

To Be Argued By:  
Philip Allen Lacovara

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# New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



CENTRO EMPRESARIAL CEMPRESA S.A. and  
CONECEL HOLDING LIMITED,

*Plaintiffs-Respondents,*

*against*

AMÉRICA MÓVIL, S.A.B. DE C.V., TELÉFONOS DE MÉXICO, S.A. DE C.V.,  
CARLOS SLIM HELÚ, DANIEL HAJJ ABOUMRAD,  
AMX ECUADOR, LLC (f/k/a Telmex Wireless LLC),  
WIRELESS ECUADOR LLC (f/k/a Telmex Wireless Ecuador LLC), and  
CONSORCIO ECUATORIANO DE TELECOMUNICACIONES S.A. CONECEL,

*Defendants-Appellants.*

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## BRIEF FOR DEFENDANTS-APPELLANTS

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## QUESTIONS INVOLVED

Between 2000 and 2003, the Ecuadorian plaintiffs sold interests in an Ecuadorian cell phone carrier to some of the Mexican defendants for a total of \$165 million, starting with a \$35 million payment in 2000. Plaintiffs complain about defendants' alleged failure to comply with a contractual obligation, triggered in early 2001, to "negotiate in good faith (for a period not to exceed 20 days)" to exchange plaintiffs' remaining shares in the carrier for shares in a new public company. Plaintiffs assert that, if "good faith" negotiations had taken place, they would have received securities that since have appreciated to more than \$1 billion, rather than the \$130 million in cash they actually received when they sold defendants their remaining shares and in 2003 provided defendants with a comprehensive release.

This appeal from the denial of defendants' motion to dismiss presents the following questions:

1. Whether this action is barred by plaintiffs' agreement to release defendants from "all manner of actions, \*\*\* whatsoever, in law or equity, whether past, present or future, actual or contingent" when they sold their shares to defendants for \$130 million.

*(Trial Court's answer: No)*

2. Whether plaintiffs' non-contract causes of action for damages, including "fraud" claims, all of which seek the asserted benefit of a contractual bargain, should be dismissed as duplicative of their contract claim.

*(Trial Court's answer: No)*

3. Whether plaintiffs' claims are time-barred because, according to their allegations, they knew by 2001 that defendants (allegedly) would not negotiate in "good faith" for a share exchange and had grounds to suspect that defendants were not providing complete and accurate financial information about the value of plaintiffs' holdings.

*(Trial Court's answer: No)*

4. Whether plaintiffs have failed to plead damages from any misconduct, when they could have used the cash they received in the allegedly tainted transaction to purchase the publicly traded securities they now claim they should have received instead—and whose appreciated value they claim as the sole measure of their damages.

*(Trial Court's answer: No)*

5. Whether the New York courts have personal jurisdiction over foreign defendants who have not submitted to jurisdiction here and have not engaged in relevant conduct in this State, based solely on (a) their corporate affiliations with some corporate defendants that did submit to jurisdiction, or (b) the overseas actions of individual officers of corporate defendants that have submitted to jurisdiction.

*(Trial Court's answer: Yes)*

## **PRELIMINARY STATEMENT**

Unhappy with the total of \$165 million in cash they received for a struggling Ecuadorian cell phone company that also required an additional \$150 million infusion just to keep it afloat, two Ecuadorian corporations now seek over \$900 million more. They base that lavish claim on the appreciation of public securities they say they should have received, but that they did not buy on the open market with the cash they received instead of those securities. Their complaint asserts

claims released six years ago, when plaintiffs bargained for the last \$64 million of their pay-out.

In a series of transactions beginning in 2000, plaintiffs sold their majority interest in the cellular carrier to some of the corporate defendants (all based in Mexico). Throughout these transactions, all parties were represented by sophisticated American and foreign lawyers. Plaintiffs sold the last of their holdings in 2003. As part of this final deal, which netted them \$64 million, plaintiffs agreed to release all the defendants from any and all liability, “actual or contingent,” “whether past, present, or future,” arising out of their relationship. Plaintiffs signed several releases, pocketed their millions, and walked away.

Five years later, plaintiffs filed this lawsuit, contending that they had been duped into releasing their claims and that they were entitled to a do-over on the sale of their interests in the Ecuadorian carrier. When plaintiffs sold the first block of those interests, they received an option to sell, or “put,” 95% of their remaining interests (in a private holding company) at a stated price in installments ending in 2006. Plaintiffs exercised the first installment of their “put” option in 2002, receiving over \$64 million for half of their shares.

Certain circumstances (assumed for the purpose of this appeal) triggered a separate obligation of some of the defendants to enter into a 20-day, good-faith negotiation over acquiring a portion of plaintiffs’ remaining shares in exchange for

shares in the publicly-held corporation that owned a majority of the shares. The negotiation provision did not include a price or other means of determining the rate of exchange, nor did it require the defendants to *agree* to an exchange. Those negotiations were not productive.

Instead, in 2003 plaintiffs and some defendants agreed to a different deal under which they *accelerated* plaintiffs' right to "put" their shares at the contractually specified price and extended it to *all* of plaintiffs' remaining shares. In exchange, plaintiffs provided a broad release. Plaintiffs took their cash and ran; they did not invest a dime in the publicly-traded stock they now claim they should have received. Having watched the value of that stock increase dramatically, however, plaintiffs now want the risk-free benefit of a bargain they never negotiated, for the stock they did not buy when they could have bought cheaply.

Their complaint asserts twelve causes of action, most of which allege fraud and breach of contract, all seeking the benefit of an obligation to negotiate for 20 days—many years ago—over an exchange of plaintiffs' private shares for shares of a public company. All the causes of action are covered by the 2003 release, and all are time-barred under the applicable statutes of limitations.

Plaintiffs argue that they should be excused from the release, and that the statute of limitations should be tolled, because, they allege, the defendants "fraudulently induced" them to give up their right to file suit. According to

plaintiffs' own allegations, however, they suspected fraud as far back as 2001, when they allege the defendants first refused to provide requested financial information. Yet plaintiffs—who could have asserted what they now claim was a contractual right to more complete disclosures—chose to do nothing about it other than sell their shares for a huge pile of cash and release defendants from liability.

The IAS judge ruled from the bench that the suit could proceed to discovery simply because the complaint was “fraught” with allegations of fraudulent inducement. If left undisturbed, this error will unfairly subject these defendants to the costly and disruptive burdens of defending a lawsuit over claims that were released six years ago.

The complaint also suffers from other fatal defects. Plaintiffs have improperly split their contract claims into causes of action purportedly sounding in tort in order to take advantage of more generous limitations periods and the availability of punitive damages, and to concoct a basis to name high-profile defendants who were not parties to the contracts. In addition, there is no cognizable theory of damages alleged at all, on any claim. Finally, the New York courts lack personal jurisdiction over most of the defendants, who are foreign individuals and corporations that have never set foot in this State in connection with this transaction.

## STATEMENT OF FACTS

Plaintiffs are the former owners of an Ecuadorian cell phone company called “Conecel.” R. 30-31. By 1999, according to the complaint, the company had accumulated several hundred million dollars in liabilities, and its owners began seeking outside investors to help the business “increase its capital.” R. 31.

### **A. Telmex Invests In Conecel**

Specifically, the complaint alleges that in “late 1999,” a Conecel representative began approaching potential investors to solicit investments in the company. *Id.* One of those investors was a Mexican businessman named Carlos Slim Helú (“Slim”),<sup>1</sup> who was the Chairman of the Board of a Mexican telecommunications company called Telmex. *Id.*; R. 29. Telmex is the leading telecommunications company in Mexico, with international subsidiaries throughout Central and South America. Its stock is traded on the New York Stock Exchange. R. 28.

According to the complaint, plaintiffs declined to sell Conecel outright, because they wished to retain a minority interest in the company, along with the potential to realize any “stock market upside” that might result from a public offering. R. 31-32. After several months of negotiations, in which all parties were

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<sup>1</sup> Following Spanish-language convention, we refer to Slim and the other Latin American defendant, Daniel Hajj Aboumrads (“Hajj”) using the patronym, or first of the two surnames.

represented by sophisticated U.S. counsel, a deal was struck in March 2000. Plaintiffs transferred ownership of Conecel to a new holding company, TWE. Telmex contributed \$150 million to TWE and also paid one of the plaintiffs \$35 million in order to retire various debts formerly owed by Conecel. R. 33. In return for its \$185 million contribution, Telmex owned 60% of TWE. The plaintiffs (along with a third shareholder that is not a party to this lawsuit) owned 40%. R. 34.

