IN THE
DISTRICT COURT OF APPEAL
THIRD DISTRICT
DCA Case No. 3D15-2622

On Review from the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida
Lower Case No. 09-34950 CA 01
The Honorable John W. Thornton

THE REPUBLIC OF ECUADOR,
Appellant,

vs.

ROBERTO ISAIAS DASSUM and WILLIAM ISAIAS DASSUM,
Appellees.

Appellant's Initial Brief

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I. ISSUES ON APPEAL

FIRST: Having held that the Republic of Ecuador's ("Republic") acts at issue here were acts of state, the Trial Court erred in allowing Defendants to prevail on affirmative defenses barred by the Act of State Doctrine, that improperly and expressly challenged the validity of those same sovereign acts.

SECOND: The Trial Court erred in holding that the Republic lacked standing when (1) the Trial Court had entered an unopposed Order expressly substituting the Republic for the original plaintiff whose standing was undisputed; (2) Defendants never pled lack of standing as an affirmative defense; (3) Defendants waived this defense throughout the entire prior course of the case and during the prior appeal in this action; and (4) the substitution was at the instance of the Defendants themselves who sought the substitution so that Defendants could proceed with claims against the Republic.

THIRD: The Trial Court erred in finding that the Republic's claim was time-barred since (1) the Act of State Doctrine precluded such a challenge; (2) the Trial Court relied on inapposite law; (3) the record established that the time limitations were tolled under the applicable Ecuadorian law; and (4) less than a year had run against any possible Florida statute of limitations.

FOURTH: The Trial Court erred in accepting the testimony of an expert not disclosed in accordance with the Court's own Order on a matter the Trial Court

found to be dispositive while simultaneously rejecting the testimony of a properly disclosed expert offered to rebut Defendants' experts in accordance with the Court's express direction, as agreed to by Defendants.

II. STATEMENT OF THE CASE & FACTS

The Act of State Doctrine precludes courts in the United States from reviewing the acts of a foreign sovereign taken within that foreign sovereign's own territory. The Trial Court's Judgment contains three primary holdings. First, the Trial Court ruled that the acts relied upon by the Republic were acts of state pursuant to the Act of State Doctrine. Inconsistently, the Trial Court then ruled that the Republic did not have standing to enforce its own acts of state and that the statute of limitations had run for doing so. Thus, the Trial Court rendered judgment against the Republic.

In doing so, the Trial Court's Judgment failed to correctly apply the Act of State Doctrine. The Trial Court could not grant relief based on Defendants' affirmative defenses because the Trial Court is barred from considering affirmative defenses challenging the Republic's official acts under the Act of State Doctrine.

Moreover, even had the Trial Court been permitted to consider Defendants' affirmative defenses of standing and the statute of limitations – which it was not – it decided these matters improperly. Specifically, the Trial Court found that the Republic lacked standing to sue (1) despite having entered an unopposed order

substituting the Republic as party plaintiff in this matter; (2) even though Defendants never pleaded lack of standing as an affirmative defense or in the prior appeal; (3) this defense even though had been waived; and (4) contrary to the Defendants' own earlier self-serving assertion that the Republic did have standing. Further, in finding that the Republic's claim was time-barred, the Trial Court (1) violated the Act of State Doctrine by going behind the validity of the Republic's acts; (2) relied on a demonstrably inapposite body of law; (3) ignored record evidence demonstrating that any applicable statute had been tolled; and (4) disregarded the fact that less than one year had elapsed between the finding of liability and the commencement of litigation. Moreover, in finding the claim to be time-barred, the Trial Court accepted the evidence of an undisclosed expert and rejected, contrary to the Court's own ruling, the opinions of the Republic's expert.

The Trial Court should be reversed.

A. Statement of the Case

1. The Pleadings

On April 29, 2009, the Agencia de Garantia de Depositos ("AGD") filed suit against Defendants, Roberto and William Isaias Dassum, seeking to recover monies owed to the Republic as a result of Defendants' misconduct during their

ownership and control of the largest bank in Ecuador, Filanbanco S.A. ("Filanbanco").[1] [Record on Appeal ("ROA") Vol. 1; 27: App. Tab 1, Complaint].

The Republic, through the AGD, sought entry of a monetary judgment to recover the amount of Defendants' liability, reduced by the amount the Republic had previously recouped through authorized administrative seizures of Defendants' properties in Ecuador. [*Id*.].

On June 22, 2009, the Defendants counterclaimed seeking declarations: (1) that Defendants "owe nothing" to the Republic and (2) that the "seizures . . . were illegal and improper under Ecuadorian law." [ROA Vol. 1; 65, Answer, Affirmative Defenses and Counterclaim]. The Defendants raised the affirmative defense of the statute of limitations. They did not challenge the AGD's standing. [*Id*.].

2. Defendants Demand That The Republic Become a Party

The AGD was an agency created to temporarily serve an equivalent purpose to the Federal Deposit Insurance Corporation in the United States. At the end of 2009, its legislative authorization expired. As a result, on March 10, 2010, Defendants – not Plaintiff – filed a Motion for Substitution or Joinder, seeking to

[1] For the sake of clarity and brevity, when any document that has been included in the Appendix is cited initially, the Republic will cite to both the record and the Appendix. Thereafter, however, further citations to the same document will be solely to the location in the Appendix.

either substitute the Republic of Ecuador for the AGD or join the Republic of Ecuador in the action. [ROA Vol. 3; 574, Motion for Substitution or Joinder]. Their purpose was to preserve their ability to collect on their counterclaim. [*Id*. at 3]. Defendants attached a decree of the Republic of Ecuador to their Motion demonstrating, according to Defendants, that the Republic was the appropriate successor to the AGD, with authority to proceed on the AGD's claim. [*Id*. at Exhibit B [*Id*. at 1-3][ROA Vol. 3; 593]

Expressly responding to the Defendants' request, the Republic filed a complaint Motion to Substitute Party Plaintiff, with a proposed order effectuating the Defendants' desired result. [ROA Vol. 3; 595, Unopposed Motion to Substitute Party Plaintiff] The Republic's Motion explicitly relied upon Defendants' identical Motion. [*Id*. at 1]. The Republic's Motion was understandably unopposed. [*Id*.]. The Trial Court entered the proposed order, acceptable to all parties. Accordingly, essentially at Defendants' instance, the Republic was substituted into this lawsuit as Plaintiff, with the resultant impact on standing. [App. Tab 2, ROA Vol. 4; 599, Substitution Order at 1]. The AGD's standing to bring this suit was never contested in this lawsuit. [*See* generally; *accord* Judgment at 4; App. Tab. 9; ROA Vol. 33; 6554]. Nor was the Republic's standing ever challenged, in a manner required by the Rules of Civil Procedure.

3. The Trial Court Defines and Applies the Act of State Doctrine

On December 9, 2009, a group of third parties attempted to intervene in this action ("Intervenors"), seeking essentially the same relief as the Defendants were seeking in their Counterclaim. [ROA Vol. 2; 385, Intervenors' Complaint]. A motion to dismiss these claims was promptly granted, with prejudice, based on the Act of State Doctrine and Foreign Sovereign Immunity. [App. Tab 3, ROA Vol. 4; 699, January 12, 2011 Order]. The Trial Court specifically and properly found that the Republic's official acts challenged by the Intervenors, which are virtually the same acts recognized as acts of state in the Trial Court's Judgment here, were acts of state. [*Id*. at 1-2]. This January 12, 2011 Order was the first of multiple orders in this case applying the Act of State Doctrine. It stated:

> The relief sought by the Intervenors is also precluded by the Act of State Doctrine. This doctrine precludes courts of the United States from inquiring into the validity of official acts of a foreign sovereign committed within its own territory.

Recognizing the implication of this ruling for their counterclaim, Defendants attempted to amend their counterclaim in order to maintain a challenge to the Republic's official acts. [ROA Vol. 8; 1218, Motion for Leave to Amend] The Amendment did not assert lack of standing as an affirmative defense. The Defendants' counterclaim challenging the actions of the Republic was then rejected on the same basis as the attempted intervention, i.e. it was barred by the

Act of State Doctrine. [App. Tab 4 at 2; ROA Vol. 9; 1448, Jun. 20, 2011 Order]. In denying the Defendants' claim for a declaration essentially seeking to invalidate the Republic's acts of state, that June 20, 2011 Order stated:

> The Court finds, as it did with regard to the claims of the Intervenors, that the relief sought [by Defendants] is precluded by the Act of State Doctrine. This doctrine precludes courts of the United States from inquiring into the validity of official acts of a foreign sovereign committed within its own territory. . . . [Whether liability was validly created] . . . is not for this Court to determine.

