their selective quotation does not reveal is that counsel was in the process of explaining that BNS had seconded employees to GFI, who were involved in GFI management, when the court cut short the explanation with a further question. (*See* R.2799.)

<sup>25</sup> The TSA has various other provisions regarding particular services to be provided by BNS to GFI, none of which, separately or collectively, amount to a contract for BNS to manage GFI. (*See* R.4374-75, 4378-80, §2.2 (consulting services), §2.3 (training of certain GFI employees), §2.8 (providing that GFI, under the direction of BNS, shall provide accounting services regarding records for a narrow subset of loans in which BNS had a particular financial interest (for example, because their performance affected calculation of the premium possibly payable by BNS upon conversion of its GFI debentures (§2.8(b)).) Indeed, given the explicit commitment in Section 2.8 to assist with record keeping with respect to this confined set of loans, it would be illogical to read in a general recordkeeping obligation not supported by any contract language.

agreement to manage a corporation through persons assigned to act as employees or under powers of attorney of that corporation is not the same as an agreement to fulfill or be responsible for that corporation's obligations. (R.7327, Abascal Decl. ¶18.)

Plaintiffs' example in their summary judgment papers of a contractor who undertakes to build a house and thereby becomes liable in contract for the breaches of a subcontractor (R.5425) is inapt. By Plaintiffs' own description, the alleged contract here was not for BNS to clean up GFI itself and to subcontract certain aspects of that work (as would be the case with a builder who promised to build a house and then subcontracted the plumbing work). Rather, on Plaintiffs' theory, the supposed obligation of BNS was to "manage" the companies that were actually obligated to manage the clean up. (R.5425.) Pursuing Plaintiffs' building contractor analogy, such a "management company" (an architectural firm for example) would not be liable for a breach of contract merely because an employee it had seconded to the builder committed some wrongful act. (R.7326-27, Abascal Decl. ¶17.)

Plaintiffs' claim faces another hurdle—that Plaintiffs were not parties to the TSA.<sup>26</sup> Plaintiffs argued a third-party beneficiary theory below, but that also

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<sup>26</sup> In asserting their new claim under the TSA, Plaintiffs also subject themselves to all defenses BNS has to such a claim, including the right to arbitrate it. (R.4389, TSA §6.11; *see* R.7334, Abascal Decl. ¶33.) BNS has fully reserved its right in this respect. (R.7292 n.11.)

fails for lack of evidence. First of all, Mexican law recognizes third-party beneficiary rights only if the contract reflects the parties' clear intent to impose obligations in favor of non-parties such as the Former Shareholders. (R.7332-33, Abascal Decl. ¶30.) Plaintiffs point to no language in any of the contracts to which BNS was a party—or any other agreement—that supports the recognition of third-party rights of Former Shareholders as against BNS. Obviously, the Cleanup Guidelines recognizes that FOBAPROA (a party to that contract) will distribute shares to Former Shareholders in defined circumstances, but even if that makes Former Shareholders third-party beneficiaries of FOBAPROA's undertaking, it creates no rights as against BNS.

Second, although Plaintiffs claim that BNS “consented” to the Cleanup Guidelines (R.5420-21) and thereby “agreed” that under the Guidelines “the clean up process was in part for [Plaintiffs'] benefit” (Pl. at 4-6), they did not respond to Mr. Abascal's point that to establish that BNS was bound in any respect, Plaintiffs must show that any “consent” by BNS was to be a “promisor,” not a mere “stipulator,” of any third-party beneficiary promise in the Cleanup Guidelines. (R.5251-52 ¶¶15-17; R.7328 ¶20.) Nothing in the language of the Guidelines suggests such a promise.

Nor is there is any language in the TSA that makes Plaintiffs third-party beneficiaries of that agreement. The TSA does not even mention the Former

Shareholders, much less suggest that they had rights under the contract. Plaintiffs do not actually argue that they have found any such language in any contract. Instead, they claim an amorphous right to be third-party beneficiaries of the “integrated agreements” (Pl. at 6; *see also* R.5418) or, at other points, the collection “effort” (R.5423), the “process” of cleaning up the bank (Pl. at 4), or an unspecified “contract” (Pl. at 29). This argument paints with far too broad a brush. BNS, GFI and the Government chose to implement the recapitalization of GFI in a series of discrete agreements signed by different parties for different purposes. (*See* R.7627-29.) Even though they were deemed an “integral part” of the SPA, they were still separate contracts. Plaintiffs point to nothing in those agreements (nor to extrinsic evidence) that reflects the clear intent required under Mexican law to impose on BNS any obligation to Plaintiffs as third-party beneficiaries. (R.7332-33, Abascal Decl. ¶30.)

**3. Dismissal of the Complaint May also Be Affirmed on the Basis that Summary Judgment Would Be Proper on Two Further Grounds Argued Below.**

In the court below BNS moved for summary judgment on two additional grounds: (i) there is no record evidence that BNS “manipulated” the KPMG Report and (ii) Plaintiffs’ own expert report, corrected for two plain errors, demonstrates that Plaintiffs had no right to additional shares and can therefore prove no injury. Although this Court might benefit from consideration of these

issues in the first instance by the lower court, in order to prevent any suggestion that BNS has waived these grounds for affirmance and to permit this Court to consider them if it wishes, we summarize them below.

**a. There Is No Evidence that Either BNS or GFI Provided False Information to the Mexican Government; nor Could BNS Be Liable for any such Conduct by GFI in any Event.**

The only breach that Plaintiffs have asserted is that BNS intentionally provided false information to the Mexican Government in March 2000 and then “allow[ed] the Mexican Government to act on that false information,” thereby causing the Former Shareholders not to receive any part of the 36% of GFI equity potentially available to them under the Cleanup Guidelines. (R.2902, FAC ¶¶154-155.) Plaintiffs’ interrogatory responses confirm that the only supposed false statements asserted were made to KPMG by two GFI employees, Alberto Miranda and Jose del Aguila, in March of 2000. (R.5006-07.) The record, however, is devoid of evidence to support claims of manipulation by Miranda or del Aguila or of any legal basis for attributing their conduct to BNS. (See R.3604-07, 5256-59, 7298-7300, 7326-34.)

**b. Plaintiffs’ Own Expert’s Report, When Corrected for Two Clear Errors, Establishes that Plaintiffs Are Not Entitled to Any Additional Shares.**

Plaintiffs’ theory of recovery in this case requires that they prove loss causation—*i.e.*, that, if the Cleanup Guidelines had been correctly applied, they

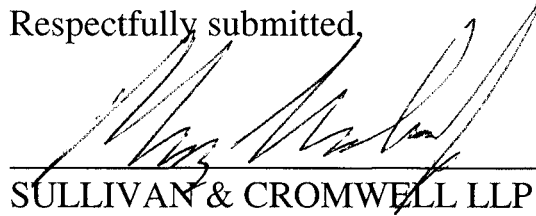
would have been entitled to receive additional GFI shares. In fact, if the calculations submitted by Plaintiffs' expert, Marianne DeMario (R.7038-44), are corrected for two plain errors in her reading of the Cleanup Guidelines, and the formula is then in all other respects applied exactly as Ms. DeMario applied it, the result is that Plaintiffs were not entitled to receive additional shares. (R.5296, Negreira Decl. ¶41; R.5304.) This is an independent basis for affirmance of the lower court's order. (*See* R.3607-12, 5279-96, 7300-04, 7661-81.)

## CONCLUSION

This Court should affirm the judgments from which Plaintiffs appeal.

First, Plaintiffs' contract claim is barred by the statute of limitations. Second, Plaintiffs' proposed claim for unjust enrichment fails to state a cause of action under Mexican law. Although the lower court did not reach BNS's other arguments on summary judgment, dismissal can be affirmed on those grounds as well.

Respectfully submitted,



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## **PRINTING SPECIFICATIONS STATEMENT**

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