11-1150-cv(L)
11-1264-cv (con)

United States Court of Appeals
for the Second Circuit

CHEVRON CORPORATION,

Plaintiff/Appellee,

v.

HUGH GERARDO CAMACHO NARANJO , JAVIER PAIGUAJE PAYAGUAJE, STEVEN R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants/Appellants.

(*Additional Caption on the Reverse)*

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF/APPELLEE, URGING AFFIRMANCE

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Michael Wilt
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

June 30, 2011

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, aka AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREGA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUNIDA, BEATRIZ MERCEDES GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUNIDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSÉ ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, JOSÉ GABRIEL REVELO LLORE, MARÍA CLELIA REASCOS REVELO, MARÍA MAGDALENA RODRIGUEZ, JOSÉ MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVÁEZ, LOURDES BEATRIZ CHIMBO TANGUILA, MARÍA HORTENCIA VIVEROS CUSANGUA, SEGUNDO ÁNGEL AMANTA MILÁN, OCTAVIO ISMAEL CÓRDOVA HUANCA, ELÍAS ROBERTO PIYAHUAJE PAYAHUAJE, DANIEL CARLOS LUSITANDE YAIGUAJE, VENANCIO FREDDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUAJE LUSITANDE, DELFÍN LEONIDAS PAYAGUAJE, ALFREDO DONALDO PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, FERMÍN PIAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTÍN PAYAGUAJE PIAGUAJE, EMILIO MARTÍN LUSITANDE YAIGUAJE, SIMÓN LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ÁNGEL JUSTINO PIAGUAJE LUCITANDE,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor does it have any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 10

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING AN ANTI-SUIT INJUNCTION AGAINST APPELLANTS 10

A. The Anti-Suit Injunction Does Not Offend Comity 10

B. The District Court Properly Exercised Its Discretion to Consider Chevron's Declaratory Judgment Claim 15

II. THE DISTRICT COURT PROPERLY DETERMINED THAT THE ECUADORAN JUDGMENT IS UNENFORCEABLE UNDER NEW YORK'S RECOGNITION ACT 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Ackerman v. Levine,
788 F.2d 830 (2d Cir. 1986) 20

China Trade & Development Corp. v. M.V. Choong Yong,
837 F.2d 33 (2d Cir. 1987) 4, 7, 13

Dow Jones & Co. v. Harrods Ltd.,
346 F.3d 357 (2d Cir. 2003) 8, 15, 16

Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co.,
470 F. Supp. 610, (S.D.N.Y. 1979). 19

Karaha Bodas Co. v. Perusahaan Pertambangan,
500 F.3d 111 (2d Cir. 2007) 10, 11, 14

New York Times Co. v. Gonzalez,
459 F.3d 160 (2d Cir. 2006) 16

Paramedics Electromedicina Comercial, Ltd. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645 (2d Cir. 2004) 14

Page(s)

Statutes and Constitutional Provisions:

Recognition Act 8, 9
N.Y. CPLR § 5304(a) 8, 17
N.Y. CPLR § 5304(b)(3) 9, 18, 19, 20

Miscellaneous:

7 James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE
¶ 60.33 (3d ed. 1999). 19

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF/APPELLEE, URGING AFFIRMANCE

INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file this brief.[1] In brief, WLF is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has litigated to maintain the integrity of the judicial process and to support adoption of legal rules to ensure that tort defendants are provided an adequate opportunity to defend against claims. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 2011 U.S. LEXIS 4567 (U.S., June 20, 2011); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010).

WLF strongly supports the right and duty of an American court to police the judicial conduct of those within the jurisdiction of the court. Where, as here, there is evidence that those within the jurisdiction of the New York federal courts have engaged in a massive fraud against a litigant, WLF believes it is wholly appropriate

---

[1] Pursuant to Local Rule 29.1, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

for the court to enter an order designed to prevent them from continuing to carry out their fraudulent scheme – regardless whether they contemplate continuing their fraud here in the United States or abroad. It is no sign of disrespect toward foreign courts to enter an order that protects them from becoming the next targets in a fraudulent scheme. Accordingly, WLF does not believe that principles of international comity counsel against issuance of an injunction that prohibits Appellants from continuing their scheme by filing enforcement actions in courts throughout the world.