Plaintiffs wanted a continuing ownership interest in the company, but they also negotiated exit strategies. Under one option, a “put” agreement gave plaintiffs the option to force Telmex to buy them out, at a pre-set price, during pre-defined windows in time. R. 35. Specifically, the contract entitled plaintiffs to force Telmex to buy up to 50% of their shares during a six-month period in 2002 (two years after the contract was signed). During a six-month period two years later, they could require Telex to buy up to 75% of their shares, and two years after that, in 2006, plaintiffs could sell up to 95% of their shares. The “put price” for these options was negotiated in advance. *Id.*

This appeal focuses on a separate way out for plaintiffs. According to Section 3.09 of the governing contract—the “Agreement Among Members”—if Telmex ever decided to restructure its investments in Central and South American telecommunications companies by “consolidat[ing]” its holdings into a “single

entity,” Telmex would be required to “*negotiate in good faith (for a period not to exceed 20 days)*” to exchange plaintiffs’ shares in TWE for equity shares of the new “consolidated” entity “at a mutually satisfactory rate of exchange.”<sup>2</sup> R. 70 (emphasis added). By its terms, this contract provision did not guarantee plaintiffs a right to a share exchange; rather, it guaranteed a 20-day period of “good faith” negotiation aimed at a “mutually satisfactory price” for such an exchange. This was not even an “agreement to agree” but simply an agreement to negotiate. The alleged breach of this negotiation provision forms the basis for this suit. Plaintiffs allege that defendants never intended to honor the provision, and that Slim’s alleged promises regarding the potential “stock market upside” were fraudulent from the start. R. 32.

### **B. Plaintiffs Begin Negotiations For A Share Exchange**

In September 2000, Telmex formed a spin-off company called “América Móvil.” R. 35. This new holding company held various assets; among them were

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<sup>2</sup> The relevant provision reads as follows:

in the event that Telmex LLC or its Affiliates seeks \*\*\* to consolidate the investments of [Telmex Mexico] in the telecommunications industry in Central and South America, including [TWE] or Conecel, into a single entity \*\*\* Telmex LLC and [Plaintiffs] shall negotiate in good faith (for a period not to exceed 20 days) to exchange Units [in TWE] for the equity securities of such entity at a mutually satisfactory rate of exchange.

R. 70.

several of Telmex's international telecommunications properties, including TWE (and thus Conecel). *Id.* According to the complaint, the formation of América Móvil triggered the negotiation rights guaranteed by Section 3.09 of the contract. R. 36.

Plaintiffs allege that defendants did not tell them that América Móvil had been formed, but that they nevertheless learned of the new company's existence in December 2000. *Id.* The complaint alleges that three months later, in March 2001, plaintiffs' representative met with defendant Daniel Hajj Aboumrad ("Hajj"), Slim's son-in-law, who was América Móvil's CEO. The purpose of the meeting, the complaint alleges, was to begin negotiations, pursuant to Section 3.09 of the contract, to exchange plaintiffs' TWE shares for shares of América Móvil. *Id.*

The complaint charges that Hajj rebuffed plaintiffs' attempts to hold a good-faith negotiation. At the very first meeting, for example, plaintiffs allege that they requested "financial information" about Conecel and TWE, so that they could learn the true value of their 40% holdings and thus formulate a sensible negotiating position. *Id.* The complaint alleges that the defendants repeatedly refused to provide that information, despite various contractual obligations to do so. R. 36-38.

The complaint also alleges that beginning in 2001, defendants repeatedly failed to provide requested information or engage in genuine negotiations.

Plaintiffs claim they were referred to several Conecel and América Móvil executives, each one purposely denying full responsibility for handling the negotiations. R. 37. Plaintiffs allege that their phone calls often were not returned. *Id.* And despite multiple requests throughout 2001, plaintiffs allege they were never given the financial information they requested at the very first meeting with Hajj. R. 36-38. In short, the complaint alleges that the plaintiffs were “deprived by Defendants of *complete and accurate financial information* regarding Conecel,” and were thus “deprived of having an informed negotiation for the exchange.” R. 38 (emphasis added). Based on these events, plaintiffs charge that by the end of 2001, they were “*wary* of the threat that Defendants would *never negotiate in good faith.*” *Id.* (emphasis added).

### **C. Plaintiffs Exercise Their Buy-Out Right**

Plaintiffs allege that by 2002, they had lost hope for a good-faith negotiation under Section 3.09, leaving them “no practical alternative” but to exercise their rights under the “put agreement.” R. 39. And so they did. Shortly after the first sales window opened in March 2002, plaintiffs required Telmex to purchase half their TWE shares at the originally-negotiated price—receiving more than \$64 million. R. 39, 90.

The complaint does not reveal what plaintiffs did with this money, but one thing is clear: they did not use it to purchase shares in América Móvil, which by

then was publicly traded. Had plaintiffs used their \$64 million to purchase shares in América Móvil on the day they received their money, they could have bought nearly 10 million shares. R. 333.<sup>3</sup>

#### **D. Plaintiffs Sell Their Remaining Shares And Execute Releases**

Even though they allegedly believed that the defendants would “never negotiate in good faith” (R. 38), and indeed had acted in accord with that belief, plaintiffs claim that they “continued to press Defendants” for the next year and a half to “open negotiations” for the exchange of their remaining shares. R. 39. In 2003, the complaint alleges that plaintiffs’ representative “pressed [Hajj] for business plans and other financial information of Conecel.” *Id.* Hajj allegedly refused to provide business plans, but instead furnished plaintiffs with company balance sheets that the plaintiffs allege contained false information about Conecel’s financial condition. R. 39-40.

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<sup>3</sup> This figure is based on publicly-available listings of historical stock prices, which were before the trial court as exhibits to an attorney affirmation supporting the motion to dismiss. On the day plaintiffs sold 50% of their TWE shares, América Móvil stock closed at \$6.57 per share. R. 333. (This price has been adjusted to take into account the effects of stock splits and dividends. See generally R. 336-38.) Plaintiffs received \$64,317,688.58 on March 12, 2002; had they invested that money in América Móvil stock on that day, they would now hold approximately 9,789,603 shares. This court is entitled to take judicial notice of such “matters of public record,” *Chasalow v. Board Of Assessors of Cty. of Nassau*, 176 A.D.2d 800, 804 (2d Dep’t 1991), including historical stock prices. See, e.g., *Mahoney-Buntzman v. Buntzman*, 11 Misc. 3d 869 (N.Y. Sup. Ct. 2006).

At this point, long after the 20-day contractual negotiation period had come and gone, the complaint alleges that Telmex approached plaintiffs with an offer. “[I]nstead of negotiating for the exchange of Units pursuant to Section 3.09,” Telmex allegedly offered to accelerate and expand the “put” agreement so that it could buy all of plaintiffs’ remaining shares immediately, at the pre-defined price. R. 40. This offer gave plaintiffs a better deal than the one they had negotiated in 2000. Rather than holding their remaining TWE shares until the contractual windows (2004 to sell half their remaining shares, and 2006 to sell most, but not all, of the rest), plaintiffs could cash out *all* their shares in 2003, if they chose to do so. In return, Telmex allegedly “required” plaintiffs to sign a release, giving up any and all legal claims arising from or in connection with the original contract or their ownership of TWE shares. *Id.*

Plaintiffs accepted the offer. In July 2003, after several months of negotiation in which, once again, all parties were represented by experienced counsel, plaintiffs sold all their remaining TWE shares to Telmex, for another \$64 million. *Id.*, R. 296. Once again, although they claim to have been interested in enjoying any appreciation in the shares of América Móvil, plaintiffs apparently did not use any of the \$64 million they received to purchase shares of that company. Had they done so on the day the sale was made, they would have been able to

purchase nearly nine million additional shares.<sup>4</sup> All told, plaintiffs received almost \$130 million from the sale of their shares in the Conecel holding company, in addition to the \$35 million they were paid initially. Had they invested that money in América Móvil, they would now hold over \$1 billion in stock.<sup>5</sup>

Concurrent with the second, accelerated buy-out, all parties signed a package of sweeping “Mutual Releases.” Those documents unequivocally release the current defendants from all liability—“all manner of actions, \*\*\* whatsoever, in law or equity, whether past, present or future, actual or contingent”—“arising under or in connection with” the original Agreement Among Members (including Section 3.09), or “arising out of, based upon, attributable to or resulting from the ownership of” TWE shares. R. 316-17.

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<sup>4</sup> América Móvil stock closed at \$7.30 per share on July 29, 2003. R. 334. (Again, this figure is adjusted in the historical database to account for intervening stock splits and dividends.) Plaintiffs received \$64,317,066 for the sale of their TWE units that day; had they invested that money in América Móvil stock, they would now hold 8,810,557 shares.

<sup>5</sup> As explained above (*supra*, note 3), The proceeds from the 2002 put would have resulted in plaintiffs’ now holding 9,789,603 shares. With the 8,810,557 additional shares they could have bought with the proceeds of the 2003 sale, plaintiffs would now own 18,600,160 shares, which as of the date the complaint was filed (June 3, 2008) would have been worth \$1,065,789,240. R.335 (showing a closing price on June 3, 2008 of \$57.30 per share).

### **E. Plaintiffs Wait Five More Years And Then Sue**

After the final sale and release in 2003, nothing more transpired among these parties until June 2008, when plaintiffs filed this lawsuit in New York. The catalyst for the suit, plaintiffs allege, was a series of audit reports released by the Ecuadorian government in 2008. R. 40-41. According to the complaint, these audit reports confirmed what plaintiffs had suspected all along: that defendants allegedly had been concealing Conecel's "true financial situation." R. 41.

The sweeping complaint alleges 12 causes of action against seven defendants, including Telmex, América Móvil, various affiliated or successor corporations, and both Slim and Hajj individually. The alleged causes of action run the gamut from breach of contract, to breach of fiduciary duty, to various species of fraud, but the harm alleged is the same: Plaintiffs claim that the defendants, acting in concert, conspired to deprive them of their "rights" under Section 3.09 of the 2000 contract by purposely engaging in "bad faith" negotiations and thus preventing plaintiffs from entering into a share exchange in 2001. Such an exchange, plaintiffs claim, would have netted them "at least 7,000,000 American Depository Shares of América Móvil," holding a value as of the date of the complaint of "over \$1 billion dollars." R. 41. The asserted basis for jurisdiction in this State is a forum-selection clause in the original set of contracts, and the "transacting business" prong of New York's long-arm statute, CPLR 302.

R. 30. Plaintiffs do not allege, however, that either of the individual defendants (Slim or Hajj) was a party to the original contract or was ever present in New York (or even in this country) in connection with any aspect of this transaction. Indeed, only two of the corporate defendants—Telmex LLC and TWE—were parties to the forum-selection clause. The other corporate defendants—América Móvil, Telmex Mexico, and Conecel—are foreign corporations that have no connection to the contract or this State.

Defendants promptly moved to dismiss the complaint, asserting (among other things) that the claims were barred by the 2003 releases and the applicable statutes of limitations. R. 54. In addition, defendants argued that the court lacked personal jurisdiction over Slim, Hajj, and the corporate defendants who were not parties to any of the governing contracts.

After a brief hearing, Justice Lowe denied defendants' motion in its entirety. The IAS judge declared from the bench that the it is "difficult at this stage" to dismiss the complaint because it contained "assertions \*\*\* based on misrepresentations, fraudulent acts, etc." R. 23. The court ordered discovery to begin. Trial has been set for February 22, 2010. Defendants timely noticed this appeal.

## ARGUMENT

### I. PLAINTIFFS HAVE RELEASED THESE DEFENDANTS FROM ALL CLAIMS ALLEGED IN THE COMPLAINT.

The release plaintiffs signed in 2003 protects these defendants against “all manner of actions, \*\*\* whatsoever, in law or equity, whether past, present or future, actual or contingent” that have anything to do with the original contract (the Agreement Among Members) or relate in any way to plaintiffs’ ownership of TWE shares. That covers every claim raised in this lawsuit. To get around this problem, plaintiffs allege that the release *itself* was fraudulently induced—that is, that they “relied” upon the defendants’ supposedly false statements about the value of plaintiffs’ TWE shares when they agreed to sign the releases. R. 40. Had they known at the time that Conecel—TWE’s only asset—was worth more than the defendants were letting on, plaintiffs claim they never would have signed the releases. *Id.* Based on these allegations, the IAS judge effectively nullified the releases and allowed this suit to continue.

This was error. Although an otherwise valid release may be disregarded if it was fraudulently obtained, a plaintiff cannot claim that he relied to his detriment on statements he knew or had reason to know were false. Here, the plaintiffs actually *allege* that they strongly suspected fraud as early as 2001 and that they chose not to inquire further or pursue other remedies in order to confirm what they suspected to be true. Aware of the possibility they had been misled, plaintiffs

nonetheless released the defendants from all possible claims—“whether past, present or future, actual or contingent.” As consideration for the releases, they received a valuable and lucrative buy-out deal that netted them many millions of dollars several years earlier than they otherwise would have had a contractual right to put their shares to Telmex. They cannot cry foul now.

**A. The 2003 Release Bars This Suit.**

The broadest of the releases plaintiffs signed in 2003 encompasses this action: it protects defendants against all claims arising out of the “Agreement Among Members” or the ownership of TWE shares. That release, the product of careful negotiation among parties represented by experienced and sophisticated counsel, releases the defendants from

*“all manner of actions, \*\*\* whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE].” R. 317 (emphasis added).*

The release of “all manner of actions” did not exclude any type of claim, including fraud or fraudulent inducement.

Lest there be any doubt that this release was intended to protect defendants even from potential fraud claims, it is worth noting that a different release, signed

concurrently with this one and pegged to other transactions, *did* explicitly carve out such claims: “provided that the foregoing release shall not release any claims involving fraud.” R. 325 (including otherwise identical language releasing claims arising from a different contract). In short, the parties knew how to circumscribe a release provision, if they chose to; there is no serious question that the release applicable to *these* claims was intended to preclude exactly the sort of suit now pending.

There is no reason not to enforce it according to its terms. As the Second Circuit observed (applying New York law),

“[w]hen, as here, a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel, the general rule is that, if the language of the release is clear, \*\*\* the intent of the parties [is] indicated by the language employed.” *Middle East Banking Co. v. State Street Bank Int’l*, 821 F.2d 897, 907 (2d Cir. 1987) (internal marks omitted).

It is black letter law that “a valid release constitutes a complete bar to an action on a claim which is the subject of the release.” *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dep’t 2006). See also CPLR 3211(a)(5) (authorizing dismissal where “the cause of action may not be maintained because of \*\*\* release”). There are strong policy reasons to enforce fairly-negotiated releases according to their terms, no matter how broad. As the Court of Appeals has explained, a release is

“a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice.” *Mangini v. McClurg*, 24 N.Y.2d 556, 563 (1969).

See also, *e.g.*, *Toledo v. West Farms Neighborhood Hous. Dev. Fund Co., Inc.*, 34 A.D.3d 228, 229 (1st Dep’t 2006) (same). When a release, like this one, uses broad “general” terms, it is “construed most strongly against the releasor,” *Mt. Read Terminal, Inc. v. LeChase Constr. Corp.*, 58 A.D.2d 1034, 1035 (4th Dep’t 1977) (citations omitted), and presumed, absent evidence to the contrary, to preclude every possible claim encompassed by its general language. See, *e.g.*, *Mangini*, 24 N.Y.2d at 563.

The language here is not only “general,” but aggressively inclusive as to the category of claim—“all manner of actions, \*\*\* whatsoever, in law or equity,” and as to time—“past, present or future,” and as to ripeness and foreseeability—“actual or contingent.” In 2003, plaintiffs were willing to release every claim, even future and contingent claims they could not possibly know about, in order to cash out their TWE holdings in full and immediately. Having received \$64 million in part for that consideration, they should not be permitted to retract their part of the deal.

**B. Plaintiffs' Fraudulent Inducement Allegations Cannot Resuscitate These Claims.**

Plaintiffs try to plead around the consequences of their decision by alleging that they were improperly induced to sign the 2003 releases by the defendants' "false representations" about the financial condition of Conecel. Had they known at the time that they were being lied to, plaintiffs claim, they never would have given up their right to sue for fraud and breach of contract.

There are two problems with this argument. First, plaintiffs actually allege that they knew they were not receiving the full story about Conecel and TWE. Second, their arguments are wholly circular: they re-label as fraudulent inducement of the release the very conduct—supposed misinformation about Conecel and TWE—that unquestionably falls within the release's terms.

**1. Plaintiffs Were Aware Of Their Potential Claims At The Time They Gave Them Up.**

Knowledge of a potential claim is not a prerequisite to giving a valid release. If it were, few releases would be of significant value, and parties would be less likely to settle commercial disputes. For this reason, the courts are properly reluctant to entertain bare allegations of "fraudulent inducement" as a basis for reopening the very dispute the parties settled.

Here, however, plaintiffs' own allegations show that they were on notice that, in return for millions of dollars of accelerated cash-out, they were releasing

the kinds of claims they now have sought to revive. Far from being lulled, unsuspecting, into releasing claims they had no reason to believe existed, plaintiffs allege that they already were deeply frustrated by the defendants' refusal to negotiate or provide "complete and accurate financial information," and were "wary" of their motives, well before defendants' proposed the 2003 sale, and the subject of releases, arose. R. 38.