Thereafter, the Defendants filed two further challenges to the Act of State Doctrine. [ROA Vol. 5; 874, Motion for Judgment on the Pleadings; ROA Vol. 10; 1685, Second Motion for Judgment on the Pleadings]. The first was denied as premature. [ROA Vol. 10; 1659, Order Denying Motion as Untimely]. The second was denied because it required determination of disputed issues of material fact. [ROA Vol. 12; 1990, App. Tab 5; May 17, 2012 Order].

4. Trial Preparations Are Completed

In affirming and reaffirming the application of the Act of State Doctrine, the Trial Court had framed the issues for trial. Extensive documents were exchanged. A limited number of depositions, primarily of experts for the parties, were conducted. Plaintiff's timely disclosed expert on Ecuadorian law was deposed, twice. [ROA Vol. 26; 4723, ROA Vol. 32; 6418, Deposition Transcripts of Dr. Eguiguren; ROA Vol. 13; 2151, Plaintiff's Rebuttal Expert Witness Disclosure, August 24, 2012]. The two experts timely disclosed by Defendants were deposed

on a number of identified topics, none of which is pertinent to this appeal. [ROA Vol. 10; 1681, Defendants' Expert Witness Disclosures, February 24, 2012; App. Tab. 7; Amended Final Joint Statement at 7-8]. Neither disclosed defense expert was offered to provide an opinion or testimony regarding the Republic's standing or any potential statute of limitations. [*Id.*]; [Deposition Transcripts of Drs. Vega; ROA Vol. 18; 338 and Macias; ROA Vol. 17; 3019]. By the end of 2012, all discovery and pretrial matters were completed and the parties were set for trial. [ROA Vol. 15. 2566, Original Final Joint Statement]. In its final required pretrial submissions, the Republic provided the Trial Court with significant, relevant portions of the Ecuadorian civil code, along with its exhibits. [*Id*.].

5. Summary Judgment Is Granted

On the eve of the trial, March 27, 2013, Defendants moved for Summary Judgment. [App. Tab 6; Motion for Summary Judgment]. They relied on a host of undifferentiated theories, most of which were never addressed by the Trial Court in its subsequent ruling. [*See generally* Motion for Summary Judgment; App Tab 6; *see generally*, Order on Summary Judgment; ROA Vol. 20; 3402] Indiscriminately mixing and melding these various disjointed theories, the Defendants asserted that, by seeking a money judgment in the United States based on acts of state undertaken in Ecuador, the Republic had somehow transformed those acts into extraterritorial conduct. Based on this demonstrably incorrect premise, Defendants

urged the Trial Court to examine the underlying nature and bases of the Republic's conduct. [App. Tab 6; Motion for Summary Judgment]. Notably, the Republic of Ecuador's standing to enforce the AGD's claim was not one of the many bases Defendants presented for summary adjudication. Nor did Defendants argue that some statute of limitations had expired, precluding the Republic's right to pursue its claims. [*See id.*].

Having previously ruled – expressly – that the Republic's acts of state occurred in Ecuador, the Trial Court nonetheless granted summary judgment in favor of Defendants, finding that the extraterritoriality exception to the Act of State Doctrine permitted the Court to go behind the Republic's acts of state. Applying its own view of due process under United States law and resolving, improperly, a series of demonstrably disputed material facts, the Trial Court refused to enforce the Republic's acts of state. [*See* ROA Vol. 20; 3402, SJ Order at 5].

6. The Third District Court of Appeal Reverses the Summary Judgment and Remands the Case for Trial

The Republic appealed the Trial Court's Summary Judgment. Without requiring oral argument, this Court reversed the Trial Court and ruled: "The existing complaint is not barred as a matter of law as an attempt to . . . 'seize' or 'confiscate' property of the Isaiases in Miami-Dade County." *Republic of Ecuador v. Dassum*, 146 So.3d 58, 63 (Fla. 3d DCA 2014). This Court expressly rejected the Trial Court's invocation of the extraterritoriality exception by holding that the

Republic's attempt to enforce its acts of state was not barred as an action "beyond its territorial dominion." *Dassum*, 146 So. 3d at 59. Rather, in explicitly recognizing the Trial Court's earlier Orders, this Court admonished the Trial Court that the Republic's acts at issue in this case "represent governmental actions taken within Ecuador" to which "the courts of Florida and the United States will presumptively defer." *Id*. at 60-1. As such, this Court noted simply that when "Filanbanco was forced to close, [one of the Republic's acts of state] imposed liability on the Isaiases (jointly and severally) for the losses." *Id*. at 60.

7. <u>On Remand, Defendants Scramble to Identify New Defenses</u>

Following this Court's ruling, the parties resumed their trial preparations. The Republic made minor adjustments to its previous plans. It replaced one witness whose employment had since been terminated. It streamlined the compendium of Ecuadorian law submitted to the Trial Court in order to provide the required framework for understanding and applying the Republic's acts of state. [Compare Original Final Joint Statement, ROA Vol. 15; 2566, Amended Final Joint Statement, App. Tab 7].

The Defendants, however, were required to seek new pathways for their assault on the governing acts of state. [*Id.*]. Only some of these amendments to their trial strategy received leave of Court. [*See* ROA Vol. 24; 4326, Defendants' Motion to Supplement Exhibit List and Witness List; ROA Vol. 24; 4367, Agreed

Order Granting Leave to Supplement Exhibit and Witness Lists– June 4]. Others were calculatedly evasive. Principal among these was the wholly untimely, wholly unauthorized effort to add Dr. Jorge Egas Zavala, to their pretrial witness list. [App. Tab 7 Amended Final Joint Statement at 6]. No leave was sought, and accordingly, no rationale was provided, for a new expert. [Vol. 28; Trial Tr. at 413:2-25]. Similarly, Defendants submitted a gratuitous and procedurally improper filing purportedly in support of their affirmative defenses. [ROA Vol. 26; 4621, Defendants Memorandum on Ecuadorian Law Supporting Affirmative Defenses and Defenses]. In this surreptitious manner, they added "support" for the affirmative defense of standing, which they had never pled. They also submitted transparently inapposite references to Ecuadorian law for their statute of limitations defense, never previously addressed. [*Id*. at 4-5]. No resolution was sought nor obtained regarding this filing. It was a free-standing collateral submission with no end point.

Curiously, Defendants also began expressing uncertainty as to the nature of the Republic's claim. [*See, e.g.*, ROA Vol. 27; 4772, Defendants' Response to Ecuador's Motion for Pretrial Determination of Judicial Notice]. They had manifested no such uncertainty in their earlier summary judgment campaign nor in their appellate papers before this Court. To provide clarity where none should have been required, the Republic reiterated what its claim was and had always

been: a claim for statutory liability brought pursuant to Ecuadorian law, liability having been fixed by acts of state effectuated in 2008. [App. Tab 8; Reply in Support of Ecuador's Motion for Judicial Notice].

8. The Trial

At the three-day trial, the Republic presented one witness and the Defendants presented three. [ROA Vol. 28; 5044; 5243; 5485,Trial Tr. at 3, 202, 442]. The Republic had two representatives present at all times. [*Id*. at 2, 201, 441; ROA Vol. 28. 5044; 5244;5384]. The Defendants appeared briefly after the start of trial on the first day and were never seen again. They did not testify. [*See id*.].

At trial, the Republic proceeded on its long-standing trial theory, reiterated that Ecuadorian law applied and that the Republic's acts of state provided the controlling rules of decision. [ROA Vol. 28; 5044, Trial Tr. at 6-8, 28:14-29:9]. The Republic also argued that, though the Trial Court was not at liberty, as a matter of law, to reach the issue of the Defendants' affirmative defense of the statute of limitations, Ecuadorian law required a ruling in favor of the Republic on that issue as well. [ROA Vol. 28; 5044, Trial Tr. at 28:14-29:9].