STATEMENT OF THE CASE

In February 2011, a provincial court in Ecuador entered a multibillion dollar judgment against Chevron Corporation in an action brought by indigenous people in the Amazon rain forest (the "Lago Agrio Plaintiffs" or "LAPs"). The gravamen of their case is alleged pollution of the rain forest by Texaco, Inc. during the period ending in 1992. Special Appendix ("SPA") 5.[2] Chevron's objections to the judgment are continuing to be heard within the Ecuador courts.

Chevron contends that the Ecuador judgment was the product of fraud. In an effort to prevent the LAPS from collecting on their judgment, Chevron filed this

[2] Chevron acquired the stock of Texaco in 2001, long after Texaco had ceased all operations in Ecuador. Texaco remains a wholly-owned subsidiary of Chevron.

action in February 2011. The Defendants include the LAPs, several lawyers and environmental experts who represented the LAPS, and Amazon Defense Front (ADF), an organization that apparently is slated to be the direct beneficiary of any funds collected on the Ecuador judgment.

Following service of process on all defendants, the American defendants and two of the LAPS (the "LAP Representatives") filed appearances in the district court proceedings. All of the parties that appeared in the district court filed briefs in connection with a motion for a preliminary injunction filed by Chevron.

In a March 7, 2011 Opinion, the district court granted the motion, except with respect to three American defendants for whom there was no evidence that they had any intention of attempting to enforce the Ecuador judgment. SPA 1-131. The other defendants were preliminarily enjoined, pending a final determination of the action, "from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement" of the Ecuador judgment. SPA 129. Chevron later posted the $21 million bond mandated by the district court as a condition for granting the preliminary injunction.

The district court based its Opinion in part on its conclusion that Chevron had demonstrated that it was likely to succeed on the merits of its claims that: (1)

Ecuador does not provide impartial tribunals and judicial procedures compatible with due process of law; and (2) the Ecuador judgment was procured by fraud. SPA 81-88. The court rejected the defendants' claims that principles of international comity counseled against issuance of an injunction restraining their activities on a world-wide basis. *Id.* at 104-109. In particular, the court held that an injunction was appropriate on public policy grounds:

> Important public policies support injunctive relief as well. "An anti-suit injunction may . . . be appropriate when a party seeks to evade important policies of the forum by litigating before a forum court." Here, defendants intend to pursue multiple enforcement actions around the globe in an effort to pressure Chevron with respect to settlement and to enforce the judgment in *fora* that would not look closely at what occurred in Ecuador. If the LAPs were allowed to enforce, or attempt to enforce, the judgment in this manner, they would be evading the U.S.'s strong interest in protecting its citizens from judgments entered in systems that do not accord their litigants the essentials of due process or as a result of fraud, particularly fraud organized and conducted in part within the United States.

Id. at 108-09 (quoting *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1987)).

Appellants have appealed to this Court from the grant of the preliminary injunction. WLF agrees with Chevron that Appellants have failed to demonstrate that any of the district court's factual findings were clearly erroneous, and has failed to demonstrate that the district court abused its discretion in granting the preliminary injunction. WLF writes separately to focus on three issues: (1)

granting an anti-suit injunction did not offend any notions of international comity; (2) the district court did not abuse its discretion in determining that this is an appropriate case for declaratory relief; and (3) the district court correctly determined that Chevron is likely to succeed in its claim that the Ecuador judgment is unenforceable under New York's Recognition Act.

SUMMARY OF ARGUMENT

In support of its conclusion that Chevron is likely to prevail on the merits of its claims, the district courts made numerous factual findings indicating that Appellants have been engaged in a massive, decade-long enterprise to subvert the judicial process. They filed environmental assessments with the Ecuador court over the name of Dr. Charles Calmbacher; but Dr. Calmbacher disavowed having prepared the reports or espousing the views expressed therein. They blackmailed the trial judge to appoint Dr. Cabrera to conduct an "independent" assessment of environmental issues. They ghost-wrote Dr. Richard Cabrera's "independent" assessment, but concealed that fact from the court and Chevron. When Chevron learned the source of Dr. Cabrera's report, they purported to compile new, "cleansed" expert reports for the court – but those who compiled the reports never visited Ecuador but rather relied solely on the findings in Dr. Cabrera's fraudulent report. SPA 39. They intentionally sought to intimidate Ecuadorian judges,

including efforts to convince judges that they might be killed if they ruled in favor of Chevron. They pressured prosecutors to bring criminal charges against Ecuadorian attorneys who had represented Chevron.

