

To Be Argued By:  
RICHARD FRANKEL

New York County Clerk's Index No 601518/06

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# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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RITA MARIA SANCHEZ DE HERNANDEZ, ET AL.,

*Plaintiffs-Appellants,*

—against—

BANK OF NOVA SCOTIA a/k/a SCOTIABANK,

*Defendant-Respondent.*

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## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Clerk Index No. :  
-against- : 601518/06  
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BANK OF NOVA SCOTIA :  
a/k/a SCOTIABANK, :  
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Defendant-Respondent :  
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**REPLY BRIEF OF PLAINTIFFS-APPELLANTS**

Plaintiffs-Appellants, Rita Maria Sanchez de Hernandez, *et al.*, respectfully submit this reply brief in further support of their appeal from three orders of the Supreme Court of the State of New York (Lowe, J): (1) the order entered on August 21, 2009, granting Defendant’s Motion for Summary Judgment on statute of limitations grounds;<sup>1</sup> (2) the order rendered on August 8, 2008 which granted, in part, Defendant’s Motion to Dismiss Plaintiffs’ Second Amended Complaint For Failure to State a Claim, including the ruling that Plaintiffs had failed to state a

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<sup>1</sup> Plaintiffs moved for reargument and vacatur of this order on September 21, 2009. (SR1). The trial court denied vacatur in an order dated April 26, 2010 and received on April 29, 2010. That order merely repeats the errors which are the subject of this appeal.

claim for unjust enrichment under Mexican law; and (3) the order rendered on November 13, 2008 which denied Plaintiffs' Motion for Leave to File a Fifth Amended Complaint to assert a claim for unjust enrichment under Mexican law.

### **PRELIMINARY STATEMENT**

Plaintiffs are former shareholders in GFI who, in 1996, entered into an agreement with Scotiabank and the Mexican government, to recapitalize GFI. Shareholders found "eligible" by the Mexican authorities were entitled to receive 9% and could receive up to an additional 36% of the stock in the recapitalized GFI, depending on the amount of non-performing loans that the bank collected through July 2000.

Scotiabank was responsible for managing the bank, including collecting loans, accounting for the bank's results, and reporting those results to the Mexican financial authorities. As to the additional 36% of the shares, Scotiabank held the fate of the Plaintiffs in its hands. Because Scotiabank breached its contractual obligations, it ended up with all of the 36% and the eligible shareholders with 0%. This was not a result of lack of success in the bank's collections effort. Collections exceeded expectations (R.6930-1), and were over 29 billion pesos (about \$2.9 billion). (R.7024). But, in order to obtain the shares for itself, Scotiabank falsely reported that collections were just 6.3 billion pesos (about \$630 million) (R. 6360), with the result that Plaintiffs received none of the 36% and Scotiabank bought it all

for itself. By its conduct, Scotiabank breached its contract in 2003 and 2004 and profited through dividends and the increased value of the shares that rightly belonged to the eligible shareholders by approximately \$1 billion. (R.7035 ¶5).

Plaintiffs filed their original complaint against Scotiabank in May 2006, well within the six-year statute of limitations. This record cannot justify depriving Plaintiffs of their day in court.

## **ARGUMENT**

### **I. PLAINTIFFS' BREACH OF CONTRACT CLAIM WAS FILED TIMELY**

#### **A. The Claim Was Filed Less Than Six Years From the Date Plaintiffs Could Enforce Their Rights in Court**

##### **1. The Parties Agree on the Applicable Legal Principles**

Scotiabank concedes that the statute of limitations is tolled until a claimant can enforce his claim in court.<sup>2</sup> Any other rule is “contrary both to fairness and to reason”, *Roldan v. Allstate Insurance Co.*, 149 A.D.2d. 20, 33, 544 N.Y.S.2d 359 (2nd Dep’t 1989), and “absurd”. *Edlux Construction Corp. v. State of New York*,

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<sup>2</sup> Scotiabank identifies factual distinctions between this case and those cited by Plaintiffs. The factual differences, which all relate to the reason the claimant was unable to enforce his claim in court, do not change the controlling principle of law. Whether the claimant had to first comply with a mandatory administrative process, or wait for a government audit, for a stay to be lifted, or for his name to be removed from a government list, the cardinal rule is the same: the statute of limitations is tolled during any period in which the claimant cannot enforce his rights in court.

252 A.D. 373, 375, 300 N.Y.S. 509 (3d Dep't 1937), *aff'd* 277 N.Y. 635 (1938).

This view is one “firmly embedded in American law” *Roldan, supra* at 34.<sup>3</sup>

- 2. Plaintiffs Could Not Have Enforced Their Claim in Court Until 2004**
- a. Scotiabank Has Required Every Plaintiff To Have Been Found Eligible By The Mexican Authorities As A Condition Precedent To Asserting A Claim**

Scotiabank's current position that Plaintiffs could have - in fact, should have - asserted their claims years before the Mexican Committee made its eligibility determinations is belied by its actions in this lawsuit. In 2007, Scotiabank insisted that certain Plaintiffs had asserted claims improperly because they had not been declared eligible by the Mexican administrative process. (SR.194). Scotiabank demanded that, absent a showing that these Plaintiffs had been declared eligible by the Mexican authorities, these Plaintiffs must be dismissed. (SR.194). Plaintiffs' counsel agreed it had been a mistake to sue on behalf of these Plaintiffs because they could not allege an essential element of this claim, namely, eligibility, and

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<sup>3</sup> Scotiabank cites to only one case, *Ely-Cruikshank v. Bank of Montreal*, 81 N.Y. 2d 399, 615 N.E. 2d 985 (1993), to support its claim that the statute of limitations began to run four years before any Plaintiff was declared eligible. Other than reaffirming that the statute of limitations does not commence in a breach of contract case until all of the elements necessary to obtain relief in court are present, *Ely-Cruikshank* does not address either the reasoning or case law supporting Plaintiffs' argument. As this Court noted in *Rachmani Corp. v. 9 East 96th Street Apartment Corp.*, 211 A.D.2d 262, 629 N.Y.S.2d 382 (1st Dep't 1995): “the holding in *Ely-Cruikshank* turns on the express terms of the contract in that case . . . ” which clearly showed that the claim was untimely and the plaintiff had no basis for recovery.

thus dismissed these Plaintiffs from the case.<sup>4</sup> If, as Scotiabank now argues, each of these Plaintiffs could have sued for nominal damages and had the New York courts rule on eligibility, there would have been no basis for Scotiabank to demand (or Plaintiffs' counsel to agree) that those Plaintiffs who had been found ineligible in the Mexican administrative process must dismiss their cases. Thus, as Defendant's own insistence and agreement obtained from Plaintiffs demonstrate, the Plaintiffs had no ability to bring a claim in New York before January 2004, when the Mexican authorities made eligibility determinations. (R.2854-55). This is well within the six-year limitations period since this action was commenced in May 2006--only two years and four months later.

**b. In Any Event, The Plaintiffs Had to Have Their Eligibility Decided in Mexico**

In its brief, Scotiabank admits that one of the interrelated agreements signed in July 1996—"the Banco Union Trust Agreement—sets out an administrative process pursuant to which eligibility determinations were to be made." (SBr.23 n.13).<sup>5</sup> Under the terms of the Trust Agreement, a Technical Committee composed

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<sup>4</sup> A handful of ineligible shareholders are appealing their eligibility determinations in the Mexican courts. With the agreement of Scotiabank, these Plaintiffs remain in the case but have agreed to dismiss their claims if, within 45 days of trial of this case, they have not obtained a final favorable eligibility determination in Mexico. (SR.194). The fact that both parties agree that the review of the Mexican authorities' eligibility decisions must be made in Mexico is decisive evidence that the New York courts cannot decide eligibility.

<sup>5</sup> Scotiabank also concedes "Plaintiffs' right to sue IPAB may turn on establishing eligibility in Mexico." (SBr.23 n.13). The same is true for Plaintiffs' right to sue Scotiabank.

of representatives of the Mexican banking and finance authorities was established and given the exclusive responsibility for deciding the eligibility of the Existing Shareholders. (R.980, 4049, 4051). The decisions had to be approved by the Mexican banking regulators and all disputes decided in the Mexican courts. (R.4050, 4055). All Existing Shareholders who wished to exercise their rights under the ESHA had to sign a letter accepting the terms of the Trust Agreement (R.4065).

In carrying out its duties, the Technical Committee was required to act “in strict compliance with and observance of the Existing Shareholder Agreement (“ESHA”)”, which was attached to the Trust Agreement as Appendix B (R.4052). The ESHA defined “eligible shareholders” as those (1) without outstanding loans with GFI for the purchase of shares (or who had duly restructured their loans) as of November 30, 1996; (2) who have paid off or restructured at market conditions any loan for which they were responsible or may have been related; (3) who “at no time have participated in irregular operations that give rise to liability”. (R.4058 n.1). The eligibility decisions, therefore, were necessarily subjective. The Technical Committee used its judgment to decide whether a loan was “duly restructured”, whether a shareholder was responsible for or “related” to a loan, whether a loan had been restructured at market conditions, and whether the shareholder had engaged in “irregular operations giving rise to liability.” For that

reason, it would have been impossible for a Plaintiff to prove in a New York court that he was “eligible” except by showing that the Technical Committee in Mexico declared him so.

Scotiabank’s admission in its brief that the Mexican authorities were responsible for deciding a shareholder’s eligibility is nothing new. In support of its Motion for Summary Judgment, Scotiabank wrote that “Former Shareholders *found ‘eligible’ by FOBAPROA (or later its successor IPAB)* could receive up to an additional 36%. . . .” (R.3594) (*emphasis added*). At the hearing on Scotiabank’s Motion for Summary Judgment, its counsel said a New York court should not second-guess determinations that had been made or would be made by the Mexican government. (R.7703). And these statements reaffirm Scotiabank’s earlier representation that “. . . [t]he Technical Committee of the Banco Union Trust . . . had responsibility for determining the eligibility of the Former Shareholders to receive shares of GFI pursuant to the Cleanup Guidelines.” (R.2497 n.6). Scotiabank’s claim that in March 2000 the Plaintiffs could have filed suit in New York, alleged they were eligible under the ESHA, and had a New York judge or jury decide their eligibility, is both disingenuous and contrary to the procedures established in the Trust Agreement and agreed to by each shareholder.<sup>6</sup>

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<sup>6</sup> In its summary judgment order, the lower court did not address whether a New York jury could have decided a Plaintiff’s eligibility. But in an earlier order, the lower court found that eligibility determinations were to be made through a Mexican administrative process. (R.2862).

**3. The Claim Was Filed Less Than Six Years from Scotiabank's Last Breach**

**a. Scotiabank Owed Ongoing Duties to Plaintiffs**

When a party has ongoing contractual duties and continuously breaches its contract, limitations run from the date of the last breach. Scotiabank denies it was a party to the ESHA or owed any duties to the Plaintiffs. As discussed more fully below, Scotiabank agreed to manage the bank through the clean up, in part, for the benefit of the Existing Shareholders. Scotiabank's duty continued until Plaintiffs received their stock in 2004. Moreover, the lower court, in its August 8, 2008 order, ruled that Scotiabank was a party to a set of interrelated agreements and owed contractual duties to the Plaintiffs. (R.2873-74). Those rulings are not reviewable since Scotiabank never appealed them. (*See* p.18-19 *infra*).

**b. The Lawsuit is Timely Under *Airco***

Scotiabank acknowledges that under *Airco Alloys Div., Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 430 N.Y.S.2d 179 (4th Dep't 1980), a breach of contract claim is timely if filed within six years of the most recent breach. (SBr.26). The Fourth Amended Complaint alleges facts that occurred less than six years from the date this case was filed that state claims for breach of contract.<sup>7</sup> For

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<sup>7</sup> Scotiabank uses the term "affirmative breach" to distinguish some breaches from others. The case law treats all breaches equally. When a party continuously fails to perform during the life of a contract, the *Airco* rule applies. *See Lippe v. Genlyte Group, Inc.*, 2002 WL 531010

example, Plaintiffs allege that in April 2003, Scotiabank purchased for itself stock that it knew rightfully belonged to the Plaintiffs, thereby breaching its contractual duty of good faith. (R.2899 ¶146). Scotiabank ignores this allegation, which alone makes the lawsuit timely under *Airco*. Further, Plaintiffs allege that in 2004 Scotiabank breached its contractual duties by causing the Mexican Government to deliver less stock to the Plaintiffs than Scotiabank knew was owed. (R.2902 ¶154-55). Scotiabank claims those allegations state a claim for tortious interference rather than breach of contract. But Scotiabank never challenged the legal sufficiency of the allegations in the lower court. Moreover, as Scotiabank argues and the lower court ruled, a party to a contract cannot tortiously interfere with it. (R.899; SBr.33). That is what makes the claim one for breach of contract.

**c. Scotiabank Confuses a Continuous Failure to Perform With a Failure to Cure**

Plaintiffs allege Scotiabank breached its obligations by failing to supply accurate collections information and allowing the Mexican Government to act on that false information in 2004. (R.2902 ¶¶154-55). Scotiabank claims that this allegation is not of a separate breach, but of a failure to cure an earlier breach.

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(S.D.N.Y. 2002) (continuously failing to record a deed); *Measom v. Greenwich & Perry Street Housing Corp.*, 798 N.Y.S. 2d 298 (1st Dep't 2005) (continuously failing to provide a habitable apartment); *Bulova Watch Co., Inc. v. Celotex Corp.* 46 N.Y. 2d 606, 389 N.E. 2d 130 (1979) (continuously failing to repair a roof); *Colpan Realty Corp. v. Great American Insurance Co.*, 83 Misc. 2d 730, 373 N.Y.S. 2d 802 (N.Y. Sup. 1975) (continuously failing to provide a legal defense).

The difference between the two depends on the timing of the failure to act. It is an elementary rule that a party cannot breach a contract after it ends. Therefore, a party's failure to cure a breach after a contract ends is not a breach itself. On the other hand, the failure to perform throughout the term of a contract is a continuous breach for which the limitations period starts from the last date of nonperformance. *Compare Lippe v. Genlyte Group, Inc.*, 2002 WL 531010 (S.D.N.Y. 2002) (continuous breach for twelve years) with *First American Title Insurance Co. v. Fiserv Fulfillment Services, Inc.*, 2008 WL 3833831 (S.D.N.Y. 2008) (failure to cure after contract expired). Here, Plaintiffs allege Scotiabank's duties continued until Plaintiffs received their shares in 2004. Thus, unlike in the cases that Scotiabank cites, Scotiabank's continuous failure to perform in this case occurred during the life of the contract.<sup>8</sup>

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<sup>8</sup> The cases cited by Scotiabank are unavailing. Two of them, *Bullard v. State*, 307 A.D. 2d 676 (3d Dep't 2003) and *Selkirk v. State*, 249 A.D. 2d 818 (3d Dep't 1998), are not contract cases. Two others, *Welwert v. Dataware Elec. Corp.*, 277 A.D. 2d 372 (2d Dep't 2000) and *First American Title Insurance Co.*, *supra*, are discussed in Plaintiffs' opening brief. The final two, *Seghers v. Olympia Capital*, 2009 WL 386338 (N.Y. Sup. 2009) and *Roslyn Savings Bank v. Nat'l Westminster Bank USA*, 266 A.D. 2d 272 (2d Dep't 1999), are cases where the contract duties breached—procuring insurance and performing monthly reconciliations—ended more than six years before the date of suit.

**B. The Claim Was Filed Less Than Six Years From the Date Scotiabank's Performance Was Due**

Scotiabank does not dispute the well-settled law that a contract is not breached until the time set for performance has expired.<sup>9</sup> Instead, Scotiabank claims – without reference to anything in the Record – that Plaintiffs have improperly characterized Scotiabank's conduct as an anticipatory repudiation. In fact, Plaintiffs never treated Scotiabank's conduct as an anticipatory repudiation, so “the date from which the breach of a contract is measured is the date performance is required to be tendered according to its terms.” *Rachmani Corp. v. 9 East 96th St. Apartment Corp.*, 211 A.D.2d 262, 266, 629 N.Y.S.2d 382 (1st Dep't 1995).

As set forth above, Scotiabank's ongoing contractual duties continued into 2004. But Scotiabank's performance could not possibly have been due any earlier than July 31, 2000 because Plaintiffs' right to receive stock depended on Scotiabank's collection of loans through that date. (R.5468 ¶6). As bank manager, Scotiabank's duties to record and account for the results of its collection efforts thus necessarily extended to at least sometime after July 31, 2000.

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<sup>9</sup> Scotiabank claims that this argument was waived because it was not raised below. In the lower court, Plaintiffs argued that the claim was timely, that Scotiabank had duties to the Plaintiffs through 2004, and that Scotiabank continuously breached the agreement through 2004. (R.5430-32). “[Plaintiffs are] not presenting a new theory for the first time on appeal which requires the development of facts that [Scotiabank was] deprived of an opportunity to submit at the [trial] court.” *New York City Health and Hosp. Corp. v. Bane*, 208 A.D. 2d 97, 103, 621 N.Y.S.2d 539, 542 (1st Dep't 1995). Instead, they are simply offering a new legal argument for their continually maintained position that the claim is not barred by limitations. Thus, there is no waiver. *Id.*

Scotiabank's only response to this indisputable fact is that it had no duty at all to the Plaintiffs. In fact, as discussed below and as the lower court found, Scotiabank did have such a duty. (*See pp.18-25 infra*); (R.2874). Therefore, the date from which Scotiabank's breach is measured is the date performance was required to be tendered, which was no earlier than July 31, 2000. Plaintiffs sued in May 2006, months before the earliest possible date on which limitations could have run.

Scotiabank also contends that the breach of contract claim was not interposed until 2008 and does not relate back to May 2006, the date the case was filed. The original complaint alleges all of the elements of a breach of contract claim against Scotiabank so the relation back rule is not applicable. Moreover, the lower court decided in its summary judgment order that May 2006 is the relevant date for measuring limitations. (R.7726).

Ignoring the lower court's ruling, Scotiabank argues Plaintiffs' breach of contract claim does not relate back to the date the original complaint was filed because a breach of contract claim is "fundamentally at odds" with a tortious interference claim. But the original complaint does not contain a tortious interference claim. (R.135). Moreover, when Plaintiffs attempted to plead a tortious interference claim in an amended complaint, the lower court ruled that the claim was invalid because a party cannot interfere with its own agreement. (R.898-

899). Since the court ruled Scotiabank was a party to the agreement, the Court construed the allegations as stating a breach of contract claim instead of a tortious interference claim.

Finally, if it had not already been pled, the contract claim would relate back to the original complaint because Scotiabank cannot show, as it must, that it is somehow prejudiced by Plaintiffs' claim. The allegations in the original complaint put Scotiabank on notice of the same agreements, transactions, and occurrences out of which the breach of contract claim arises. (R.135-156); *See* CPLR § 203(e); *Pendleton v. City of New York*, 44 A.D.3d 733, 843 N.Y.S.2d 648 (2nd Dep't 2007). Extensive discovery has been taken on this claim. It therefore should relate back.

## **II. PLAINTIFFS STATED A CLAIM FOR UNJUST ENRICHMENT UNDER MEXICAN LAW**

The controlling issue on this point is whether Plaintiffs have stated a claim for unjust enrichment under Mexican law. If so, then the Court erred (1) in ruling in its August 8, 2008 order that Plaintiffs had not stated an unjust enrichment claim in their Second Amended Complaint (R.2876) and (2) in denying Plaintiffs'

motion for leave to amend to allege an unjust enrichment claim on the grounds an amendment would be futile in light of his prior ruling. (R.3557-61).<sup>10</sup>

Article 1882 of the Mexican Civil Code provides:

One who without justification is enriched at the expense of another is obligated to indemnify him for the impoverishment in the proportion to which he has been enriched. (R.3080; 3026 ¶10).

Article 1882 applies when the victim has no other basis for relief against the unjustly enriched party. (R.3030 ¶32; R.2687). It is an alternative claim that applies if Plaintiffs do not have a contract claim against Scotiabank.

Plaintiffs allege Scotiabank falsely understated the results of the collection efforts, allowed the Mexican Government to rely on those results, and thereby deprived Plaintiffs of stock to which Plaintiffs were entitled so that Scotiabank could purchase the stock for itself, with knowledge the stock was owed to and would have been delivered to Plaintiffs but for Scotiabank's misconduct. (R.3007-10 ¶¶146 and 154-5; R.3464-65 ¶¶181, 184). Two distinguished Mexican law experts, including the 2009 President of the Mexican Bar Association, are of the view Plaintiffs have stated a claim under Article 1882. (R.1547-50, ¶32-7; 3028-9, ¶¶21-4).

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<sup>10</sup> In the August 8, 2008 order the court also ruled for the first time that Mexican law applied. (R.2864-6). Because the Second Amended Complaint was pled under New York law, Plaintiffs sought leave to amend to allege unjust enrichment under Mexican law.

Scotiabank argues that, even if it acquired stock it knew belonged to Plaintiffs by falsifying the collection results, it still is not liable for unjust enrichment. Scotiabank makes three arguments for this untenable result.

**A. Scotiabank’s Enrichment Was Without Justification**

Scotiabank argues its enrichment was not “without justification” because it purchased the shares, relying on authorities cited by its experts. (SBr.39). But none of those authorities involved facts, as here, where the purchaser had no right to purchase the shares and engaged in improper conduct to deprive the owners of their property in order to create the opportunity to purchase it for itself. A defendant’s enrichment is without justification if, as here, the defendant receives an asset he was not entitled to receive. (R.3028 ¶18; 3095). Plaintiffs’ allegations satisfy the “without justification” element. (R.1547-8 ¶32; 3027-31 ¶¶17-18, 22-36).<sup>11</sup>

**B. Unjust Enrichment Is Not Precluded When A Remedy Against Another Party May Be Available**

Scotiabank argues there is no claim for unjust enrichment if the impoverished party has another remedy for its damage against a party other than

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<sup>11</sup> Scotiabank says, without argument or reference to its Mexican law experts, that it was not enriched because it bought the shares. (SBr.34). The enrichment is the misappropriation of Plaintiffs’ right to the shares and the profit from dividends on and increase in value of those shares, which is recoverable under Mexican law. (R.3027-9 ¶¶13-14, 24; R.1547-8 ¶¶32-33). Scotiabank’s enrichment from the total shares is approximately \$1 billion. (R.7035-6 ¶5).

the defendant, and allegedly Plaintiffs could sue the Mexican Government for failure to deliver their shares. Scotiabank selectively quotes from the authorities, claiming the authorities state an element of unjust enrichment to be that “the impoverished person has no other means to obtain indemnity.” (SBr.41). The full quote is that the impoverishment “lacks a legal, contractual or extra-contractual cause, in such way that the impoverished person has no other means to obtain indemnity.” (R.3099-3100). This does not mean a victim has a remedy against the unjustly enriched party only if he has no remedy against anybody, and Scotiabank cites no case in which that occurred. Rather, it means that unjust enrichment is available only if there is no other means of recovery against the unjustly enriched party. (R. 2687; R.3030 ¶32).

An example provided by Scotiabank’s expert clearly makes this point. (R.2548 ¶51). Mr. Abascal gives as an example of a valid unjust enrichment claim a circumstance where a bank mistakenly credits to party B’s account a payment meant for party A. As Mr. Abascal correctly concludes, because A has neither a contract claim nor a tort claim against B, the law “resorts to the notion of enrichment without justification” to provide A with a remedy against B. Notably, Mr. Abascal reaches this conclusion regardless of whether A also has a claim against the bank for improperly crediting his payment to B’s account.

This case is the same. Regardless of whether Plaintiffs have a claim against the Mexican Government, Scotiabank has been unjustly enriched. Mexican law does not allow the unjustly enriched party to keep the property it unjustly obtained. If Plaintiffs do not have a contract claim against Scotiabank, Mexican law resorts to unjust enrichment to provide a remedy.

**C. Scotiabank’s Enrichment Was A Direct Consequence Of Plaintiffs’ Impoverishment**

Scotiabank argues that Scotiabank’s enrichment was not a direct consequence of Plaintiffs’ impoverishment because Plaintiffs did not sacrifice anything. (SBr.42). To the contrary, Plaintiffs sacrificed their shares, which showed up in Scotiabank’s account. Scotiabank’s gain was a direct consequence of Plaintiffs’ loss.

Scotiabank also argues its conduct did not cause Plaintiffs’ loss, claiming the loss was caused by the Mexican Government’s conclusion that Plaintiffs were not entitled to the shares. (SBr.42). But if Scotiabank had not falsified the collection records, the Mexican Government would have determined Plaintiffs were entitled to the shares. Plaintiffs’ loss was a direct consequence of Scotiabank’s misconduct. (R.3028 ¶21).<sup>12</sup>

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<sup>12</sup> Scotiabank claims *Morris v. LTV*, 725 F.2d 1024 (5th Cir. 1984) holds that Article 1882 requires the plaintiff to have “procured” the defendant’s enrichment. (SBr.42). Scotiabank does not reference its experts on this point. The example used by Scotiabank’s expert Abascal involving the bank’s error in crediting the payment meant for A to B’s account makes clear there