Importantly, for purposes of this appeal, during trial an agreement was reached with opposing counsel, with the imprimatur of the Trial Court, regarding the submission and application of Ecuadorian law. It was agreed that, if necessary,

the relevant Ecuadorian law would be presented in post-trial briefing. [ROA Vol. 28; 5243, Trial Tr. at 431:10-437:10]. Specifically, the parties agreed that:

> MR. DAVIS: If the court is going to permit affidavits of Ecuadorian law by both parties, then we will not put our witness on to testify about Ecuadorian law, with the understanding that we will present it in an affidavit accompanying our memo of our findings of fact and conclusions of law. . . .
>
> THE COURT: Mr. Tein.
>
> MR. TEIN: It's acceptable with –
>
> THE COURT: I mean, I think it's a fair resolution. [Trial Tr. at 431:18 – 432:1; 432:14-16].

Both parties complied with this arrangement, presenting relevant Ecuadorian law as part of their post-trial submissions.

Plaintiffs appropriately presented and proved the specific, applicable acts of state at trial. [ROA Vol. 28; 5044, Trial Tr. at 88:16-103:13]. The Republic's witness in its case-in-chief, Dr. Eguiguren, was called to describe and authenticate the Republic's acts of state that established the Defendants' liability. [*Id*.]. Following his testimony and overruling the Defendants' objections, the Trial Court admitted each act of state into evidence. [*Id*.].

The Defendants confined their testimony and documents to challenges to the validity of the acts of state, which they were precluded from doing as a matter of

law.[2] [ROA Vol. 28; 5044, 5243, Trial Tr. at 128:1-381:12]. Ironically, they did present evidence clearly supporting the Republic's position on the statute of limitations defense. Through their own witness, Defendants demonstrated that Filanbanco remained in liquidation throughout the entire period relevant to this dispute. Specifically, admitted Exhibit FP recites that Filanbanco was put into liquidation on July 30, 2002. [ROA Vol. 30; 6006, ROA Vol. 30; 6006, Exhibit FP at 1]. Then, Defendants elicited the testimony of Filanbanco's liquidator, Alfonso Niemes, who testified that he was Filanbanco's liquidator through March 2007. [ROA Vol. 28; 5044, Trial Tr. at 130:2-4]. Defendants' representatives further recite in that same exhibit that Filanbanco S.A. is "currently in liquidation" as of the date of their filing, which was shortly after July 8, 2008. [ROA Vol. 30; 6006, 5913, Exhibit FP at 1, 3; *see also* Exhibit EU at 8, 10].

9. <u>The Judgment</u>

On October 15, 2015, the Trial Court entered Judgment in favor of the Defendants. The Judgment determined: First, that the Republic's acts are acts of state. [ROA Vol. 33; 6554, Judgment at 1]. Second, that the Republic lacked standing to bring this suit. [*Id*.]. Third, that the Republic's claim was barred by the statute of limitations. [*Id*.].

[2] They also recapitulated the due process arguments that were the centerpiece of their earlier summary judgment effort, since rejected by this Court.

The Trial Court rationalized the standing determination by citing the following findings of fact and conclusions of law [App. Tab. 9; ROA Vol. 33. 6554]:

- "The [Republic's] witness was not competent to corroborate the resolutions in any way." [Judgment at 2].
- "Under the express terms of Article 29, only the AGD has standing to sue." [Judgment at 4].
- "The AGD is not the plaintiff in this action, having been replaced, upon its motion, by the 'Republic of Ecuador.'" [Judgment at 5].

The Trial Court justified its holding that the Republic's claim was time-barred by citing the following findings of fact and conclusions of law:

- "More than 10 years elapsed between the last possible occurrence of a wrongful act and the filing of this lawsuit." [*Id*.]
- A report that could have revealed the Defendants' misconduct "was not concealed." [Judgment at 3].
- "Ecuador offered no Ecuadorian law, before or at trial, about Ecuadorian limitations periods . . .". [Judgment at 6].
- "Defendants offered Ecuadorian law indicating that any Ecuadorian limitations period would have long expired. According to the Defendants' expert, Dr. Jorge Zavala . . . the limitations period is three months . . . the longest possible limitations period is five years." [Judgment at 6-7, fn 2.]
- According to Dr. Zavala, "Ecuadorian law provides for tolling only for claims brought by the bank-in-liquidation . . . [h]ere the plaintiff is not Filanbanco (or Filanbanco-in-liquidation, or any receiver or liquidator of Filanbanco); rather, the plaintiff is the Republic of Ecuador." [Judgment at 7, fn. 3].

B. Statement of the Facts

1. The Defendants' Rampant Misconduct Causes Their Bank to Fail

Until December 2, 1998, Roberto Isaias and William Isaias, as Executive President and Executive Vice President, respectively, were the senior administrators of Filanbanco, an Ecuadorian bank. They were also indirect shareholders of 99% of the Bank's shares. [ROA Vol. 28; 5243, App. Tab 9, Trial Tr. at 353:16-355:2; Judgment at 3].

In 1998, while Filanbanco was under the administration of Defendants, it was not recovering from an on-going financial crisis. Accordingly, it requested that it be restructured by the Central Bank of Ecuador ("Central Bank"). [ROA Vol. 30; 5787, Ex. 2033 at 1; Ex. 7 at 1]. As a response to this crisis, the Ecuadorian legislature had passed Ecuador's Economic Matters Restructuring Law in the Tax-Financial Area ("AGD Law"). [ROA Vol. 30; 5711, Ex. 3]. It provided relief for both the banks and their customers. [*Id*.]. On December 2, 1998, Filanbanco, among other failing banks, was placed under the AGD's control. [ROA Vol. 30; 5787, Ex. 2033].

In fact, the Defendants vastly misrepresented to the Republic the condition of Filanbanco and the reasons for its precarious circumstances. The Republic's acts of state establish that Defendants actively concealed the real condition of Filanbanco before and after it was turned over to the AGD. [Ex. 7 at 1]. Multiple

investigations and analyses revealed that the Defendants had engaged in systematic, wholesale, fraudulent misconduct, had obtained enormous capital infusions from the Central Bank to which it was not entitled, drained the bank of its funds and misled the regulators to avoid discovery. [*See* ROA Vol. 30; 5746, Ex. 5]. They made significant loans to their own companies or affiliates, supported by vastly overstated collateral or, in some instances, no collateral at all. [*Id*.].

In 2000, facing criminal prosecution, Defendants unsurprisingly fled to Miami. [Trial Tr. at 215:11-217:5, 329:4-15; App. Tab 7, Amended Final Joint Statement at 2-3].

Before Filanbanco closed, the international accounting firm of Deloitte & Touche, among others, was retained to investigate and report on Filanbanco's financial status as of December 2nd, 1998. [Ex. 5 at 1]. This investigation resulted in what has become known as the "Deloitte Report" of May 8, 2001. Importantly, the Deloitte Report did not assess blame or establish responsibility. It described the losses and the manner in which they occurred. [*Id*.]. Relying on the Deloitte Report as a foundation document, the AGD thereafter established through an act of state that, as a result of the Defendants' manipulations and misrepresentations regarding Filanbanco's banking activities and balance sheets, there was a deficiency of $661.5 million dollars when Filanbanco was turned over to the AGD in December of 1998. [Ex. 7 at 1, 7].

After 1998, and continuing through 2008, Filanbanco remained in liquidation as efforts to recover assets proceeded. [App. Tab. 7, Amended Final Joint Statement at 2; ROA Vol. 28; 5044, Trial Tr. at 130:2-4; ROA Vol. 30; 6006, Exhibit FP at 1, 3; ROA Vol. 30; 5917, Exhibit EU at 8, 10].

From 2000 through 2010, as a result of further investigations into the activities of the Defendants and the catastrophic collapse of Filanbanco, criminal proceedings in Ecuador continued against the Defendants for embezzlement of public funds. [ROA Vol. 28; 5243, Trial Tr. at 330:13-331:8]. Having fled the country, Defendants declined to appear and present their defense. Instead, they enlisted specialized teams of legal surrogates to defend their interests and the interests of their companies. [ROA Vol. 28; 5243, Trial Tr. at 309:2-310:6]. Despite these well-funded, well-calibrated efforts, Defendants were eventually convicted for their role in the criminal mismanagement of Filanbanco. [ROA Vol. 13; 3239, April 2012 Criminal Judgment].

2. The Acts of State Establishing Defendants' Misconduct

Article 29 of the AGD Law ("Article 29") authorizes the AGD to proceed, as it did in this case, against bankers like the Defendants. [ROA Vol. 30; 5711, Ex. 3 at 12-13]. That Article states, in pertinent part, that administrators who have declared false technical equity and altered the amounts on their balance sheets "shall guarantee deposits in the financial institution with their personal equity. . .".