Appellants make no serious effort on appeal to contest any of those findings. The "international comity" claims raised by Appellants must, accordingly, be judged against the backdrop of the fraud findings. Appellants' position comes down to the following: so what if we engaged in fraud on the Ecuadoran court? By the end of the trial, Chevron had exposed much of our fraud, and thus the trial judge vowed that he would not consider our fraudulently procured evidence in rendering his final judgment. No harm no foul.

But, of course, the district court determined that the Ecuadoran judge *did*, in fact rely on tainted evidence – he relied on Appellants' "cleansed" reports that were derived in large measure from findings in the fraudulent report prepared in the name of Dr. Cabrera. More importantly, Appellants' comity argument is untenable because it is being advanced in support of parties who do not seriously dispute that they have been engaged in a massive fraudulent exercise. Their argument that the district court's anti-suit injunction displays insufficient respect for the judicial systems of other countries rings hollow when one considers that the only individuals enjoined are individuals determined by the district court to have

engaged in an effort to defraud the courts.

This Court has made clear that one of the most important factors in determining whether an anti-suit injunction is appropriate is whether "strong public policies of the enjoining forum are threatened by the foreign action." *China Trade*, 837 F.2d at 36. The United States, as does every civilized nation, has a strong public policy of protecting those within its jurisdiction from fraud, particularly when (as here) a significant portion of the fraud took place within the United States. A preliminary injunction simply prevents Appellants from continuing to engage in their fraudulent scheme until the district court has an opportunity to conduct a trial on the merits. Indeed, at this point, there are no comity concerns because there are no on-going proceedings with which the anti-suit injunction might interfere. Appellants are reduced to complaining about interference with "anticipated" proceedings; and there is no reason to believe that foreign courts would be offended if those determined to have been engaging in fraud are barred from carrying on their fraudulent scheme by filing collection actions in those foreign courts.

Equally lacking in merit is Appellants' claim that the district court erred in exercising its discretion to consider Chevron's declaratory judgment claim. LAP Br. 56-60. The Court has recognized that district courts possess "broad" discretion

to consider declaratory judgment claims, and Chevron has demonstrated that the five relevant factors identified by this Court, *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357 (2d Cir. 2003), all support the district court's decision to exercise its discretion in this case. In particular, this action will completely resolve the parties' dispute in this country, and very likely in much of the rest of the world as well.

Nor is there merit in Appellants' claim that Chevron has failed to establish that the Ecuadoran judgment is unenforceable under New York's Recognition Act. In seeking to support the conclusiveness of the Ecuadoran judgment under CPLR § 5304(a), Appellants bear the burden of establishing that the judgment was rendered under a legal system which "provide[s] impartial tribunals or procedures compatible with due process of law." Given the district court's numerous findings regarding the woeful shortcomings of the Ecuadoran court system, Appellants' evidence does not come anywhere near establishing that the district court's findings were erroneous. Indeed, Appellants attempt nothing more than to demonstrate that the Ecuadoran judiciary has not deteriorated in the past decade. LAP Br. 68-76. Quite apart from the fact that Appellants fail to address many of the shortcomings in the Ecuadoran judiciary identified by the district court, Appellants' assertion that the judiciary has not deteriorated says nothing about whether it ever provided impartial tribunals.

The Recognition Act also provides that a foreign country judgment "need not be recognized" if it was "obtained by fraud." CPLR § 5304(b)(3). The district court's fraud findings are well supported by the evidence. While the findings that Appellants actively defrauded the Ecuadoran court are largely uncontested, they insist that Chevron has not met § 5304(b)(3)'s requirements because their scheme to defraud was not fully successful – after Chevron uncovered their scheme, the Ecuadoran trial judge declared that his February 2011 judgment was not based on any of Appellants' fraudulent evidence. But as the district judge found, it is probable that the judgment *did* rely on tainted evidence – the "cleansed" expert reports that relied on the findings of the fraudulent report of Dr. Cabrera. Moreover, even if the judgment had not relied on the "cleansed" reports, the evidence is overwhelming that the entire proceedings before the Ecuadoran court were so infected by Appellants' fraudulent activities that the district judge was well justified in determining that Chevron was likely to succeed in its claim that § 5304(b) precluded recognition of the Ecuadoran judgment.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING AN ANTI-SUIT INJUNCTION AGAINST APPELLANTS

Appellants largely concede that the district court did not exceed his authority in entering an injunction that prevented Appellants from engaging in collection efforts within the U.S. court system. Rather, they object primarily to the district court's decision to extend its anti-suit injunction to encompass all nations outside of Ecuador. They contend that the injunction "displays a complete lack of respect for foreign courts and offends principles of international comity by denying foreign courts the opportunity to decide if the Judgment is enforceable under their laws." LAP Br. 39-40.