Plaintiffs were entitled under the contract to *20 days of good-faith negotiations*, but they claim that the defendants openly refused to negotiate for over *two years*, beginning in March 2001. These refusals allegedly prompted plaintiffs to take advantage of the first of their "put" rights (and to that extent abandon the possibility of an exchange) by March 2002. Plaintiffs allege that they were repeatedly stonewalled: calls were not returned, various executives denied responsibility for conducting negotiations, and the defendants refused multiple requests for key financial documents. Assuming *arguendo* that this behavior occurred, it not only made plaintiffs "wary of the threat that Defendants would never negotiate in good faith" (R. 38), but made clear that plaintiffs were getting a runaround rather than the information they believed necessary.

Although a release can be set aside on grounds of fraudulent inducement, see, e.g., *Littman v. Magee*, 54 A.D.3d 14, 17 (1st Dep't 2008), a party cannot avoid the consequences of a valid release on this ground when he knows (or

reasonably should know) at the time he signs the release that he has a claim he is giving up. The reason, of course, is that in order to establish fraudulent inducement in the first place, a plaintiff “must establish justifiable reliance on the misrepresentations or omissions at issue. So, if he was aware of information that rendered his reliance unreasonable, or if he had enough information to create a duty to investigate further, the requisite reliance cannot be established.” *Id.* As this Court has explained, a party who “has hints of [the] falsity” of an alleged misrepresentation must exercise “a heightened degree of diligence.” *Global Minerals*, 35 A.D.3d at 100. After such tip-offs, reliance is unreasonable, so that if the “party fails to make further inquiry or insert appropriate language in the agreement for its protection, it has willingly assumed the business risk that the facts may not be as represented.” *Id.*

These plaintiffs, of course, did not insist on protective language in the release contract. Quite the opposite: they agreed to an exceptionally broad release notwithstanding the “hints” they now allege to have had. “[C]onclusory allegations of fraudulent inducement” are not enough to “overcome the unambiguous language” of a release where a plaintiff did not follow up on the suspicions it had or should have had, if its allegations are true. *New York City School Constr. Auth. v. Koren-DiResta Constr. Co., Inc.*, 249 A.D.2d 205, 205-06 (1st Dep’t 1998) (“*Koren-DiResta*”). Taking the plaintiffs’ allegations at face

value (as we must at this stage), then by the time they sat down at the negotiating table in 2003, they had every reason to believe, and in fact did believe, that relevant information was being kept from them and that they were not getting “accurate financial information.” That compels the conclusion that plaintiffs, “wary” as they were, purposely gave up the right to sue in exchange for consideration they believed at the time to be adequate compensation for their forbearance.

As this Court observed in rejecting similar claims of fraudulent inducement, considering “the sharply acrimonious nature of the negotiations, [plaintiffs] can hardly claim with any credibility that [they], \*\*\* savvy businessm[e]n, entered into the resulting agreements lulled by faith or trust in the parties across the bargaining table, or that [they] unwittingly gave up some valued right in the bargain.” *Shea v. Hambros PLC*, 244 A.D.2d 39, 47 (1st Dep’t 1998) (internal marks omitted).

Plaintiffs cannot show that asserted reliance was reasonable, if they “ha[d] the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fail[ed] to make use of those means.” *Koren-DiResta*, 249 A.D.2d at 205-206. The plaintiffs here had ample available means to investigate their (admitted) suspicions. (See *Littman*, 54 A.D.3d at 19.) As they point out in their complaint, the original set of contracts entitled them to review TWE’s tax statements and quarterly financial statements. Indeed, plaintiffs’ first cause of

action in the current suit alleges a breach of the defendants' contractual obligation to share this information. If plaintiffs were in the dark about the true value of their holdings when they chose to release defendants from liability, that is no one's fault but their own. According to their allegations, plaintiffs knew that the defendants were stubbornly refusing to share financial data. Plaintiffs could have forced them to do so by filing suit in 2002 or 2003 and claiming exactly the same contractual violations they now allege. At the least, they could have excluded potential "fraud" claims from the releases they chose to provide as part of the 2003 deal.

**2. Plaintiffs Cannot Settle A Fraud Claim And Then Attack The Settlement Based On The Same Purported Fraud.**

In any event, even if plaintiffs had not been on notice of the alleged fraud when they released their claims, their assertion of fraudulent inducement would not defeat the release. When a party knowingly waives his right to sue *for fraud*, he has done just that. He cannot invalidate that choice because he later learns that he was, in fact, defrauded. As the federal courts have repeatedly recognized when applying New York law in this context, a claim for fraudulent nondisclosure can be settled, prospectively, like any other claim. The defendant need not "come forward and confess to all his wrongful acts" in order to guarantee that he has truly been released from future claims. *Alleghany Corp. v. Kirby*, 333 F.2d 327, 333 (2d Cir. 1964). See also *Bellefonte Reins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527 (2d Cir. 1985). Instead, the party that chooses to waive a prospective claim, in return

for valuable consideration, bears the risk of later discovering that the claim he released might have had merit.

To be sure, a release can be set aside if the plaintiff alleges and eventually proves that he was fraudulently *induced* to enter the agreement, but the “fraud” alleged must be *separate* from the one that was released in the first place. See, e.g., *Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc.*, 11 A.D.3d 296, 296 (1st Dep’t 2004) (affirming dismissal of claim of fraudulent inducement of settlement agreement, where fraudulent inducement was released in global settlement); *DirectTV Group, Inc. v. Darlene Invs., LLC*, No. 05 Civ. 5819, 2006 U.S. Dist. LEXIS 69129, at \*4 (S.D.N.Y. Sept. 27, 2006) (parties granting releases for fraud can only challenge the release for fraudulent inducement by pointing to “a separate and distinct fraud from that contemplated by the agreement”); *Bongo Apparel, Inc. v. Iconix Brand Group, Inc.*, 18 Misc. 3d 1108(A) (N.Y. Sup. Ct. 2008) (broad language in settlement agreement bars fraudulent inducement claim where claim relates to or arises from settled matters regardless of when fraud is discovered).

Here, the alleged “fraud” that purportedly induced the release was the exact same “fraud” supporting the plaintiffs’ underlying claim. Plaintiffs allege that the defendants—Hajj—falsely claimed that Conecel was in dire financial straits, and that therefore, a “share exchange” would be unprofitable for all involved. That is

the allegedly false misrepresentation that purportedly led plaintiffs to sign the release, and it is also the precise fraud claim plaintiffs released by signing the agreement (and concurrently accepting the cash “put” price for their remaining TWE shares). The same act of fraud cannot simultaneously be the subject of the release and the basis for invalidating the release.

## **II. PLAINTIFFS IMPROPERLY SPLIT THEIR LONE CONTRACT CLAIM INTO A SERIES OF TORTS.**

Even if plaintiffs’ lawsuit survives the release, the tort causes of action are duplicative of the contract claim for breach of Section 3.09 and should be dismissed, simplifying this overwrought action. The complaint asserts twelve causes of action, when it should have asserted one: the second, for breach of Section 3.09 of the Agreement Among Members. Plaintiffs assert no harm, and seek no relief, separable from the defendants’ alleged non-performance of the obligation under Section 3.09, which plaintiffs allege required a successful exchange agreement rather than the mere 20-day negotiation required by its text. As a result, plaintiffs’ third through ninth causes of action (alleging breach of the covenant of good faith, breach of fiduciary duty, various species of fraud, and unjust enrichment) should have been dismissed as duplicative.

A plaintiff who cries fraud but does “not allege that she sustained any damages that would not be recoverable under her breach of contract cause of action” has stated only a contract claim. *Mañas v. VMS Assocs., LLC*, 53 A.D.3d

451, 454 (1st Dep't 2008). In that circumstance, “the fraud-based causes of action are duplicative of the breach of contract cause of action,” and should be dismissed.

*Id.* Here, plaintiffs’ fraud claims simply assert alternate paths to recover whatever damages might be due for a breach of defendants’ alleged duty under Section 3.09 to negotiate a share exchange in good faith.

Indeed, each of plaintiffs’ fraud claims simply repeats their plea for \$900,000,000 in damages for breach of contract, resting on the notion that “Telmex LLC failed to ‘negotiate in good faith’ with Plaintiffs to determine a price for the exchange as required by Section 3.09 of the Agreement Among Members” (R. 43). Plaintiffs allege that \$900,000,000 would have been their contractual “benefit of the bargain” (R. 41)—that is, the excess of the present value of the América Móvil shares they claim they would have received in a Section 3.09 negotiation, over the \$130 million they actually negotiated and received for their shares in TWE. Each of Plaintiffs’ damages claims seeks the same damages based on the same hypothetical Section 3.09 exchange.

Plaintiffs cannot plead around the consequence of duplication by asserting promissory fraud (as they do in their fifth cause of action). As this Court has recognized, “[a] fraud-based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.’” *Mañas*, 53 A.D.3d at 453 (quoting *First*

*Bank of Ams. v Motor Car Funding*, 257 A.D.2d 287, 291 (1st Dep’t 1999)). The same rule applies to a cause of action alleging a “misleading[] disclosure of an existing fact.” *Andres v. LeRoy Adventures, Inc.*, 201 A.D.2d 262, 262 (1st Dep’t 1994). So long as the claimed “damages under the fraud cause of action \*\*\* do not exceed the recovery sought under the contract cause of action”—and the damages claimed here for fraud and contract are identical—they are “duplicative.” *Id.* (internal citation omitted). Here, contract damages provide the only theory or measure of harm.

Underscoring their improper claim-splitting approach, plaintiffs nowhere plead the out-of-pocket damages—“damages for foregone opportunities”—recoverable for a breach of a duty *apart* from contractual performance. *Mañas*, 53 A.D.3d at 454. Fraud damages “compensate plaintiffs for what they lost because of the fraud, not \*\*\* for what they might have gained.” *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996). The Court of Appeals has made clear that “where [a] plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory.” *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 552 (1992). So it is here.

Plaintiffs’ claims for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment are duplicative and should be dismissed for the same reason. Each seeks only the alleged benefit of the

bargain in Section 3.09. Thus, for breach of the implied covenant, plaintiffs seek the same \$900 million because they “g[a]ve up trying to exchange” their Units. R. 43-44. That claim must be dismissed because the “alleged breach” of the covenant “is ‘intrinsically tied to the damages allegedly resulting from a breach of the contract.’” *The Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep’t 2004) (quoting *Canstar v. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dep’t 1995)).

For breach of fiduciary duty, plaintiffs’ only claimed harm is their failure to “realize the advantages of the América Móvil spin off”—that is, through a Section 3.09 exchange. R. 44-45. But a claim for breach of fiduciary duty must be dismissed if, like plaintiffs’ breach of fiduciary duty claim here, it is “premised on the same facts and seek[s] the identical relief sought in” a contract claim. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (1st Dep’t 2004); *William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep’t 2000).

The unjust enrichment claim, too, rests on the notion that plaintiffs were not able “to exchange the TWE LLC [Units] for shares in América Móvil” under Section 3.09. R. 49. Because that unjust enrichment claim “simply claims damages identical to” the contract cause of action, it should be dismissed. *Fallon v. McKeon*, 230 A.D.2d 629, 630 (1st Dep’t 1996). Indeed, no unjust enrichment

claim is cognizable where, as here, “the parties’ rights and obligations are governed by a valid and enforceable contract.” *Golub Assocs. v. Lincolnshire Mgmt.*, 1 A.D.3d 237, 238 (1st Dep’t 2003); see also *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 587-88 (2005).

The dismissal of plaintiffs’ duplicative claims would have three principal consequences, assuming that the contract claim survives.

First, the defendants who were not party to the contract (the individual defendants, as well as three separate corporate defendants: América Móvil, Telmex Mexico, and Conecel) must be dismissed from the action. When fraud claims rest on a breach of contract, they cannot be maintained against nonparties to the contract, if the similar fraud claims against the contract parties fail. Rather, where “the main fraud claim against the direct actor falls, so does the claim against the remaining [nonparty] defendants.” *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 305 (1st Dep’t 2003). Here, as in *Milan Music, Inc. v. Emmel Commc’ns Booking, Inc.*, 7 Misc. 3d 1008A (N.Y. Sup. Ct. 2004), “the fraud claim amount[s] to an allegation that defendants never intended that [the contracting defendant] would perform obligations under the [c]ontract.” Just as the fraud claims generally should be “barred as duplicative of the claims for breach of contract,” the nonparty defendants should “dismissed because they [were] not parties to the [c]ontract.” *Id.* at \*2.

Likewise, plaintiffs' unjust enrichment claim against the defendants who were not parties to the contract fails for this reason and the additional reason that they did not render any services to the defendants who were not party to the contract. *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d 766, 767-68 (2d Dep't 2008). They sold their shares to the corporate counter-parties, not to the individual defendants or their other corporate defendants.

Nor can plaintiffs enforce a "covenant" against nonparties to the contract. *Mark Patterson, Inc. v. R.M. Stephens & Co., Inc.*, 232 A.D.2d 178, 179 (1st Dep't 1996).

Second, if the Court properly rejects plaintiffs' effort at claim-splitting, they cannot rely on the longer statute of limitations for fraud. *Brick v. Cohn-Hall-Marx Co.*, 276 N.Y. 259, 264 (1937); *Fireman's Fund Ins. Co. v. Kapralos*, 942 F. Supp. 836, 839 (E.D.N.Y. 1996).

Finally, plaintiffs' claim for punitive damages falls with their fraud claims, because punitive damages are not available for breach of contract. See *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603, 613 (1994) ("Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights.").

### **III. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTES OF LIMITATIONS.**

In any case, all claims are time-barred. The conduct on which all of plaintiffs' claims rest occurred no later than 2001. That is when defendants supposedly (1) breached their contractual obligations to share financial data and to negotiate for a share exchange in good faith, and (2) made false representations about the value of the plaintiffs' holdings. (Indeed, some of plaintiffs' fraud claims rest on acts from 1999.) These acts were not secret, but open and obvious. Indeed, nearly all of the claims in this suit, on all theories, stem from the defendants' obvious refusal to negotiate an exchange in 2001 and their purported bad-faith refusal to turn over Conecel's tax documents and financial statements, despite repeated requests and (allegedly) various contractual obligations to do so.

Even though the conduct alleged in the complaint occurred in 2001, plaintiffs waited until 2008 to file suit. Each of plaintiffs' claims is subject to a six-year statute of limitations. Therefore, even if the claims had not been released in 2003, they would still be untimely and subject to dismissal.

Plaintiffs argued below that the statutes of limitations for all their claims were tolled or otherwise failed to accrue immediately, because plaintiffs did not "discover" the fraud or breach of contract until they examined Ecuadorian government reports in 2008. As detailed above, however, the complaint alleges that by 2001 plaintiffs were actually aware of the contract breach, and at least on

notice of the strong possibility of fraud, because the defendants allegedly were known to be withholding “accurate financial information.” At the latest, plaintiffs knew they were not going to get the benefit of an exchange negotiated under Section 3.09 no later than March 2002, when they chose to “put” half their TWE shares at the originally-negotiated price.

Plaintiffs have not alleged that they were in the dark until discovering new information from the tax authorities in 2008. The “government reports” may have provided the *latest* information hinting at (alleged) fraud, but the limitations period runs from the *earliest* information that put plaintiffs on inquiry notice. As the Court of Appeals held long ago,

“[a] new cause of action for fraud does not accrue each time a plaintiff discovers new elements of fraud in a transaction or new evidence to prove such fraud. Where there is knowledge of facts sufficient to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises and may thus start the running of the statute.” *Sielcken-Schwarz v. Am. Factors*, 265 N.Y. 239, 245-46 (1934).

See also *TMG-II v. Price Waterhouse & Co.*, 175 A.D.2d 21, 22-23 (1st Dep’t 1991) (same). At most, taking plaintiffs’ allegations at face value, the reports merely confirmed what plaintiffs already knew or suspected long ago. They cannot wait to investigate, or sue, until the strongest basis for suspicion drops into their lap.

### A. The Contract Claims Are Time-Barred.

Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing are governed by a six-year statute of limitations. See CPLR 213(2); *Liberman v. Worden*, 268 A.D.2d 337, 339 (1st Dep't 2000). A cause of action for breach of contract accrues, and the statute begins to run, at the time of the breach, even if the plaintiff is unaware that the contract has been violated. See, e.g., *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993).

Plaintiffs' contract claims are based on the alleged violation of the good-faith-negotiation provision in Section 3.09 of the agreement.<sup>6</sup> This provision entitled plaintiffs to 20 days of negotiations. Contrary to plaintiffs' assumption, the contract did not guarantee them a *right* to exchange their TWE shares for those of a spin-off company, much less at any particular price. Rather, under the plain

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<sup>6</sup> Plaintiffs also raise another breach-of-contract claim (the First Cause of Action), asserting that the defendants violated a separate contract by allegedly failing to furnish quarterly financial statements. This contract (the "LLC Agreement") was governed by Delaware law. Delaware's statute of limitations bars contract claims brought more than three years after the alleged breach. See Del. Code Ann., tit. 10, § 8106; *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1292 (Del. 1982); see also *Schuster v. Derocili*, 775 A.2d 1029, 1034 (Del. 2001) (three-year statute of limitations applicable for breach of implied covenant of good faith and fair dealing in Delaware as well). Under New York's borrowing statute, that shorter period applies here. CPLR 202. As alleged, the failure to furnish financial statements occurred no later than July 2003, when plaintiffs sold the last of their TWE shares. The statute of limitations thus ran out no later than July 2006.

language of Section 3.09, the parties could fully comply with their obligations even if 20 days passed without their settling on a “mutually satisfactory” price, or on other necessary terms. Instead, the contract simply guarantees an honest—and finite— negotiation.

The complaint alleges that the plaintiffs first requested such a negotiation in March 2001. R. 36. If the defendants responded to this request (as they allegedly responded to other requests) by negotiating in “bad faith”—stalling the talks, withholding “accurate,” critical information, or lying about financial information— then the breach occurred no later than 20 days after the original request. If, as the complaint alternatively suggests, the defendants failed to negotiate at *all*, then the breach occurred at the moment of the request, when the defendants refused to sit down to a talk within the 20 days despite a contractual obligation to do so. Either way, the contract was breached, if it was breached at all, in March or April 2001. Moreover, any chance of performance under Section 3.09 had passed once plaintiffs sold half their shares at the “put” price in March 2002, still too early to support their June 2008 complaint.

Before the trial court, plaintiffs asserted two reasons for avoiding the statute of limitations. Neither has merit.

**1. The Defendants Are Not Equitably Estopped From Asserting A Limitations Period, Which Was Not Tolloed.**

First, plaintiffs argued that the defendants should be equitably estopped from asserting a limitations defense, because plaintiffs have alleged that they were fraudulently induced to release their claims, and thus to refrain from filing suit, in 2003. The statute, plaintiffs claim, should therefore be tolled from the date of the releases.

This argument fails for the same reason plaintiffs cannot avoid the releases in the first place: even if the defendants made false representations about Conecel's financial condition, plaintiffs were not permitted to rely on those representations and thus avoid taking responsibility for their actions. Plaintiffs' allegations make clear that they were on notice that the defendants were hiding "complete and accurate financial information." R. 38. Indeed, plaintiffs affirmatively allege that they were "wary" that the defendants were being dishonest nearly two years before they claim to have taken the defendants at their word and signed away important rights as a result. Plaintiffs, therefore, were concededly on notice that (according to their own suspicions) they might not receive accurate and candid information about the company's finances, which would be central to good-faith negotiations over the value of their TWE shares. Seven years later they sued because they (allegedly) did not receive the accurate information that they suspected at least as

early as 2001 was being withheld from them or would be concealed. But they knew what they were getting into, and they cannot get off the hook now.

Because these facts imposed on plaintiffs a “duty to make inquiry and ascertain all the relevant facts before the statute of limitations expires,” they cannot rely on a tolling argument to revive their stale claims. See, e.g., *Estate of Boyle v. Smith*, 15 A.D.3d 338, 339 (2d Dep’t 2005). In particular, “‘a claim of estoppel grounded in fraud’” must fail “[w]hen plaintiffs possess ‘timely knowledge’ sufficient to pace them ‘under a duty to make inquiry and ascertain for themselves all the relevant facts.’” *Renz v. Beeman*, 589 F.2d 735, 751 (2d Cir. 1978) (quoting *Augstein v. Levey*, 3 A.D.2d 595, 598 (1st Dep’t 1957)).

In any event, the supposed misrepresentations to which the plaintiffs point are irrelevant to their contract claim. Plaintiffs complain that defendants wrongfully deprived them of the right to negotiate in good faith for an exchange of shares. None of the alleged misrepresentations regarding Conecel’s financial condition in 2003 are relevant to the claim that the parties failed to negotiate an exchange in 2001. Even if the defendants had provided comprehensive, accurate financial information on a daily basis, plaintiffs would have the same complaint: no share exchange. The report from the Ecuadorian government, which plaintiffs allegedly reviewed in 2008, revealed nothing about the defendants’ alleged refusal to negotiate a share exchange; plaintiff were aware of that refusal when it occurred

in 2001. Put simply, plaintiffs knew that the defendants would not negotiate when they *did* not negotiate. The government report, and all of plaintiffs' claims of financial misrepresentation, are irrelevant—a transparent ploy to preserve stale claims and avoid a binding release.

**2. The Obligation Under Section 3.09 Was One 20-Day Negotiation, Not An Evergreen Obligation Of “Continuing Performance.”**

Second, plaintiffs argued below that they should be relieved of the obligation to bring suit within six years of the breach they allege because Section 3.09 called for “continuing performance” of the duty to negotiate for a share exchange. This argument is frivolous.

Where a contract calls for continuing, *open-ended* performance of a specified duty, and a defendant continuously breaches the contract by never performing that duty, a plaintiff may sue for breach at any time during the period of continuing non-performance and recover damages for the six years preceding suit. See, e.g., *Beller v. William Penn Life Ins. Co. of N.Y.*, 8 A.D.3d 310, 314 (2d Dep’t 2004).

But the contract provision at issue here calls for a period of good-faith negotiation “*not to exceed 20 days*,” once certain circumstances triggered that obligation—not a *continuing* performance. According to plaintiffs, the events triggering the duty to negotiate occurred in 2001. Defendants did not have a

perpetual and recurring obligation to negotiate for a share exchange whenever asked; to the contrary, they had an obligation to do so for 20 days and *only* 20 days. Nothing in Section 3.09 creates an evergreen right or an endless string of 20-day negotiating obligations. The provision calls for a single negotiation and, at best, a single exchange of shares. Defendants breached their obligation when they (allegedly) negotiated in bad faith upon being approached in 2001. Plaintiffs' claim accrued, at the latest, on day 21, seven years before they filed this action.

**B. The Fraud Claims Are Time-Barred.**

Plaintiffs' fraud claims are equally untimely because they rest on alleged misrepresentations that stretch back to 1999 and came to fruition by the time the defendants refused to negotiate an exchange in 2001, and surely by the time plaintiffs had to abandon any hope of a full share exchange when they "put" half their TWE shares in March 2002.

The statute of limitations for fraud claims in New York is also six years, unless the plaintiff was unaware of the fraud at the outset and could not "with reasonable diligence" have discovered it immediately; in that event, a two-year statute then begins to run at the time of discovery or at the time a reasonable person should have discovered the fraud. See CPLR 213(8). Thus, a fraud claim is timely if it is brought either within six years of the fraud itself or within two years of actual or imputed discovery.

Most of the fraud claims in the complaint stem from the allegation that Slim, Hajj, and the corporate defendants misled the plaintiffs in 1999 about the potential for “stock market upside” from an eventual share exchange, and then allegedly engaged in “bad faith” negotiations while providing purportedly incomplete or false information about the state of Conecel’s finances. This fraudulent scheme allegedly began in 1999 (when the first references to a share exchange were made) and continued through 2000, when the defendants failed to inform plaintiffs of the América Móvil spin-off. Reading the complaint very generously, it is possible for plaintiffs’ to argue that the alleged fraud began as late in 2001, when the actual “bad faith negotiations” took place. But the fraud was essentially *complete* no later than March 2002, when it was clear that no share exchange would take place, because plaintiffs had given up and sold half their shares at the “put” price.

One way or another, the six-year statute of limitations ran on these claims well before suit was filed. For this reason, plaintiffs are reduced to arguing that they did not discover the “fraud” until they read the 2008 reports from the Ecuadorian government, and that they filed suit soon after that. In the trial court, plaintiffs argued that this late discovery of the fraud made their claim timely.

But the 2008 government findings did not bring plaintiffs’ stale claims back from the dead, because that information came years after the information that put plaintiffs on inquiry notice. Plaintiffs cannot claim the benefit of the “discovery

rule” if they knew or should have known about the alleged fraud more than two years before they filed their complaint. And as we have explained above (*supra*, pp. 20-24), plaintiffs knew that they had not been given “complete and accurate financial information” and that there would be no 20-day good-faith negotiation for a share exchange when the defendants refused to engage in one. Therefore, they were on notice that the promise of a “good faith” negotiation for a share exchange was a false one. Plaintiffs actually *allege* that they suspected fraud as early as 2002, when they decided to exercise their put option, “wary that Defendants would never negotiate in good faith.”

More important than their actual wariness, plaintiffs have alleged numerous facts that, if true, would have put any reasonable party on notice of the possibility of fraud, triggering a duty of inquiry. Whether fraud could have been discovered more than two years before commencement of suit is ultimately an objective inquiry, and plaintiffs are charged with the knowledge that a reasonable person would have acquired under the same circumstances. *Sabbatini v. Galati*, 43 A.D.3d 1136, 1140 (2d Dep’t 2007). Having alleged, for example, that the defendants repeatedly refused to provide the critical financial data plaintiffs knew they possessed, they cannot turn around and claim that they were not on notice that something was amiss. See, *e.g.*, *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir. 2006) (“A plaintiff cannot close his eyes to an obvious fraud.”). To the

contrary, such factors trigger a duty to investigate and render reliance on any further representations unjustifiable. See *Global Minerals*, 35 A.D.3d at 100 (1st Dep't 2006).<sup>7</sup>

#### **IV. PLAINTIFFS HAVE NOT ALLEGED ANY COGNIZABLE DAMAGES.**

Under whatever theory they assert in their effort to revive their foregone bargain under Section 3.09, plaintiffs have not alleged any actual damages attributable to the defendants' actions.

Even if the plaintiffs had a right to exchange their TWE shares for stock in América Móvil, and even if the defendants wrongly deprived them of that right, even "fraudulently," plaintiffs have still alleged no facts that could show that the

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<sup>7</sup> This analysis applies with equal force to all of plaintiffs' fraud claims, including the Sixth and Eighth claims, which allege detrimental reliance on representations made in 2002 and 2003. For one thing, given the plaintiffs' allegations, including the claim that they had been repeatedly rebuffed, since 2001, in their attempts to obtain critical financial data, they cannot prove that they were *justified* in relying on the defendants' purportedly false statements about the company's health in 2003.

In any event, any misrepresentations allegedly made after the close of the 20-day negotiation period (in April 2001, at the latest) are objectively irrelevant. After that time, plaintiffs had lost the only right they claim as a basis for damages. Plaintiffs try to plead around the statute of limitations by asserting that they were damaged when they were induced to sell their remaining shares in 2003 (R. 46-47, 48). But the damage they claim for that sale is the same damage that underlies all their fraud charges: the amount of money they say they would have now, if they had achieved a share exchange in 2001. Once the obligation to negotiate toward a share exchange was breached, plaintiffs' claim accrued, no matter what label they place on it.

defendants' actions caused them actual harm. When they were given \$130 million in cash instead of stock, plaintiffs could have used the cash to purchase América Móvil shares on the open market and put themselves in the same financial position that they claim they would have been in, if defendants had not (allegedly) mistreated them. Apparently they chose to invest that money elsewhere. Now they seek to use this action to salve their buyers' remorse because they elected to use the proceeds for other purposes. Nothing in the applicable contracts or in New York law gave them an option to avoid taking the market risk that América Móvil shares might decline after they cashed out their TWE shares but then to demand the fruits of an investment—escalating share price of América Móvil—that they elected not to make at the time.

No alleged act of the defendants caused the plaintiffs to forgo acquiring América Móvil stock on the open market. Plaintiffs could have acquired at least as many shares in open-market transactions as they allege they would have received in a direct exchange for their interest in TWE. Because they “made no payments to defendants” but rather received \$130 million cash from them, and “there being no dispute that” América Móvil stock “could have been purchased” on the open market, “no damages were sustained” and the complaint should have been dismissed. *Dweck v. Oppenheimer & Co.*, 30 A.D.3d 163, 163 (1st Dep’t 2006) (affirming dismissal of fraud and contract claims).

In any event, as we have explained already, the premise of this entire lawsuit is the plaintiffs' incorrect assumption that Section 3.09 of the Agreement Among Members granted them a right to a "share exchange" in 2001. That is simply not what the contract says. According to the plain terms of the contract, plaintiffs had a right to a "good-faith negotiation" for a share exchange—and a negotiation not to exceed 20 days. But nothing in the contract required defendants reach an agreement, even at the conclusion of a good-faith negotiation. Even if defendants had done everything plaintiffs claim they should have—shared all the most accurate information about the value of the Conecel shares, and been responsive and open during the discussions—defendants still would have been within their rights under the contract to insist on the price provided in the "put agreement" or to refuse a share exchange altogether.

Courts will not dream up a price term not included in an agreement to negotiate on the speculation that an agreement would have been reached, if a defendant had negotiated in good faith: "[E]ven with the best faith on both sides, the deal might not have been closed." *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 74 n.2 (2d Cir. 1989) (refusing recovery).

"It is impossible to assess any damages, as there is no way that anyone could foresee what would have come from examining the possibility of executing a new contract, even if this were done in the utmost good faith." *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 698 (2d Cir. 1965).

*See also Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 430 (8th Cir. 2008) (“Fairbrook asks us to do what New York law prohibits—transform a binding preliminary agreement to negotiate for a contract into the contract itself.”); *Goodstein Constr. Corp. v. City of New York*, 80 N.Y.2d 366, 370 (1992). Plaintiffs therefore have not alleged any damages cognizable under the contract, and they have certainly claimed no actual damages attributable to fraud. Even if there had been a good faith negotiation, plaintiffs still would have had to exercise their put rights in order to have an enforceable right to get any money for their shares in TWE.

#### **V. NEW YORK LACKS PERSONAL JURISDICTION OVER MANY OF THE DEFENDANTS.**

No part of this action should go forward. But if some aspect of it survives, several of the defendants must be dismissed for lack of jurisdiction. A forum selection clause in the “Agreement Among Members” places any disputes arising out of that contract within the jurisdiction of the New York courts. But only two of the defendants (TWE and “Telmex LLC”) were parties to that contract. The rest of the defendants (Slim, Hajj, América Móvil, Conecel, and Telmex) are not bound by that agreement. These foreign individuals and corporations have insufficient ties to this State and have not submitted to the jurisdiction of its courts. Whatever else the Court decides, these defendants should be allowed to go home.

The complaint alleges two bases for personal jurisdiction, but neither applies to the defendants who were not parties to the “Agreement Among Members.”

**A. The Forum Selection Clause Provides No Basis For Asserting Jurisdiction Over Defendants Who Did Not Agree To It.**

Plaintiffs assert jurisdiction over all defendants by citing the forum selection clauses contained in certain of the agreements referenced in the complaint:

“This Court has personal jurisdiction over each Defendant \*\*\* by reason of their submission to the jurisdiction of this Court in \*\*\* Section 9.08 of the Master Agreement; Section 5.04 of the Agreement Among Members; Section 14 of the Put Agreement, [and] Section 7.08 of the 2003 Purchase Agreement \*\*\*.” R. 30.

But the two individual defendants (Slim and Hajj) were not parties to any of those agreements. They did not negotiate the agreements in New York, and did not even sign the agreements on behalf of any of the signatory corporations. As for the corporate defendants, only two of those entities (TWE and Telmex LLC) were party to the “Agreement Among Members” or the “LLC Agreement,” the sole contracts on which the plaintiffs have sued. The other three corporate defendants were parties to other contracts referenced in the complaint, but the plaintiffs have not pleaded a claim for relief under any of these contracts. Those contracts therefore cannot provide a basis for jurisdiction here.

Because they are not parties to either of the contracts that form the basis of the dispute here, none of these non-signatory foreign defendants can be forced to

defend a lawsuit in New York. It is hornbook law that, absent special circumstances, a contract cannot bind a nonparty. See, e.g., *Dember Constr. Corp. v. Staten Island Mall*, 56 A.D.2d 768, 769 (1st Dep’t 1977). Consequently, “the general rule [is] that a non-party to an agreement may not be subject to a forum selection clause.” *Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, 13 Misc.3d 1241A (N.Y. Sup. Ct. 2006). The only exception to this rule is where the plaintiff can demonstrate that the nonparty is so “close[ly] relat[ed]” to the party that signed the contract, so that its invocation against the non-party is foreseeable. See *L-3 Commc’ns Corp. v. Channel Techs., Inc.*, 291 A.D.2d 276, 277 (1st Dep’t 2002).

The plaintiffs have not alleged any facts that would support a conclusion that any nonparty defendant is so “closely related” to a contracting party as to be bound by the latter’s contracts. Indeed, any showing would have to be especially strong in order to bind a nonparty to a forum selection clause that would, if enforced, require him to defend a lawsuit in a foreign country, conducted in a foreign language, and adjudicated under foreign law.

In particular, with respect to the individual defendants, the complaint alleges only that they are current or former officers of the corporations that signed the contract. Plaintiffs submitted media reports about Slim and Hajj noting that they are or were senior officers of the corporate parties to the contract. But “[t]he fact

that [a foreign corporation] has submitted to the jurisdiction of the New York courts does not mean that its directors have done so.” *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep’t 2004). New York courts routinely dismiss claims against individual officers of foreign corporations that have submitted to the jurisdiction of the courts. See, e.g., *id.*; *Baran Computer Servs., Ltd. v. First Bank of Maury Cty.*, 143 A.D.2d 63, 64 (2d Dep’t 1988) (defendant’s “status as an officer of a corporate defendant which might be subject to jurisdiction in this State does not render him personally subject to such jurisdiction”); *Braun v. Giarratano*, No. 00-CV-1767, 2002 WL 1916368, at \*6 (N.D.N.Y. July 30, 2002) (“The individual defendants never accepted the jurisdiction of a New York court, and therefore the mandatory forum selection clause \*\*\* is not applicable.”); *Socline Corp. v. Podell*, No. 93 Civ. 1500, 1996 WL 109076, at \*3 (S.D.N.Y. Mar. 12, 1996) (“[T]he forum selection clause does not bind the two defendants in their individual capacity.”).

As for the non-signatory corporate defendants, one (Conecel) is alleged to be a wholly-owned subsidiary of one of the contracting parties (TWE). But that allegation is insufficient by itself to bind a party to a forum selection clause. See *L-3 Commc’ns. Corp.*, 291 A.D.2d at 277. The other two corporate defendants (América Móvil and Telmex Mexico) are alleged to have no current corporate connection at all to the contracting parties. Indeed, América Móvil was not even

formed until after the operative contract was signed. Those entities cannot be held to answer in this foreign court simply for plaintiffs' convenience.

**B. The Long-Arm Statute Does Not Reach Defendants Who Neither Submitted To Jurisdiction Nor Engaged In Relevant Conduct In New York.**

The other asserted basis of jurisdiction is the "transacting business" subpart of New York's long-arm statute, CPLR 302. Plaintiffs have not alleged general jurisdiction over any of these defendants, who are all foreign citizens who maintain no continuous presence in New York. Rather, plaintiffs allege that the original deal between Telmex and the plaintiffs was negotiated in New York, as was the final buy-out in July 2003. Plaintiffs base their assertion of jurisdiction on these meetings and the listing of América Móvil on the New York Stock Exchange.

These allegations are insufficient. Most notably, neither of the two individual defendants is alleged ever to have set foot in New York in connection with this transaction. The individual defendants' "status as \*\*\* officers of a corporate defendant \*\*\* does not render [the]m personally subject to such jurisdiction," even if the corporation they work for is subject to jurisdiction. *Baran*, 143 A.D.2d at 64. Plaintiffs conceded below that neither individual defendant had ever personally conducted business in New York in connection with this matter. They asserted instead that the corporate entities that did conduct such business did so as agents of Slim and Hajj. According to affidavits that plaintiffs

submitted, Slim and Hajj, calling from overseas, telephoned the corporate representatives who attended the New York meetings several times and apparently gave orders and suggestions.

That argument turns agency law on its head. The individual defendants are officers of the corporations that signed these agreements; if anything, their actions were as agents of the corporation, not the other way around.

“Pursuant to New York law, the acts of an agent may subject a foreign principal to personal jurisdiction; however, the relevant statutory provisions do not provide for the ‘reverse.’ They do not permit the acts of a principal to be imputed to a foreign agent to confer jurisdiction over the agent.” *Sargent v. Budget Rent-A-Car Corp.*, No. 94 Civ. 9215, 1996 WL 413725, at \*3 (S.D.N.Y. July 24, 1996) (internal marks omitted).

In any event, the mere fact that the defendants were highly placed officers who acted in a supervisory role is not sufficient to establish jurisdiction on the theory that a large, multi-national corporation is merely an agent of its CEO. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007) (“Under New York’s long-arm statute, \*\*\* personal jurisdiction cannot be predicated solely on a defendant’s supervisory position.”); *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 984 (S.D.N.Y. 1992) (corporation is not agent of a corporate officer “by virtue of the officer’s position with the company”).

As for the non-signatory corporate defendants, none is alleged to have been represented at any meetings in New York or otherwise to have transacted any

business here. Plaintiffs note in the complaint that América Móvil's shares are traded on the New York Stock Exchange, but that is not sufficient to establish jurisdiction under the CPLR. See, e.g., *In re Ski Train Fire in Kaprun, Austria* on Nov. 11, 2000, 230 F. Supp. 2d 376, 383 (S.D.N.Y. 2002) (jurisdiction does not arise merely because "Siemens AG is listed on the NYSE").

It would be hard to imagine concepts of long-arm jurisdiction that would be more disruptive of New York's status as a business center than plaintiffs' notions. Foreign corporations will be reluctant to conduct negotiations here or select this State as the situs for resolving commercial disputes, if their senior corporate officials become vicariously subject to personal jurisdiction here themselves. Similarly, if listing on a New York-based stock exchange becomes a predicate for jurisdiction over companies that have no other connection with New York, foreign companies will be far more reluctant to list here.

**C. Due Process Bars The Assertion Of Personal Jurisdiction Over The Defendants Who Did Not Consent To It.**

Finally, even if personal jurisdiction were authorized under New York's long-arm statute, federal constitutional law would preclude its exercise. A State may exercise personal jurisdiction over a nonresident defendant only if two conditions are met: First, the defendant must have "certain minimum contacts" with the forum State such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297

(1980). Second, the exercise of jurisdiction must “comport with traditional notions of ‘fair play and substantial justice.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The allegations in the complaint against the individual and non-signatory corporate defendants satisfy neither of these tests.

**1. These Defendants Did Not Have “Minimum Contacts” With New York.**

The Due Process Clause permits a defendant to be sued in a State only if it has established minimum contacts there and has “purposefully avail[ed] itself of the privilege of conducting activities within the forum State.” *Burger King*, 471 U.S. at 475 (internal quotes omitted); see also *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Plaintiffs have not alleged that any of the individual and non-signatory corporate defendants has minimum contacts with New York.

All three corporate defendants are foreign corporations with their principal places of business outside the United States. (Telmex and América Móvil are headquartered in Mexico, and Conecel is headquartered in Ecuador.) None has ever conducted any business in New York, and they are not authorized to do so; they have not transacted or solicited any business in New York, or performed any work or service here. None of the three defendants has ever had offices or employees in New York, they have never owned or leased property here, they have never had any bank accounts or phone numbers here, and they have never derived

any revenue from New York. R. 341-43, 360-61, 368-69. All of these facts are undisputed. There is therefore no constitutional basis to assert of personal jurisdiction over them.

The jurisdictional case against the individual defendants is just as weak. Both individual defendants are citizens and residents of Mexico. They do not own, lease, or rent real or personal property in New York. They do not maintain offices, telephone listings, post office boxes, or bank accounts in New York. They employ no New York agents or personnel, including financial advisors, brokers, accountants, or agents for service of process. They have not paid, nor been required to pay, income taxes to the State of New York. Neither individual defendant has entered into any contract with New York residents or entities personally or been sued personally in New York (apart from this lawsuit). Moreover, neither individual defendant traveled to New York in connection with the transactions that are the subject of this suit. They did not conduct negotiations in New York or attend meetings in the State. R. 350-51, 364-65. In short, the individual defendants, like the three nonparty corporate defendants, have not “purposely availed” themselves of the privileges of doing business in this state, and could not reasonably have anticipated the necessity of defending a suit here.

## **2. It Would Be Fundamentally Unfair To Subject These Defendants To Suit In New York.**

Even if these defendants had minimum contacts with New York, the Constitution would still prohibit the exercise of personal jurisdiction in this suit out of simple fairness. The Due Process Clause forbids assertion of jurisdiction if doing so would offend “traditional notions of fair play and substantial justice.” *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987). In evaluating whether an assertion of jurisdiction is fair, courts evaluate factors such as (1) the burden on the nonresident defendant, (2) the interests of the forum state, (3) the plaintiff’s interest in securing relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) fundamental social policies. See, e.g., *World-Wide Volkswagen*, 444 U.S. at 288-290.

No complex constitutional analysis is required here. Plaintiffs ask the Court to subject three Latin American corporations and two individual Mexican citizens to the massive expense and inconvenience of defending a lawsuit in New York when none of these defendants, and no aspect of the plaintiffs’ alleged causes of action, has anything to do with New York. Indeed, even the plaintiffs are foreign citizens with minimal connections to this State, who could have sued in their home country.

As for the State's interest in adjudicating this dispute, New York has no interest in allowing foreign corporate plaintiffs to bring in foreign nationals with no substantial connections to the State. Indeed, New York is a complete stranger to this contract and to the underlying business transactions. The case is in the New York courts only because *two* defendants *agreed* to let disputes be resolved here. That agreement does not create a constitutionally sufficient interest in having other foreign nationals dragged into this forum.

### CONCLUSION

The trial court's Order should be reversed, the Defendants' motion should be granted, and the Complaint should be dismissed.

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