[*Id*. at 13]. Article 29 further provides that the AGD "may seize property publicly known to belong to those shareholders." [*Id*.]

Pursuant to the detailed provisions of the acts of state admitted into evidence at trial, the AGD and other agencies of the Ecuadorian banking system established Defendants' liability for their misdeeds. [ROA Vol. 30; 5711, 5765, Ex. 3; ROA Vol. 30; 5746, Ex. 5; ROA Vol. 30; 5758, Ex. 6; ROA Vol. 30; 5778, Ex. 7].

Specifically, on February 26, 2008, pursuant to clause (b) of Article 175 of the General Law for Institutions Within the Financial System, the Banking Board of the Republic passed Resolution JB-2008-1084 ("JB-1084") authorizing and directing the Superintendent of Banks ("SBS") to recognize the $661.5 million loss established by the Deloitte Report. [ROA Vol. 30; 5746, Ex. 5]. On March 6, 2008, the SBS passed Resolution SBS-2008-185 ("SBS-185") approving the Deloitte Report as having established the amount of Defendants' liability at $661.5 million. [ROA Vol. 30; 5758, Ex. 6]. Then, on July 8, 2008, the AGD, in recognition of the resolutions authorizing and approving the Deloitte Report, and the loss established therein, passed Resolution AGD-UIO-GG-2008-12 ("AGD-12"). [ROA Vol. 30; 5778, Ex. 7].

Pursuant to the analyses and conclusions of the Deloitte Report and to Article 29 of the AGD Law, Resolution AGD-12 found that Defendants, while at Filanbanco, had declared false technical equity and altered the legitimate,

authorized amounts on Filanbanco's balance sheets. [Ex. 7 at 1, 7]. Pursuant to AGD-12, and subsequent related resolutions, certain of Defendants' property in Ecuador was accordingly seized to satisfy as fully as possible the debt Defendants owed to the Republic. [*Id*. at 2-6]. Defendants' representatives contested these proceedings but were unable to prevail. [ROA Vol. 28; 5243, Trial Tr. at 243:1-295:8].

III. STANDARD OF REVIEW

This appeal involves a final judgment premised on conclusions of United States law and determinations of foreign law. The principal focus of this appeal is not the Trial Court's findings of fact. The emphasis of this appeal is on the Trial Court's misapplication of U.S. and foreign law. Accordingly, the standard of review is plenary *de novo* review. *Transportes Aereos Nacionales, S.A. v. De Brenes*, 625 So. 2d 4 (Fla. 3d DCA 1993) (Determinations of both Florida and foreign law receive *de novo* review). A fundamental element of this appeal is the ability, if not the requirement, for this Court to rely on any source for determining the applicable Ecuadorian law on appeal. *Id*.[3] "[I]n reviewing, do novo, the trial

[3] The Trial Court elected to rely exclusively on Defendants' characterizations of Ecuadorian law, despite the agreement of the parties, which the Trial Court expressly endorsed, that both parties were to submit relevant law in their post-trial submissions.

court's determination, appellate courts are not limited to matters raised by the parties, but are encouraged to take an active role in ascertaining foreign law." *Id.*

IV. SUMMARY OF ARGUMENT

The Act of State Doctrine required the Trial Court to use the Republic's acts of state as the rules of decision for determining Defendants' liability, without reference to or adoption of any affirmative defense challenging the validity of those acts. There were no exceptions to the Act of State Doctrine, and the Trial Court articulated none, that would allow it to consider the Defendants' challenges to the validity of the Republic's actions.

Moreover, even if the Trial Court were permitted to consider Defendants' affirmative defenses, the Trial Court misapplied the law when it found in favor of Defendants on those defenses. Specifically, the Trial Court found that the Republic lacked standing to sue (1) despite having entered an unopposed order substituting the Republic into this lawsuit as party plaintiff; (2) even though Defendants never pleaded lack of standing as an affirmative defense or asserted the matter during the prior appeal; and (3) contrary to the Defendants' own affirmative written submission establishing that the Republic did, in fact, have standing. Further, the Trial Court found that the Republic's claim was time-barred despite (1) the Act of State Doctrine precluding such a finding; (2) by relying on inappropriate law; (3) record evidence showing the limitations to have been tolled

during the relevant time period under controlling Ecuadorian law; and (4) less than one year having elapsed between the Republic becoming a creditor and the filing of the lawsuit. Finally, in finding the claim to be time-barred, the Trial Court, contrary to an agreement on the record adopted by the Trial-Court, accepted the evidence of an undisclosed expert while excluding, without consideration, the rebuttal testimony of a disclosed rebuttal expert.

Accordingly, the Trial Court should be reversed.

V. ARGUMENT

A. The Trial Court Erred in Not Applying the Act of State Doctrine

Prior to the trial of this case, the Trial Court adopted and confirmed on multiple occasions, that the Act of State Doctrine was an absolute bar to the claims of the Intervenors and the counterclaim of the Defendants. [App. Tab 3, Jan. 12, 2011 Order, at 1-2; App. Tab 4, Jun. 20, 2011 Order, at 1-2]. These rulings were affirmed by this Court during the prior appeal of this matter. *Dassum*, 146 So. 3d at 59-62. The Trial Court again affirmed the application of the Act of State Doctrine in entering the Judgment. [*See, e.g.*, App. Tab 6, Judgment at 1].

The Trial Court appropriately concluded that the Republic's acts were acts of state, based on the evidence admitted at trial. [App. Tab 9, Judgment at 1]. Certified copies of the various acts were properly identified by a qualified witness as acts of state and were expressly admitted into evidence by the Trial Court, after

overruling the objections of the Defendants. [Trial Tr. at 88:16 – 103:13; ROA Vol. 28; 5044].

Even in the absence of this properly accepted evidence, the Republic actually needed only to invoke judicial notice to establish these acts as acts of state. Comment (i) to Section 443 of the Restatement of the Law, Third, Foreign Relations Law of the United States specifically states: "Courts in the United States may take judicial notice of a document evidencing an act of state, or they may, in appropriate cases, call for testimony." There are only two prerequisites for taking judicial notice of foreign law: (1) timely written notice and (2) sufficient information with which to take notice (i.e. a copy of the legal matter to be noticed). Fla. Stat. § 90.203; *accord FDIC v. Grasso*, 364 So. 2d 26, 27 (Fla. 3d DCA 1978) ("Reasonable notice to the adverse party appears to be the only prerequisite to the means of notification to be utilized by a party intending to rely upon foreign law."). Those two requirements were met here. [App. Tab. 10; Notice of Intent to Rely on Foreign Legal Matters and Motion for Pretrial Determination of Judicial Notice] Accordingly, the Trial Court appropriately admitted these matters as "judicial notice of these matters is [rendered] mandatory" by this notice. *See* § 90.203, Fla. Stat. and comments to § 90.202, Fla. Stat. Thus, no testimony – "competent" or otherwise –was necessary to present these acts and establish that they were acts of state.

The Act of State Doctrine is dispositive of this appeal. As a matter of law, it should be applied to determine Defendants' liability below.

1. The Act of State Doctrine Applies; The Republic's Acts of State Decide Defendants' Liability in this Action

The Act of State Doctrine precludes the courts of the United States from questioning the validity of the acts of foreign sovereigns taken within their own nations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1293 (11th Cir. 2001); [ROA Vol. 4; 699; App. Tab 3, Jan. 12, 2011 Order, at 1-2; ROA Vol. 9; 1448, App. Tab 4, Jun. 20, 2011 Order, at 1-2; App. ROA Vol. 20; 3402, App. Tab 9, Judgment at 1]. Rather than question the validity of such acts, courts within the United States are to treat the acts of state of foreign sovereigns as the rules of decision – i.e. the legal framework for the judgment to be entered. *W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406-410 (U.S. 1990). All of the sovereign acts pertinent here are covered by, and subject to, the Act of State Doctrine. *See Credit Suisse v. U.S. Dist. Ct. for the Cent. Dist. Of Cal*., 130 F.3d 1342, 1347 (9th Cir. 1997) (executive branch seizure orders are acts of state.).[4]

[4] *See also Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440, 1442-4 (S.D.N.Y. 1983) (resolutions of a foreign nation's central bank and its administrative agencies are acts of state); *accord Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985); *see also Riggs Nat'l Corp. & Subsidiaries v. Commissioner*, 163 F.3d 1363, 1369 (D.C. Cir. 1999) (orders and rulings of foreign Ministries of Finance are also acts of state);

Fundamental to this appeal in particular, in which the Trial Court predicated its decision on affirmative defenses, one pled, one not, the Act of State Doctrine also acts to bar affirmative defenses that question the validity of acts of foreign sovereigns. *FOGADE*, 263 F.3d at 1296 (holding that "the act of state doctrine applies to . . . affirmative defenses" and finding that affirmative defenses challenging acts of state may not be considered); *accord Bank Tejerat v. Varsho-Saz*, 723 F. Supp. 516, 521 (C.D.Cal. 1989). The Act of State Doctrine, once deemed to apply, therefore requires that acts of state determine all issues to which they pertain. *See id*. Any affirmative defense purporting to challenge the validity or legality of an established act of state is barred. *FOGADE*, 263 F.3d at 1296; *Bank Tejerat*, 723 F. Supp. at 521.