WLF finds it rich that parties who have largely failed to contest findings that they engaged in a massive fraud on the Ecuadoran courts can accuse others of not showing proper "respect" to courts. In any event, their "international comity" concerns are misplaced.

A. The Anti-Suit Injunction Does Not Offend Comity

The district court's issuance of an anti-suit injunction is subject to the same abuse-of-discretion standard of review applicable to all injunctions. *See, e.g. Karaha Bodas Co. v. Perusahaan Pertambangan*, 500 F.3d 111, 118-19 (2d Cir.

2007). Appellants' assertion that a more exacting standard of review should apply to anti-suit injunctions is without merit.

Karaha explained that the Second Circuit's test "governing the circumstances under which a federal district court [may] issue an anti-foreign-suit injunction" requires that two "threshold requirements" be met: (1) the parties are the same in both matters, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined. *Id.* at 19. Both requirements are met in this case.

First, all parties with a colorable claim to enforce the Ecuadoran judgment (including all Ecuadoran plaintiffs plus the ADF, the party slated to be the direct beneficiary of any funds recovered under the Ecuadoran judgment) are parties before the district court. While there are no current "parallel" proceedings before a foreign court, only by engaging in further questionable conduct could Appellants arrange for anyone other than themselves to serve as plaintiffs in a foreign collection action. Accordingly, the first requirement is satisfied. Moreover, resolution of the case before the enjoining court is highly likely to be dispositive of any collection action that might be filed. Appellants point to a theoretical possibility that other countries might apply a standard that differs from New York's standard (does the legal system "provide impartial tribunals or procedures

compatible with due process of law") in determining whether deficiencies in the Ecuador court system undercut the conclusiveness of the Ecuadoran judgment. But that argument does not address the more fundamental deficiency of the Ecuador judgment: it was the product of a court proceeding that was infected throughout by Appellants' fraudulent activity. As Chevron's brief demonstrates, "Scholars and court alike recognize that fraud is a universal ground for non-recognition in civilized nations." Chevron Br. 60. A ruling by the district that the Ecuadoran judgment is unenforceable because it was procured by fraud would be dispositive of any collection action that Appellants might file in a foreign court; the rules of every nation of which WLF is aware would prohibit the enforcement of such a judgment.

After determining that Chevron had met the two threshold requirements, the district court went on to consider the other factors that this Court deems relevant in determining the propriety of an anti-suit injunction. *See Karaha*, 500 F.3d at 119. The district court determined that all of those factors pointed in favor of granting an injunction. SPA 104-109. WLF respectfully suggests that this Court, in deciding the issue, need look no further than the district court's finding that the injunction would serve the United States' strong public policy of protecting those within its jurisdiction against fraud. *Id*. at 109. Unless an anti-suit injunction is

entered, a party within the jurisdiction of the United States (Chevron) is highly likely to be subjected to multiple lawsuits by parties who have been determined by the district court to have engaged in massive litigation fraud against Chevron in the past.[3] While this Court has instructed that courts should look at a variety of factors in determining whether to issue an anti-suit injunction, *China Trade* made clear that one of the two most important factors to consider is "whether strong public policies of the enjoining forum are threatened by the foreign action." 837 F.2d at 36.

"The power of federal courts to enjoin foreign suits by persons subject to their jurisdiction is well-established." *China Trade*, 837 U.S. at 35. Moreover, the need for "due regard to principles of international comity," *id.*, are somewhat

---

[3] Those who view the anti-suit injunction in this case as a mark of "judicial imperialism" argue that American courts display improper favoritism when they issue anti-suit injunctions that benefit American corporations. But Chevron is not entitled to protection on the basis of being an American citizen; it is entitled to protection because it is within the jurisdiction of the United States. A foreign corporation or citizen would be entitled to like protection under similar circumstances.