### III. SCOTIABANK'S ARGUMENT TO AFFIRM ON ALTERNATE GROUNDS FAILS

#### A. Scotiabank Has Waived Its Contract Arguments

Scotiabank argues it is not a party to the Existing Shareholder Agreement (ESHA) and owes no contractual duties to the Existing Shareholders. Scotiabank waived this argument. In its August 8, 2008 order in response to Scotiabank's second motion to dismiss, the Court not only held Plaintiffs did not state a cause of action for unjust enrichment (R.2877), which holding Plaintiffs have appealed, but also held (1) Scotiabank is a party to the ESHA and (2) Scotiabank is obligated to the Existing Shareholders to act in good faith with regard to their rights to GFI stock. (R.2873-4). Scotiabank did not appeal or cross-appeal that holding and therefore waived the contract arguments. *See Baker v. Levitin*, 211 A.D. 2d 507, 622 N.Y.S.2d 8 (1st Dep't 1995); 8 N.Y. Prac., *Civil Appellate Practice* § 3:3 (2010) (party winning a partial victory must file an appeal or cross-appeal of that portion of an order by which he is aggrieved, and may not otherwise seek the relief not granted by the trial court, for example by merely opposing the adverse party's appeal of the order). Indeed, this Court is precluded from considering the

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is no such requirement. (R.2548 ¶51). In Abascal's example, Party A did not procure Party B's enrichment but rather was the victim of it, just as Plaintiffs were the victims of Scotiabank's enrichment in this case. In *Morris*, plaintiff, a real estate agent, claimed he procured a sale of property and was therefore entitled to a commission on the sale, which the defendant seller did not pay. Plaintiff claimed the seller was thereby enriched. Thus, to prove the enrichment in *Morris* the Plaintiff had to prove he procured the sale; otherwise there would have been no enrichment. On those facts, the court denied the claim because the plaintiff "was not the procuring cause of the sale . . ." *Id.* at 1032.

arguments. *Hecht v. City of New York*, 467 N.Y.S. 2d 187, 189-90 (1983); *Molinoff v. Sassower*, 471 N.Y.2d 312, 99 A.D.2d 528, 529 (2d Dep't 1984).

**B. Scotiabank Agreed To Manage GFI And Clean Up The Bank Consistent With The Rights Of The Existing Shareholders To Obtain Stock In GFI.**

In any event, the lower court was correct in ruling that Scotiabank had contractual obligations to Plaintiffs. Scotiabank agreed as a part of the overall agreement to reorganize GFI and clean up the bank that (1) it would manage GFI and the bank during the clean up (2) the clean up process was in part for the benefit of the Existing Shareholders and (3) the Existing Shareholders would receive a minimum of 9% and up to 45% of the equity of the cleaned up GFI, depending on the success in collections of non-performing loans during the clean up. Having agreed to manage GFI during the clean up in part for the benefit of the Existing Shareholders, Scotiabank is obligated under Mexican law to do so in good faith. Fed. Civ. C. Art. 1796 (R.7240). Scotiabank breached its contractual obligations to Plaintiffs by sabotaging their rights. Scotiabank falsely understated the collection results and allowed the Mexican Government to act on the false report so as to deprive Plaintiffs of stock to which Plaintiffs were entitled, and purchased the stock for itself.

Scotiabank argues it did not agree to manage the clean up. (SBr.7, 8, 49). Scotiabank also argues that, even if it did make that agreement, it owes no obligations to the Existing Shareholders arising out of its clean up obligations.

(SBr.44, 46). These contentions are contrary to the lower court’s prior rulings and the evidence.

**1. Scotiabank Agreed To Manage GFI In The Clean Up**

**a. Scotiabank Did Manage GFI And Repeatedly Acknowledged That Obligation**

Under Mexican law, the intent of the parties controls the interpretation of contracts. Fed. Civ. C., Art. 1851 (R.7244) (“If words appear to contradict the evident intent of the parties the intention of the parties shall prevail.”); *Argonaut Partnership*, 1997 WL 45521 at 12 (S.D.N.Y. 1997) (under Art. 1851, “intent prevails over express wording if the two conflict.”). The evidence shows Scotiabank did manage the bank, which is compelling evidence of intent and demonstrates that Scotiabank agreed to do so.

For example, William Sutton, Scotiabank’s lead negotiator and the Scotiabank executive who actually ran the bank during the clean up,<sup>13</sup> testified: “We ran the bank managerially.” (R.6975). Alberto Miranda, who was involved in the negotiations and held senior positions with GFI and whose affidavit was submitted by Scotiabank in support of its Summary Judgment Motion,<sup>14</sup> also testified Scotiabank managed the bank: “in substance that’s what they were doing.” (R.6950). In addition, Scotiabank told the Canadian banking authorities

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<sup>13</sup> (R.6976-7; R.6975) Sutton was an Executive Vice President of Scotiabank. (R.5789).

<sup>14</sup> (R.5236).

in 2000 that, under the agreement, Scotiabank “has . . . been effectively running Grupo Inverlat since 1996” and in effect Scotiabank is “establishing business priorities for Grupo Inverlat and managing its day-to-day operations.” (R.6153, 6158). And, prior to the Summary Judgment Motion, Scotiabank’s counsel told the Court that Scotiabank “was running the bank, it was running the books.” (R.6638).

The Mexican Government also understood and intended the agreement to be for Scotiabank to manage GFI. IPAB reported to the Ministry of Finance that the agreements to clean up GFI included “a management agreement . . . under which Scotiabank undertook to manage GFI pursuant to the terms for a financial restructuring . . . .” (R.4769).

The evidence that Scotiabank did manage GFI in the clean up and that both Scotiabank and the Mexican Government understood that to be Scotiabank’s obligation demonstrates that Scotiabank agreed to do so.

**b. The Language Of The Agreements**

Despite the evidence that Scotiabank did in fact manage GFI in the clean up, Scotiabank argues there is no language in the agreements imposing that obligation. Scotiabank leaves the impression the various agreements relating to the clean up of GFI are separate and independent and each should be considered in isolation from the others. To the contrary, the agreements are interrelated and are all contained as

integral parts of a single agreement signed by Scotiabank. The overall agreement is contained in the Securities Purchase and Sale Agreement (SPSA). The SPSA provides that all of the agreements to accomplish the clean up, which are included as Appendices, “are deemed to be an integral part of this Agreement.” (R.5515 ¶1.5).

Among the agreements in the integrated set are (1) the Technical Services Agreement (“TSA”) and (2) the ESHA. The TSA contains Scotiabank’s agreement to manage GFI and the bank during the clean up. (R.5949 ¶2; R.7185 ¶¶23-25).<sup>15</sup> Under Paragraph 2.1, Scotiabank agreed that fifteen to twenty Scotiabank officers would provide services in establishing goals and strategies for and the management of the daily operations of GFI and the bank. Paragraph 3.1 provides that Scotiabank will be paid \$4 million per year for its efforts.

Scotiabank’s management obligation is also in the ESHA, which reflects the integrated nature of the agreements. The ESHA provides Scotiabank will control the boards of GFI and the bank “under the terms and conditions agreed to with the financial authorities” (which include the agreement to manage GFI and the bank

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<sup>15</sup> Scotiabank claims Plaintiffs’ contention based on the overall integrated agreement, including the TSA, should be disregarded because it was not pleaded. (SBr.49). This argument has been waived. Scotiabank not only made no such contention below, but instead affirmatively argued in its Summary Judgment Motion that the provisions of all of the agreements in the integrated set should be considered. (R.3603). Thus, Scotiabank referenced various provisions in the integrated set of agreements as supporting its position and also affirmatively claimed “there is nothing in those agreements that obligated BNS to carry out these duties.” (R.3603).

under the TSA) and will exercise that control to “financially clean up the financial group.” (R.5466 ¶¶2 and 3; R.7185-6 ¶26).

Sutton testified that Scotiabank “ran the bank managerially” (R.6975) because that is the agreement he negotiated and that is what Scotiabank did.

## **2. Scotiabank Was Obligated To The Existing Shareholders**

Scotiabank argues that, even if it was obligated to manage GFI in the clean up, it had no obligation to the Existing Shareholders because it was not a party to the ESHA. (SBr.44).

Under Mexican law, contractual obligations are created by consent. Fed. Civ. C., Art. 1794 (R.7240); (R.7179 ¶10). Consent need not be in writing, and is determined by the surrounding circumstances. “Consent may be express or implied. Express consent is manifested orally, in writing or by unequivocal signs. Implied consent results from events or acts that permit its presumption . . . .” Fed. Civ. C., Art. 1803 (R.7241); (R.7179-80 ¶¶11-12).

Evidence that at least creates a fact issue as to whether Scotiabank agreed to the ESHA includes (1) Scotiabank’s lead negotiator’s testimony that Scotiabank did agree to the deal with the Existing Shareholders, “We finally agreed to that because we thought it was a fair deal” (R.6980-1) (2) the inclusion of Scotiabank’s agreement to the Existing Shareholder deal in the initial memorialization of the

overall agreement (the Heads Of Agreement)<sup>16</sup>, which also provided that the final terms and conditions of the Existing Shareholder deal “must be acceptable to Scotiabank” (R.5487, item e; R.6982-4) (3) Scotiabank’s participation in drafting the final terms of the ESHA (R.5792; 6977; 6987) and (4) Scotiabank’s signed formal agreement to the ESHA by including it as an integral part of the overall transaction in which Scotiabank undertook to manage the clean up. (R.5515 ¶1.5; R.7181-3, ¶¶15-16).

Scotiabank argues that, even if it is a party to the ESHA, it owes no duties to the Existing Shareholders. (SBr.46). That would be an unusual agreement, and is not the case. The ESHA provides one of the purposes of the clean up is “to establish procedures that would allow [the Existing Shareholders] to participate in the capital stock of GFI.” (R.5466). By agreeing to the ESHA, Scotiabank thus agreed to manage the cleanup in part for the benefit of the Existing Shareholders consistent with their rights to participate in the cleaned up GFI as set forth in the ESHA.<sup>17</sup> (R.7185-6 ¶¶26-7).

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<sup>16</sup> The intent of the final set of agreements was to reflect the agreement as set forth in the Heads Of Agreement. (R.6976).

<sup>17</sup> At the very least, the evidence creates a fact issue as to whether Scotiabank is obligated to the Existing Shareholders as third-party beneficiaries. Mexican law provides that contracts can contain provisions for the benefit of third parties. Fed. Civ. C. Arts. 1868, 1869 (R.7245); (R.7183-4 ¶¶18-19); *Argonaut Partnership v. Bankers Trustee Co.*, 1997 WL 45521 at 10-11 (S.D.N.Y. 1997). Under the TSA, Scotiabank agreed to manage the clean up. The evidence that Scotiabank agreed to the ESHA, which provides the clean up is in part for the benefit of the Existing Shareholders, creates a fact issue as to whether the Existing Shareholders were third-

### **3. Scotiabank Was Obligated To Maintain and Report Collection Results In Good Faith**

Scotiabank argues the agreement does not obligate it to maintain and report collection records in good faith. (SBr.46–48).