The 11th Circuit's decision in *FOGADE* is directly on point and demonstrates how the Act of State Doctrine should have been applied to bar any affirmative defense challenging the validity of the Republic's acts of state.

The facts of *FOGADE* are on all fours with those of this case. In *FOGADE*, an agency of the Venezuelan government similar to the FDIC was forced to rescue a Venezuelan bank that was failing. *FOGADE*, 263 F.3d at 1279-80. Through a

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accord Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 18 (D.C. Cir. 2002); *see also Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102 (D.C. Cir. 2006) (legislation delegating power to financial entities constitute acts of state); *see also Callejo v. Bancomer*, S.A., 764 F.2d 1101, 1114 (5th Cir. 1985) (governmental orders setting banking regulations also both constitute acts of state).

series of acts of state, FOGADE placed the bank into a form of receivership and "intervened it" and one of its shareholders, a corporation named Corpofin. *Id*. That is to say, FOGADE took over management of the bank and assumed its ownership. *Id.* As here, the owners of the bank and its shareholder corporation had defalcated money from the bank – in this instance by transferring shares of the bank to several U.S. defendants. *Id.* FOGADE sued the recipients of the ill-gotten shares in Florida federal court. *Id.* It did so variously "as the Republic of Venezuela by and through FOGADE, [through the intervenor of Corpofin] and [through] Corpofin" itself "depending on the stage of the case." *FOGADE*, 263 F.3d at 1281, fn. 4.

The Eleventh Circuit's legal analysis of *FOGADE* is also directly on point. The defendants asserted affirmative defenses of standing and, though not readily apparent from the Eleventh Circuit opinion, the statute of limitations. *FOGADE*, 263 F.3d at 1292-3; Answer and Affirmative Defenses to Plaintiffs' Fourth Amended Complaint at 13-17, D.I. 1219, April 26, 1999, *FOGADE v. ENB Revocable Trust, et al*., Case No. 96-1679-CIV-MIDDLEBROOKS, United States District Court for the Southern District of Florida. The district court granted summary judgment in favor of *FOGADE* because the plaintiffs were barred from challenging Venezuela's acts. *FOGADE*, 263 F.3d at 1293. The Eleventh Circuit affirmed the district court's decision and reasoned that the Act of State Doctrine

precluded the Defendants' affirmative defense of standing which sought, essentially, to have the district court deem invalid the Venezuelan government's acts of state pursuant to which it brought the suit. *FOGADE*, 263 F.3d at 1296.

Nor is the Eleventh Circuit's decision in *FOGADE* the only case directly on point with respect to precluding affirmative defenses that challenge the validity of acts of state. The Central District of California has also concluded that, under the Act of State Doctrine, a defendant may not present affirmative defenses challenging a plaintiff nation's sovereign acts. *Bank Tejarat v. Varsho-Saz*, 723 F. Supp. 516 (C.D. Cal. 1989). In *Bank Tejarat*, the Central District of California ruled that an Iranian state bank could sue an Iranian citizen residing in the United States for having "fraudulently converted approximately 2.6 million dollars from the bank by causing the bank to wrongfully transfer these funds into accounts controlled by the defendants" and that the Iranian state bank could apply the Act of State Doctrine to defeat the defendant's affirmative defenses. *Bank Tejarat*, 723 F. Supp. at 521.

Thus, as multiple courts have shown, the Act of State Doctrine precludes Defendants from presenting affirmative defenses, including both standing and the statute of limitations. The facts and legal analysis of *FOGADE* and *Bank Tejarat* are directly on point. As noted in *FOGADE*, since the Supreme Court decision in

Sabbatino applies to counterclaims, which is indisputable here, then it applies to affirmative defenses as well. *FOGADE*, 263 F.3d at 1296.

2. ***Sabbatino*** **Requires the Trial Court to Find Defendants Liable Pursuant to the Republic's Acts of State**

The seminal decision on the Act of State Doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), unequivocally establishes that the Trial Court's earlier determinations, that the Republic's acts of state were valid as defenses, requires that those same acts of state are equally dispositive when used as bases for the Republic's causes of action. The decision is binding on this Court. *Nat'l Inst. of Agrarian Reform v. Kane*, 153 So. 2d 40, 44 (Fla. 3d DCA 1963) (noting that the Supreme Court's decisions on the Act of State Doctrine are binding on Florida courts as the "law of the land").

In *Sabbatino*, the Cuban government, pursuant to an executive resolution, confiscated a company's goods while those goods were still in a Cuban port. *Sabbatino*, 376 U.S. at 401-405. The Cuban government then assigned those goods to a Cuban government entity for delivery in New York. *Id*. At the request of the original owner, the recipient of the goods refused to pay upon delivery by the governmental entity that now owned the goods. *Id*. at 406. On those facts, the Supreme Court allowed Cuba to sue the recipient of the goods in New York. *Id*. More to the point here, the Supreme Court ruled that there could be no inquiry into the validity of Cuba's acts of state that served as the basis for that suit. *Id*. at 436-

439. The Supreme Court ruled Cuba could complete a dispositive act of state in Cuba and then use that act, without scrutiny as to the act's validity under U.S. law, to determine the outcome of its lawsuit in the United States. *Sabbatino*, 376 U.S. at 436-439.

Further, the U.S. Supreme Court has specifically noted that the Act of State Doctrine can be used as a sword to support a case brought by a foreign nation against a private litigant in the United States. *Sabbatino*, 376 U.S. at 436-439. As a result, as noted in *FOGADE* and *Bank Tejerat*, the Act of State Doctrine permits the Republic to overcome Defendants' affirmative defenses, as well as to protect itself from counterclaims. *Sabbatino* disposes of a defendant's affirmative defense because the Supreme Court affirmatively stated that "[i]t would be anomalous to preclude reliance on the act of state doctrine [by the plaintiff to prove its case]." *Sabbatino*, 376 U.S. at 438; *accord F. Palicio y Compania v. Brush*, 256 F. Supp. 481, 489 (S.D.N.Y. 1966) ("No matter how the issue of the validity of the decree of a foreign government [committed] within its own boundaries may arise . . . the act of state doctrine must be applied.").

Just as it did in *FOGADE* and *Bank Tejarat*, *Sabbatino* controls here. As in *Sabbatino*, the Republic requested that the Trial Court rely on the Republic's acts of state as the rules of decision in this case, in the same manner that the confiscation of goods effected and completed in Cuba was used to determine the

issue of ownership in *Sabbatino*. As *Sabbatino* demonstrates, bringing a lawsuit, the elements of which are decisively proved by acts of state completed elsewhere, allows a foreign state to establish liability and override any affirmative defense challenging the validity of those actions. *See Sabbatino*, 376 U.S. at 436-39; *see also FOGADE*, 263 F.3d at 1296; *Bank Tejarat*, 723 F. Supp. at 521.

To be clear, the *Sabbatino* decision, while sufficient controlling precedent, is no outlier. Nor are the decisions in *FOGADE* and *Bank Tejerat.* On the contrary, where applicable, the Act of State Doctrine consistently mandates that acts of state decide matters before a court, no matter how inequitable the result may seem. *See Empresa Cubana Exportadora de Azucar v. Lamborn & Co.*, 652 F.2d 231, 239 (2d. Cir. 1981). In *Lamborn*, the Second Circuit ruled that "the result of applying the Act of State Doctrine may be inequitable in that it permits a foreign sovereign to collect on its direct claim while avoiding . . . liability for its uncompensated seizure within its own jurisdiction of its debtor's property." *Lamborn*, 652 F.2d at 239.

Moreover, the Fifth Circuit in *Callejo v. Bancomer*, 764 F.2d 1101, 1114 (5th Cir. 1985), further elaborated on these principles:

In essence, the act of state doctrine operates as a super-choice-of-law rule, requiring that foreign law be applied in certain circumstances . . . Normally, a court will only apply foreign law if it is compatible with the public policy of the forum. .

. . The act of state doctrine recognizes, however, that in the international context, refusing to enforce foreign law because it is contrary to U.S. conceptions of public policy is unduly parochial and is likely to insult the foreign sovereign, thereby embarrassing the foreign policy of the United States.

Under any of these decisions, the Trial Court was bound – and respectfully this Court is too – to apply the Republic's acts to dispose of any facts determined therein. Challenges to the validity of these acts are impermissible. That is the "law of the land." *See Kane*, 153 So. 2d at 44.

The Judgment thus directly conflicts with, and fails to follow, *Sabbatino* and its progeny. *Sabbatino* controls and, therefore, the Trial Court was bound to accept, as dispositive of all liability issues, Resolutions JB-1084, SBS-185, and AGD-12. [App. Tab 4, Jun. 20, 2011 Order, at 2]; *Kirkpatrick*, 493 U.S. at 406-410. The Trial Court could not invalidate these acts of state by finding that they were, or would have been, time-barred. *FOGADE*, 263 F.3d at 1296. These Resolutions establish the Defendants' liability. [ROA Vol. 30; 5711-5786][ROA Vol. 30, 5746 - Ex. 5; ROA Vol. 30, 5758 - Ex. 6; ROA Vol. 30, 5778 - Ex. 7]. Accordingly, the only remaining issue for the Trial Court to determine is the amount that Defendants still owe the Republic, an issue that was left open by the Republic's acts of state. The Trial Court was obligated to apply *Sabbatino* and rely upon the Republic's acts of state as its rules of decision. Given the controlling

nature of those rules of decision, the Trial Court had no basis on which to apply Defendants' affirmative defenses, where they contradict or invalidate the Republic's acts of state.

B. The Trial Court Erred By Finding the Republic Lacked Standing, an Affirmative Defense Not Pled by Defendants, After the Trial Court Had Substituted the Republic Into This Action

The Republic inherited its standing from, and stands squarely in the shoes of, the AGD. No one challenged the AGD's standing, nor could the AGD's standing be challenged under the Act of State Doctrine. *FOGADE*, 263 F.3d at 1296. In fact, the Trial Court explicitly noted that the AGD had the requisite standing. [App. Tab 9; Vol. 33. 6554, Judgment at 4]. By operation of Ecuadorian law, the AGD was time-limited and, accordingly, ceased to exist by operation of law. The Republic of Ecuador succeeded to its role in this litigation.

In response to this pre-ordained development, the Defendants moved to substitute the Republic as a party in this case, citing acts of state of the Republic. In similar fashion and for identical reasons, the Republic filed its own motion for substitution. [Vol. 3, 574 Motion for Substitution of Joinder; Vol. 3, 595; Substitution Motion]. Understandably and logically, that motion was unopposed by Defendants. The Trial Court then entered an Order substituting the Republic for the AGD. [Order Granting Plaintiff's Unopposed Motion to Substitute Party Plaintiff].

The Trial Court's manifestly inconsistent and legally invalid holding that the Republic somehow lacked standing must be therefore reversed for all of the following reasons. First, the substitution order was unnecessary, as the action could have proceeded in the AGD's name without substitution. Fla. R. Civ. P. 1.260(c). Thus, the real party in interest remained the AGD which, the Trial Court ruled and unchallengeable acts of state established, had standing to bring this claim. Second, the substitution order had the effect of recognizing the Republic's standing to proceed on the AGD's claim as a matter of law. Thus, the Trial Court was not permitted to dismiss the AGD's claim simply because it was now being pursued by the Republic. Third, the Defendants waived any affirmative defense of standing by failing to plead that affirmative defense at any time and by failing to raise this issue on appeal. Those failures, too, require reversal. Finally, the Defendants are estopped from invoking the defense of standing. Defendants, for their own benefit, were the first to move for an order establishing that the Republic had standing. They then consented to entry of the Order substituting the Republic for the AGD.

1. Substitution Was Not Required

No substitution was necessary. Both the rule and the case law are clear. Fla. R. Civ. P. 1.260(c); *Levine v. Gonzalez*, 901 So. 2d 969, 973 (Fla. 4th DCA 2005) (plain language of Fla. R. Civ. P. 1.260(c) did not require that the individual and

corporation be substituted as plaintiffs); *Schmidt v. Mueller*, 335 So. 2d 630 (Fla. 2d DCA 1976) ("The Rule is explicit. And once the trial judge concluded the plaintiff had transferred his cause of action to his newly-formed corporation, two alternatives were available to the court: (1) to allow the action to be continued in the name of the plaintiff; or (2) to allow [the person to whom the interest was transferred] to be either substituted for or joined with the original party-plaintiff."). When a party ceases to exist, the action may either proceed in the name of that earlier plaintiff or the Court may enter an order substituting in the appropriate party. Fla. R. Civ. P. 1.260(c). No substitution order is necessary because it is always the standing of the original party that matters. Here, the standing of the AGD remains uncontested.

Moreover, at the insistence of Defendants, the Republic requested that the Court substitute the Republic as the appropriate successor in interest. The Republic did so and the Court entered an appropriate Order pursuant to Rule 1.260 of the Florida Rules of Civil Procedure. Once that Order was entered, the Republic became the successor in interest, with the same standing and interests as the AGD. *Kiefert v. Nationstar Mortgage, LLC*, 153 So. 3d 351, 353 (Fla. 1st DCA 2014) ("Pursuant to Florida Rule of Civil Procedure 1.260, a substituted plaintiff acquires the standing of the original plaintiff.") (*citing See Brandenburg v. Residential Credit Solutions, Inc.*, 137 So. 3d 604, 605-06 (Fla. 4th DCA 2014)). Because the

AGD had standing to sue — a proposition that Defendants have never contested, as it is clear from the face of Article 29 — the issue of the Republic's standing was therefore resolved by entry of the substitution order. Once the Republic was substituted for the AGD by the Trial Court order, it assumed the AGD's standing to pursue this case. *See Kiefert*, 153 So. 3d at 353.

Dismissing the Republic's claim was not within the Trial Court's discretion – it was reversible error. The Trial Court had options for addressing the statutory expiration of the AGD and the transfer of its assets and claim. It could have done nothing; no substitution was necessary. Or it could effect a substitution, which it did. But the Trial Court could not dismiss the claim for lack of standing because of the transfer, which is manifestly inconsistent with the whole concept of the substitution provisions. *Sun States Utils. v. Destin Water Users*, 696 So. 2d 944, 945 (Fla. 1st DCA 1997) (*citing Miami Airlines, Inc. v. Webb*, 114 So. 2d 361, 363 (Fla. 3d DCA 1959)). The controlling law in the Third District Court of Appeal dictates that "the court has no discretion to . . . enter adverse judgment on the merits solely because a transfer of interest has been made pending the suit." *Webb*, 114 So. 2d at 363. Once the substitution was effected, the Republic inherited the AGD's standing.

2. Defendants' Failed to Plead the Affirmative Defense of Standing

Even if the Republic somehow lacked standing – which it did not – the Trial Court had no ability to rule on that defense. The Defendants had waived any standing argument they may have had, again as a matter of law. The procedural circumstances of this case make it indistinguishable from a recent and controlling decision of this Court – *Bank of N.Y. Trust Co., N.A. v. Rodgers*, 79 So. 3d 108, 109 (Fla. 3d DCA 2012). In *Rodgers*, there was also "an earlier, previously unopposed and subsequently unchallenged order, which substituted the" original party for a transferee. *Rodgers*, 79 So.3d at 109. On defendants' motion, the trial court nonetheless entered a judgment for the defense at the conclusion of plaintiff's case for failure to prove standing. *Id*. This Court reversed the trial court, reasoning that "[b]ecause there was no denial or defense raised in defendants' pleadings concerning this finding, the judgment under review cannot be permitted to stand for that reason alone." *Id*. *Rodgers* is directly on point: here, the parties submitted an unopposed order substituting the Republic for the AGD, which the trial court found to have standing, and whose standing the Defendants never contested in a pleading.

Rodgers controls here and requires the reversal of the Judgment because standing is an affirmative defense that must be pled. S*ee also Cong. Park Office II, LLC v. First-Citizens Bank & Trust Co*., 105 So.3d 602, 607 (Fla. 4th DCA

2013) ("In this regard, lack of standing and fraud are affirmative defenses that must be pled to avoid waiver.") (*see also Rodgers*, 79 So. 3d at 109 (and cases cited therein)). Defendants did not plead lack of standing at any time. Moreover, even more egregious than the facts of *Rodgers*, the Defendants here also failed to raise standing during the prior appeal despite the fact that the Republic was already pursuing the AGD's claim during that appeal. That failure further confirms Defendants' waiver of this defense. *See Fla. DOT v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001); *accord Orange County v. Hewlings*, 152 So.3d 812, 816 (Fla. 5th DCA 2014). Any other determination would be unjust since Defendants were the first to argue that the Republic was the proper party.

3. Defendants' Are Judicially Estopped from Asserting a Standing Defense

Because of the benefit Defendants drew from the substitution order, Defendants were and remain judicially estopped from arguing that the Republic is not the proper plaintiff in this action. Defendants themselves expressly sought this very substitution in order to preserve their ability to proceed against the Republic. Under Florida's judicial estoppel doctrine, a party is estopped from taking inconsistent positions with regard to the same parties and subject matter. *See Grosso v. Fid. Nat'l Title Ins. Co*., 983 So. 2d 1165, 1172-1173 (Fla. 3d DCA 2008) (A party is estopped from taking conflicting positions "to the prejudice of the adverse party."); *Keyes Co. v. Bankers Real Estate Partners, Inc*., 881 So. 2d

605, 606 (Fla. 3d DCA 2004) (Parties cannot argue one position to their own benefit and then argue the reverse when that too benefits them); *Kaufman v. Lassiter*, 616 So. 2d 491, 493 (Fla. 4th DCA 1993) (a party is "estopped to assume in a pleading filed in a later phase of that same case, or another appeal, any other or inconsistent position toward the same parties and subject matter.").

The Judgment must be reversed.

C. The Trial Court Erred in Finding the Republic's Claim to Be Time-Barred

1. The Trial Court Expressly Violated the Act of State Doctrine.

Pursuant to act of state AGD-12, the Republic established the Defendants' liability as of July 2008. [ROA Vol. 30; 5765- Ex. 7]. Pursuant to a clear application of the Act of State Doctrine, the Trial Court was bound by this determination. It was not at liberty to examine the validity of the Republic's act, specifically the date that liability first attached. The Trial Court not only looked behind the validity of this particular act of state, it replaced it with a determination of its own. The Trial Court concluded that liability attached on December 2nd, 1998. It measured the application of the statute of limitation from that 1998 date. In terms of the Act of State Doctrine, the Court concluded that the Republic's act regarding the date at which liability attached was "invalid," and replaced that determination with one of its own.

There could not be a more direct breach of the Act of State Doctrine. The Trial Court did what every case cited by all parties in this action said could not be done: it looked behind the validity of the Republic's acts. It replaced the Republic's sovereign determination with one of its own. The Trial Court was not free to disregard the Republic's acts of state establishing Defendants' liability. These acts determine the rules of decision for this case. *Callejo*, 764 F.2d at 1114. The Trial Court's holding on the statute of limitations should be reversed for impermissibly attempting to declare the Republic's actions in Ecuador invalid. *Sabbatino*, 376 U.S. at 436-439; *FOGADE*, 263 F.3d at 1296; *Bank Tejerat*, 723 F. Supp. at 521.

2. The Court Relied on An Inapposite Body of Law

This is not a criminal proceeding. The Defendants were tried and convicted of criminal offenses in Ecuador. [ROA Vol. 28; 5243, Trial Tr. at 215:1- 6; 203:25-331:1].

This is a civil matter brought in the civil division of the Circuit Court of Miami-Dade County in 2009 to enforce a civil liability determined by an act of state of the Republic in 2008.

The Trial Court's analysis of the statute of limitations issue, improper for all of the reasons described in other portions of this section, also relied, incorrectly, on a series of Ecuadorian statutes pertaining exclusively to the prosecution of criminal

violations. [App. Tab 9; Vol. 33, 6554; Judgment at 6, Fn 2]. By definition, those provisions had no relevance to this civil enforcement action. The Republic is not seeking in this litigation to prosecute the Defendants for criminal violations, to which the provisions cited by the Court might pertain. The date by which such a prosecution must have been filed is not at issue here.[5] The provisions to which the Court made reference provided no guidance as to the period of time within which the Republic was required to act to enforce a civil liability established by an act of state. This is the only limitation period which would have been germane to this litigation.

Accordingly, there is nothing in the Trial Court's statutory analysis to support its conclusion that this action was time-barred.

3. The Statute of Limitations Was Suspended

Even accepting the Trial Court's incorrect December 1998 inception date for the running of the statute of limitations, this action was not time-barred. Contrary to the Trial Court's finding, as established in the Republic's post-trial briefing, the statute of limitations was suspended during the entire period of Filanbanco's liquidation (which lasted beyond the filing of the AGD's lawsuit

[5] In any event, that separate prosecution commenced in 2000, well within any statutory limitation.

here).[6] Defendants' own evidence establishes that Filanbanco was in liquidation at all material times. Exhibit FP recites that Filanbanco was put into liquidation on July 30, 2002. [ROA Vol. 30; 6006] [Exhibit FP at 1]. Indeed, Defendants' witness, Alfonso Niemes, was Filanbanco's liquidator through March 2007. [ROA Vol. 28; 5173; Trial Tr. at 130:2-4]. Defendants' representatives further recite in that same Exhibit FP that Filanbanco was "currently in liquidation" as of the date of their filing of Exhibit FP in Ecuador, which was shortly after July 8, 2008. [Exhibit FP at 1, 3]; [*See also* Exhibit EU at 8, 10; ROA Vol. 30; 5917]. Filanbanco did not exit liquidation before this lawsuit was filed. Accordingly, as the Ecuadorian statute of limitations did not even begin to run until after this suit was filed, it cannot be barred by the statute of limitations. Under Ecuadorian law and the evidence admitted at trial, the statute of limitations had not run.

4. <u>Florida's Statute of Limitations Had Not Run</u>

Finally, under the Act of State Doctrine, if the Trial Court felt it necessary to apply Florida law, the Trial Court was required to account for the fact that the

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[6] As noted in greater detail above, in order to resolve a dispute as to the manner in which Ecuadorian law was to be presented to the trier of fact, the parties and the Trial Court agreed, on the record, to the presentation of declarations from their respective experts in the post-trial submissions. It is for this reason that the Republic had not presented any Ecuadorian law "at trial", beyond the Republic's controlling acts of state. But for one exception that touched on factual issues, neither side's experts on Ecuadorian law testified at trial. [Trial Tr. at 431:9-437:10].

Republic had fixed Defendants' liability in 2008. No statute of limitations as to the underlying acts continues to run once liability has been established as a matter of law. Thus, if the Trial Court were appropriately applying Florida law as to the Republic's claim as a creditor, the Trial Court should have determined the statute of limitations for the enforcement of the Republic's rights as a creditor. AGD-12 established the Republic's status as a creditor of the Defendants. [ROA Vol. 30; 5765; Ex. 7]. The only possibly applicable statute of limitations for a non-judgment determination of liability is Florida's catch-all limitations period, Fla. Stat. § 95.11(3)(p). Pursuant to Fla. Stat. § 95.11(3)(p), the Republic would have four years from the act of state which fixed Defendants' liability. AGD-12 was passed in July of 2008. [ROA Vol. 30; 5765, Ex. 7 at 1]. As the Trial Court noted, this lawsuit was filed in 2009. [App Tab 9; ROA Vol. 33; 6556, Judgment at 3, 6]. There is no basis for concluding that the statute of limitations had run under Florida law.

Under any permissible application of the statute of limitations, the Republic's claim was not time-barred. The Judgment should be reversed.

D. The Trial Court Improperly Relied on the Testimony of Defendants' Undisclosed Expert And Improperly Disregarded the Testimony of the Republic's Disclosed Expert

The Trial Court should be reversed for accepting as evidence the opinions of an undisclosed expert while completely disregarding the contrary opinions of a disclosed expert, which the Court had agreed to consider.

The Judgment references the defense opinions of Dr. Jorge Egas Zavala, twice. The Complex Business Litigation Section rules require the disclosure of all expert witnesses. 11th Circuit Court Complex Business Litigation Rules at § 5. The Case Management Order issued by the Trial Court pursuant to those Rules specified a date for that disclosure. [ROA Vol. 2; 233, Sept. 8, 2009 Case Management Order at 2]. Defendants disclosed in a timely fashion two legal experts to testify at trial. [ROA Vol. 10; 1681, Defendants' Expert Witness Disclosures, February 24, 2012]. Dr. Zavala was never disclosed as an expert, or otherwise, by Defendants. Nor did Defendants move for leave to add him as a third expert, nor request in any way that the Trial Court excuse their failure to disclose Dr. Zavala. [Vol. 28; 5243, Trial Tr. at 413:20-25]. The Plaintiff timely disclosed its legal expert as required. [ROA Vol. 13; 2151, Plaintiff's Rebuttal Expert Witness Disclosure, August 24, 2012].

Defendants, nonetheless, purported to submit a declaration from Dr. Zavala in a response to a motion brought by the Republic (this was the "First Zavala

Declaration" referenced in the Judgment). [ROA Vol. 27; 4781, *See* Exhibit A to Defendants' Response to Ecuador's Motion for Pretrial Determination of Judicial Notice]. At this point in time, trial preparations were essentially complete, the deadline for discovery had been over for years, and Plaintiff, with the necessary assistance of its own expert, had deposed Defendants' two disclosed expert witnesses. At the time of Dr. Zavala's improper injection into the case, Plaintiff had never been notified of an additional undisclosed expert nor, understandably, provided with an opportunity to depose Dr. Zavala within the time limits established by the Court. Then, over the objection of the Republic during trial, to the Trial Court's receipt of any testimony from Dr. Zavala, Dr. Zavala was still permitted to submit a second declaration in the post-trial briefings (this was the "Second Zavala Declaration" referenced in the Judgment). [ROA Vol. 28; 4976, Notice of Filing Declaration of Dr. Zavala and Trial Transcript]. This second declaration was submitted after the previously described discussion as to whether and how the Trial Court would consider the opinions of Dr. Zavala and any rebuttal thereto from Plaintiff's expert, Dr. Eguiguren. [ROA Vol. 28; 5243, Trial Tr. at 431:9-437:10]. The Trial Court permitted both parties to submit papers on Ecuadorian law after trial rather than hear the testimony of an undisclosed expert on the stand. [*Id*.]. This compromise, of course did not address, let alone correct, the problem of allowing Defendants to utilize an undisclosed expert. [*See id*.;

ROA Vol. 29; 5611, The Republic of Ecuador's Post-Trial Memorandum with Proposed Findings of Fact and Conclusions of Law at 20-21, fn. 10].

Nevertheless, the Trial Court's Judgment relies exclusively on both declarations of the undisclosed, and never deposed, Dr. Zavala.[7] [App. Tab 9, Vol. 33; 6554, Judgment at 5-7, fns. 1-3]. The Trial Court cites Dr. Zavala as having provided several potential Ecuadorian statutes of limitations, ranging from three months to five years, and as having opined that the applicable tolling would only apply in any event, if Filanbanco were plaintiff.[8] [ROA Vol. 33; Judgment, 6-7, Fns. 2-3]. The Trial Court's Judgment, however, studiously and completely disregards the expert opinion submitted by the Republic's disclosed expert on Ecuadorian law, Dr. Eguiguren. [ROA Vol. 29; 5665, The Republic of Ecuador's Post-Trial Memorandum with Proposed Findings of Fact and Conclusions of Law at Exhibit B]. On the subject of tolling the statute of limitations, Dr. Eguiguren declared:

> Former Article 215 of Ecuador's Law of Institutions of the Financial System (2001) and the current Article 19 of the applicable Law 60

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[7] These declarations addressed provisions of criminal law, not relevant to this case. See pgs. 41; 47-48, infra

[8] As noted, ***supra*** pgs. 16-18, the AGD assumed control of Filanbanco at the Bank's request. Accordingly, all actions taken by the AGD thereafter were on behalf of the Bank itself, attempting to recover the Bank's assets on behalf of the Bank and its depositors. Filanbanco was, in effect, the plaintiff throughout. Thus, if Dr. Zavala were correct, he is not, the tolling would be applicable.

> published in the official registry in January, 2002, specify that all statutes of limitations of actions or rights in favor or against any institution within the financial system are suspended during the time such institution is undergoing a process of restructuring or liquidation, or if it, for any reason, suspends its dealings with the public. Notably, this provision applies to any cause of action pertaining to the rights of any institution within the financial system – whether on behalf of or against that entity. Accordingly, it applies to any cause of action for Article 29 liability because Article 29 only applies to causes of action pertaining to institutions within the financial system such as Filanbanco. [*Id*. at 5665].

The Trial Court gave no consideration whatsoever to Dr. Eguiguren's opinion.[9] Instead, the Trial Court relied exclusively on Dr. Zavala's analysis and found that, because the Republic was not the liquidator, the tolling could not take effect. [Vol. 33; Judgment at 7, fn. 3]. But Dr. Zavala's naked, untested assertion that tolling only applies to suits brought by liquidators finds no support in the language of the relevant statute. The language of the relevant article of Ecuadorian law, as submitted to the Trial Court with the Republic's original pre-trial submissions in December of 2012, states:

> "The prescription of actions and rights in favor of or against an institution within the financial system shall be suspended for the entire period of its re-structuring or reorganization process or while it is incurring grounds for liquidation, or while customer service has been suspended for whatever reason. This provision shall be applicable even when the respective legal action has commenced." [Article 215

[9] Without explanation, the Trial Court gave consideration to Dr. Zavala's post-trial submission, but declined to give consideration to Dr. Eguiguren's post trial submission.

> of Ecuador's Law of Institutions of the Financial System (2001) and the current Article 19 of the applicable Law 60].

This sort of unsupported prejudicial testimony is precisely why experts must be vetted through the disclosure process, deposed, and then have their opinions cross-examined.

These problems are also why "Florida Courts have consistently held that surprise, changed, or undisclosed expert testimony may result in prejudice sufficient to require a new trial." *Fidelity Warranty Services v. Firstate Insurance Holdings*, 74 So. 3d 506, 512 (Fla. 4th DCA 2011); *accord Rose v. Madden & McClure Grove Serv.*, 629 So. 2d 234 (1st Fla DCA 1994) (reversing trial court's decision after it allowed testimony of two undisclosed expert witnesses). In fact, this Court has ruled that a verdict must be reversed "in cases involving critical undisclosed expert testimony that goes to the heart of the litigation." *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005).

Here, the Trial Court accepted not one, but two, hearsay declarations of an expert whom the Defendants failed to disclose before trial, in clear violation of the Trial Court's own rules and pretrial order. Unlike Plaintiff's expert witness, Dr. Zavala was never qualified as an expert, was never deposed and was not permitted to testify at trial. By incorporating these declarations into the Judgment, the Trial Court has demonstrated that the undisclosed testimony did, in fact, go to the heart

of this case. Thus, reliance on either of Dr. Zavala's declarations under these circumstances is reversible error.

In reaching its conclusion, and compounding the prejudice, the Trial Court also disregarded, without explanation, the declaration of the Republic's disclosed expert, who had been qualified and who was deposed. This further accentuates the Trial Court's error. Had the Trial Court appropriately considered the Ecuadorian law and expert guidance before it, the Trial Court would have noted that the statute of limitations for actions brought while Filanbanco was in liquidation were tolled until Filanbanco exited liquidation. The admitted evidence – indeed the evidence submitted by Defendants themselves – demonstrates that Filanbanco was in liquidation until as late as July 8, 2008. [ROA Vol. 30; 6006, Exhibit FP at 1, 3].

The Judgment should be reversed.

VI. CONCLUSION

For all of the foregoing reasons, the Judgment entered in favor of Defendants should be reversed and this matter should be remanded for trial to determine the outstanding damages, if any.

Dated: March 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail this 17th day of March, 2016 upon counsel for Defendants: Michael R. Tein, Esq., mtein@lewistein.com, Lewis Tein, PL, 3059 Grand Avenue, Suite 340, Coconut Grove, Florida 33133 and Raoul G. Cantero, White & Case LLP.

/s/ Alvin B. Davis
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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that I have complied with the font standards required by Fla. R. App. P. 9.210(a)(2) for computer-generated briefs by submitting this brief in Times New Roman 14-point font.

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