The unique facts of this case suggest that the anti-suit injunction issued here will not often be replicated. First, the overwhelming evidence of fraud on the court unearthed in this case is unlikely to be so readily available in other cases; most plaintiffs's lawyers do not confess their fraud to documentary film makers. Second, the anti-suit injunction would have been unavailable but for the fact that (as determined by the district court) all of the plaintiffs in the Ecuadoran lawsuit were subject to the specific jurisdiction of federal courts in New York.

lessened in this case by the fact that the district court has granted a preliminary injunction based on findings that Chevron is likely to prevail on the merits of its claims. They included largely uncontested findings that Appellants engaged in massive fraud during the course of the Ecuadoran legal proceedings. The Court has explained that principles of comity apply with "diminished force" when the enjoining court has already entered a final judgment against the party to be enjoined. *Paramedics Electromedicina Comercial, Ltd. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004); *Karaha*, 500 F.3d at 127. In such circumstances, foreign lawsuits filed by the enjoined party are often viewed as efforts to undermine federal judgments. Obviously, the preliminary injunction issued by the district court in this case does not constitute a final judgment. But it does represent a considered effort by the district court to address the dispute between Chevron and the Appellants and a formal determination regarding the likely outcome of that dispute. Accordingly, principles of comity ought to apply less forcefully than they might in a run-of-the-mill case involving an anti-injunction suit.

Nor should the district court preliminary injunction be viewed as an effort by the district court to seize for itself the right to decide an issue that could equally well be determined by other courts around the world. A determination regarding

whether the Ecuadoran judgment should be enforceable outside Ecuador cannot be made by any other court for the simple reason that there are no other proceedings pending outside Ecuador. The district court did not seize control of this case; the case came to it. It is not trying to interfere with proceedings in any other court. Having given the matter considerable attention, the district court found that Chevron is likely to succeed on its claim that Appellants engaged in a massive fraud. Under those circumstances, it is not a sign of disrespect to foreign courts for the district court to enjoin Appellants from continuing with their fraud until such time as it can undertake a trial on the merits.

B. The District Court Properly Exercised Its Discretion to Consider Chevron's Declaratory Judgment Claim

Equally lacking in merit is Appellants' claim that the district court abused its discretion in considering Chevron's declaratory judgment claim. LAP Br. 56-60.

In *Dow Jones,* the Court identified five factors that must be considered when determining whether to exercise jurisdiction over claims for declaratory relief:

> (i) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (ii) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (iii) "whether the proposed remedy is merely being used for 'procedural fencing or a race to res judicata"; (iv) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (v) "whether there is a better or more effective remedy."

New York Times Co. v. Gonzalez, 459 F.3d 160, 167 (2d Cir. 2006) (quoting *Dow Jones*, 346 F.3d 357 (2d Cir. 2003)).

Many of the same reasons that support the granting of an anti-suit injunction also support the decision to exercise of declaratory judgment jurisdiction in this case. The district court's preliminary injunction was issued *after* the Ecuador court issued its final judgment, so the district court cannot be accused of jumping prematurely into dispute between Chevron and Appellants. Given the district court's factual determination that the Ecuadoran appeal process could be completed at a moment's notice and that collection activity could begin even before that, it is hardly surprising that it determined that resolution of the dispute should not await completion of the appeal process. Appellants suggest that the "better and more effective remedy" is to allow them to proceed with their Invictus plan and to file multiple enforcement actions around the world at the same time. LAP Br. 60. To the contrary, WLF views that approach as an invitation to chaos and a means of granting a tactical advantage to parties who have already been found to have engaged in a massive fraud on the courts.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT THE ECUADORAN JUDGMENT IS UNENFORCEABLE UNDER NEW YORK'S RECOGNITION ACT

Nor is there merit in Appellants' claim that Chevron has failed to establish

that the Ecuadoran judgment is unenforceable under New York's Recognition Act. In seeking to support the conclusiveness of the Ecuadoran judgment under CPLR § 5304(a), Appellants bear the burden of establishing that the judgment was rendered under a legal system which "provide[s] impartial tribunals or procedures compatible with due process of law." Given the district court's numerous findings regarding the woeful shortcomings of the Ecuadoran court system, Appellants' evidence does not come anywhere near establishing that the district court's findings were erroneous. *See*, *e.g.*, SPA 49 (the Ecuadoran judiciary "has been in a state of severe institutional crisis for some time. Matters have deteriorated recently."); SPA 51-52 (the Ecuadoran judiciary has been "subservient" to President Correa ever since he removed all judges from the Constitutional Tribunal after the Tribunal attempted to overturn Correa's decision to remove 57 congressional representatives from office).