Under Mexican law, terms essential to the contract, or necessary by virtue of the nature of the particular contract, are considered included even if not expressly set forth. Fed. Civ. C., Art. 1839 (R.7243); (R.7188 ¶33). Management of the bank in the clean up, in part for the benefit of the Existing Shareholders, carries with it the obligation to insure maintenance of the records and submission of the reports necessary to determine the rights of the beneficiaries resulting from that management. Otherwise, the Existing Shareholders’ rights would be meaningless. (R.7188 ¶33).

Likewise, Scotiabank’s obligation to manage the clean up in part for the benefit of the Existing Shareholders necessarily carries with it the obligation to do so consistent with the Existing Shareholders’ rights. In addition, Mexican law expressly imposes an obligation of good faith on contracting parties. Fed. Civ. C. Art. 1796 (R.7240): “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 of the law.” Article 1796 also obligates Scotiabank

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party beneficiaries of the TSA and the overall agreement of which it is an integral part. (R.7183-4 ¶¶18-19).

not to sabotage the rights of the Existing Shareholders in discharging its management obligation. (R.7186-90 ¶¶28-32; 34-36, 38).

#### **4. Scotiabank Is Liable For Its Breach Of Contract**

Finally, Scotiabank seeks to avoid responsibility for its conduct by claiming Plaintiffs are attempting to impose liability on Scotiabank for the conduct of its subsidiaries. (SBr.48, 50-1). Scotiabank argues piercing the corporate veil is not recognized in Mexican law (SBr.48) and Scotiabank cannot be held accountable for GFI's failure to report collections accurately (SBr.50-1).

Scotiabank simply ignores its own obligations and mischaracterizes Plaintiffs' claim. Plaintiffs do not seek to hold Scotiabank responsible for GFI's conduct based on veil piercing or any other theory. Plaintiffs seek to hold Scotiabank accountable for its own conduct in breaching its own contractual obligation to manage the cleanup for the benefit of and consistent with the rights of the Existing Shareholders, for which Mexican law clearly provides a remedy. (R. 7190-1 ¶¶39-44). That others may also be liable for their own conduct does not absolve Scotiabank. (R.7192, ¶¶45-6). Scotiabank cannot escape its responsibility for breaching its own contractual obligation by placing the blame on others whom it engaged to assist it in fulfilling those obligations.

### **C. Scotiabank's Other Alternative Grounds To Affirm Fail**

Scotiabank asserts the Court should affirm on the alternative ground that (1) allegedly there is no evidence the collection reports were falsified or that Scotiabank was involved in the falsification and (2) allegedly there is no evidence of damage. The lower court did not reach these issues and it is unnecessary for this court to address them. In any event, both are fact issues for the jury.

The evidence the collections report was falsified includes (1) the reported collections of 6.3 billion pesos (R.6356, 6360) and (2) the actual collections shown in the bank's records of over 29 billion pesos. (R.7024 ¶2).

The evidence of Scotiabank's involvement in the falsification includes (1) Scotiabank's motive to obtain the stock which but for the falsification would have gone to the Existing Shareholders, while neither GFI nor the bank had any motive (2) evidence which shows the GFI employees were acting for Scotiabank under the direction of Scotiabank executives (*e.g.*, R.7013-18, Sutton testimony that Miranda was acting for Scotiabank at Scotiabank's direction in providing information to the Mexican authorities in 1999-2000) and (3) evidence that Scotiabank executives directly participated in developing the KPMG report with the objective of insuring it would show the Existing Shareholders were not entitled to any of the 36%. (*e.g.*, R.5633; 6921-2, a KPMG draft report containing handwritten notes of Scotiabank's Hayward describing how to change the calculation to deny the

Existing Shareholders any recovery). Furthermore, whether the collections report was falsified at Scotiabank's behest or not, Scotiabank is liable for breaching the agreements it had with the Existing Shareholders. As discussed above, Scotiabank cannot agree to manage GFI consistent with the rights of the Existing Shareholders and dodge liability for breaching its agreement by hiding behind those it was hired to manage. (R.7190-92 ¶¶39-46).

The evidence that Plaintiffs were damaged includes (1) the magnitude of the falsification by which the collections were understated (79%) and (2) the expert report of Ms. DeMario, which shows the Existing Shareholders should have received an additional 26.63% of GFI's stock. (R.7034, 7047). Scotiabank claims Ms. DeMario made errors in her calculations, which simply raises fact issues for the jury to decide. The evidence that Ms. DeMario's calculations are correct is set forth in her declaration. (R.7024).

## **CONCLUSION**

It is respectfully submitted that, for the reasons set forth above and in Plaintiffs' opening brief the order of the Supreme Court, New York County, dated August 4, 2009, that granted summary judgment on the breach of contract cause of action should be reversed; the order issued on November 13, 2008, should be reversed to the extent it denied Plaintiffs the right to file an amended complaint asserting a claim for unjust enrichment under Mexican law; the order dated August

8, 2008, should be reversed to the extent it ruled that Plaintiffs had failed to state a claim for unjust enrichment under Mexican law; and the cause should be remanded for trial.

Dated: New York, New York  
April 30, 2010

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## PRINTING SPECIFICATION STATEMENT

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 6943.