Indeed, Appellants do not challenge any of the district court's factual findings regarding the current state of the Ecuadoran judiciary. Rather, they seek to overturn the district court's determination under § 5304(a) by asserting that the judiciary is no more deficient than it was 15 years ago. LAP Br. 68-76. Quite apart from the fact that Appellants fail to address many of the shortcomings in the Ecuadoran judiciary identified by the district court, Appellants' assertion that the

judiciary has not deteriorated says nothing about whether it ever provided impartial tribunals.

The Recognition Act also provides that a foreign country judgment "need not be recognized" if it was "obtained by fraud." CPLR § 5304(b)(3). The district court's fraud findings are well supported by the evidence. While the findings that Appellants actively defrauded the Ecuadoran court are largely uncontested, they insist that Chevron has not met § 5304(b)(3)'s requirements because their scheme to defraud was not fully successful – after Chevron uncovered their scheme, the Ecuadoran trial judge declared that his February 2011 judgment was not based on any of Appellants' fraudulent evidence. But as the district judge found, it is probable that the judgment *did* rely on tainted evidence – the "cleansed" expert reports that relied on the findings of the fraudulent report of Dr. Cabrera. Moreover, even if the judgment had not relied on the "cleansed" reports, the evidence is overwhelming that the entire proceedings before the Ecuadoran court were so infected by Appellants' fraudulent activities that the district judge was well justified in determining that Chevron was likely to succeed in its claim that § 5304(b) precluded recognition of the Ecuadoran judgment. To assert that there is not "fraud on the court" simply because the judge's ruling in support of the party engaging in the fraud *might* have been the same even in the absence of fraud is to

apply an overly narrow definition to that term. Federal courts regularly apply the term not only to "fraud perpetrated by officers of the court" but also to any "fraud which does or attempts to, subvert the integrity of the court itself, . . . so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases that are presented for adjudication." 7 James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE ¶ 60.33 (3d ed. 1999).

Appellants insist that "[t]o serve as the basis for non-recognition, the 'fraud' contemplated by § 5304(b)(3) 'must relate to matters other than issues that could have been litigated and must be a fraud on the court.'" LAP Br. 76 (quoting *Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co.*, 470 F. Supp. 610, 615 (S.D.N.Y. 1979)). But as noted above, the fraud alleged by Chevron unequivocally constituted "fraud on the court." The very cases on which Appellants rely make clear that the type of "fraud" that may *not* be raised in an Recognition Act proceeding is fraud that allegedly underlay the original cause of action. Fraud committed during the course of the initial judicial proceeding (which may have infected that proceeding) may always be raised as a basis for refusing to enforce the judgment – even when (as here) the defrauded party begins to discover (through diligent investigation) at the tail end of litigation that he has been the victim of a fraudulent legal proceeding. Thus, in *Ackerman v. Levine*, 788 F.2d

830 (2d Cir. 1986), the Court explained that successful invocation of § 5304(b)(3) requires more than a showing that the opposing party acted dishonestly in his pre-litigation dealings with the party seeking to invoke § 5304(b)(3). The Court rejected the "fraud" claim because:

> There is no basis to believe that the German judgment was fraudulently obtained. Defendant-appellee has offered no basis for us to question the district court's finding of fact that "neither plaintiffs nor defendants acted dishonestly," Op. at 646, or the court's corollary conclusion of law that the German judgment was not fraudulently obtained.

Id. at 841. Correspondingly, when the party seeking to invoke § 5304(b)(3) demonstrates that the opposing party has "acted dishonestly" in the course of litigation, he has alleged the type of fraud to which the Enforcement Act applies.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court affirm the order of the district court granting a preliminary injunction.

Respectfully submitted,

/s/ Richard A. Samp
Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Michael Wilt
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amicus curiae*

Dated: June 30, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 4,596 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2011, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp