11-1150-cv(L)

11-1264-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Appellants.

(CAPTION CONTINUED ON INSIDE COVER)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

IDENTITY, INTEREST AND AUTHORITY OF *AMICUS* [1]

Identity – The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the nation, including this Court, on issues of national concern to the business community.

Interest – The Chamber has two interests in this case. First, the Chamber has an interest in ensuring that United States corporations are subject to fair regulation, in the appropriate forum under an impartial system of justice that affords due process. Consistent with this interest, the Chamber has opposed efforts

[1] No person other than *amicus* and its counsel authored this brief in whole or in part. No party, no party's counsel and no other person — other than the *amicus curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

to assert jurisdiction over corporations under the Alien Tort Statute, has opposed the unauthorized application of United States law to conduct taking place abroad and has defended application of the *forum non conveniens* doctrine as an antidote to forum shopping. The Chamber is concerned that Appellants and their *amici*, by attacking Chevron's understandable effort to protect itself from the *Lago Agrio* judgment, may use the instant appeal to undermine these efforts.

Second, the Chamber has an interest in ensuring a robust but reasonable system of foreign judgment enforcement. Many of the Chamber's members have occasion to enforce judgments abroad or, less frequently, to enforce foreign judgments in the United States. Where there are credible allegations of impropriety, there must be a full and fair opportunity to test those allegations. In a case such as this one, presenting both overwhelming evidence of a corrupt judgment and a plan rapidly to utilize that judgment to effect disruptive world-wide asset freezes in order to extort a settlement from a United States corporation, strong prophylactic measures may become necessary. Thus, it is important for the Chamber to explain why the extraordinary circumstances presented by this case justify the preliminary prophylactic relief ordered by the district court.

Authority –Federal Rule of Appellate Procedure 29(a) authorizes this brief. Some, but not all, parties have consented to this filing, so the Chamber has filed an accompanying motion for leave to file this brief.

ARGUMENT

I. WHEN PRESENTED WITH CREDIBLE EVIDENCE OF AN IMMINENT PLAN TO USE AN UNLAWFULLY PROCURED FOREIGN JUDGMENT IN SUPPORT OF A WORLDWIDE CAMPAIGN TO FREEZE THE ASSETS OF A UNITED STATES CORPORATION, THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO RESTRAIN TEMPORARILY THE ENFORCEMENT OF THAT JUDGMENT.

This appeal involves a simple legal question but presents extraordinary facts. The simple legal question is whether the district court abused its discretion when it temporarily enjoined Appellants from attempting to enforce the *Lago Agrio* judgment outside of Ecuador. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 118-19 (2d Cir. 2007) (issuance of an antisuit injunction reviewed for abuse of discretion). The extraordinary facts concern both the extensive unrebutted evidence of corruption leading to the *Lago Agrio* judgment and credible indications that Appellants were about to use this corrupt judgment in support of a worldwide campaign to freeze Chevron's assets in order to extract a monetary settlement. Under these extraordinary circumstances, the carefully drawn order in this case represented a proper exercise of the district court's equitable discretion.

A. An Antisuit Injunction Represents An Exercise Of A Court's Historical Power To Order Equitable Relief Against Parties Subject To Its Jurisdiction.

Federal courts unquestionably have the *power* to issue an injunction that bars parties from pursuing litigation in a foreign forum. *See Ibeto Petrochemical Indus., Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). As this Court recognized nearly a century ago, such injunctions simply represent an exercise of the court's equitable power over parties subject to its jurisdiction. *The Salvore*, 36 F.2d 712, 714 (2d Cir. 1929). This equitable power has "deep roots" in English practice which supplied the basis for the modern-day American antisuit injunction. *E. & J. Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 989 (9th Cir. 2006); Charles A. Helsell, *Injunctive Relief Against Oppressive Suits in Foreign Jurisdictions*, 12 F.R.D. 502 (1951-52). Historically, English equity courts utilized this power whenever England had a sufficient interest in the matter. Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 Va. J. Int'l L. 283, 319 (2005). They did so even when no action was pending in England and when the underlying claim could not have been heard in English court. *Id.*

Both state and federal courts invoked this English practice to resolve competing jurisdictional claims between two courts within the United States. George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 593-99 (1990). In some cases, courts in one state barred litigation in another state when that parallel litigation threatened the interests of the enjoining court's state, a practice that the Supreme Court has approved. *See, e.g., Cole v. Cunningham*, 133 U.S. 107, 121 (1890). In other cases, federal courts enjoined parallel litigation in other federal courts. *See, e.g., City of New York v. Exxon Corp.*, 932 F.2d 1020, 1025 (2d Cir. 1991). Federal courts also relied on this power to enjoin state proceedings, though federalism concerns prompted Congress to trim the exercise of that power. *See* 28 U.S.C. §2283 (Anti-Injunction Act); *id.* §1342 (Johnson Act); 26 U.S.C. §7421(a) (Tax Injunction Act).

Orders barring litigation in foreign courts derive from the same basic equitable authority. Unlike injunctions of state proceedings, Congress has not restricted their use. *Seattle Totems Hockey Club v. Nat'l Hockey League*, 652 F.2d 852, 855 n.5 (9th Cir. 1981). Nonetheless, such injunctions can implicate an important countervailing consideration – not federalism but rather comity. *See Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006). Comity as this Circuit recently explained in a related context, is

based upon principles of "proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency." *Id*. Antisuit injunctions can implicate comity because, while they formally are directed only at the litigants, they can "effectively restrict the jurisdiction" of foreign tribunals. *United States v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985).

Comity – while an important value – "is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *Royal & Sun*, 466 F.3d at 92 (citations and internal quotations omitted). *Accord Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004); *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1195 (9th Cir. 1991). Consequently, courts must consider "the factual circumstances surrounding each claim" of comity and weigh those circumstances against the interests justifying the injunction. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.") (footnote omitted).

In the foreign antisuit injunction context, this Circuit like many others has developed a set of equitable factors to guide a district court's discretion in the

exercise of its authority to order injunctive relief.[2] *See Paramedics*, 369 F.3d at 654. *Accord Quaak*, 361 F.3d at 18 (The "sensitive and fact-specific nature of the inquiry counsels against the use of inflexible rules"); *Laker*, 731 F.2d at 927 ("equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether, in light of the principles outlined above, the injunction is required to prevent an irreparable miscarriage of justice."). *Cf. Royal & Sun*, 466 F.3d at 94 (analyzing "totality of the circumstances" in decision

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[2] Some courts take the view that the opinions of the various federal courts of appeals reflect a "circuit split" over the proper standard for issuance of an antisuit injunction. *Compare Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359-61 (8th Cir. 2007) (discussing competing approaches); *with Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (declining to decide "whether the differences between the standards are more than verbal, that is, whether they ever dictate different outcomes"). *See generally* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* ch. 6 (4th ed. 2006). This Circuit's jurisprudence itself has evolved since *Ibeto Petrochemical*, 475 F.3d at 64, corrected a misunderstanding among some courts about how to apply this Circuit's test. This case presents an opportunity for this Circuit to clarify further that test.

whether to stay domestic litigation in favor of foreign proceeding). Ordinarily this Circuit first examines two matters (the identity of the parties and the dispositive nature of the domestic litigation) and then considers various other equitable factors, though no rigid decisional sequence is mandated. *See LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 200 (2d Cir. 2004) (concluding that antisuit injunction was not warranted where no significant policy interests were at stake and where court's jurisdiction not threatened without deciding whether parties and issues were sufficiently similar); *China Trade*, 837 F.2d at 36 (same). In various opinions, it has described the identity of the parties and dispositive nature of the domestic litigation as "initial considerations," *LAIF X*, 390 F.3d at 200; "threshold criteria," *Paramedics*, 369 F.3d at 654; "prerequisites," *China Trade*, 837 F.2d at 36, or "threshold requirements," *Karaha Bodas*, 500 F.3d at 119.

The first criterion is whether the parties are "sufficiently similar." *In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 97 n. 5 (2d Cir. 2006); *Paramedics*, 369 F.3d at 652. *Cf. Royal & Sun*, 466 F.3d at 94 (considering "similarity of the parties" in deciding whether to abstain in favor of foreign proceeding). The stricter standard urged by Appellants – requiring precise "identity" of the parties (Appellants' Brief at 45-46) – is not consistent with this Circuit's decisions in *Davis* and *Paramedics*. In *Davis*, this Circuit, in connection with a criminal investigation in the United States, upheld an injunction against further proceedings

in the Cayman Islands to block the release of bank records even though the United States was not a party to the proceedings in the Cayman Islands and the bank was not a party to the United States proceeding. 767 F.2d at 1039. Similarly, in *Paramedics*, this Circuit again upheld an injunction against further proceedings in Brazil even though one of the parties in the Brazilian action was not a party in the United States proceeding. 369 F.3d at 652-53.

Moreover, a rigid requirement of precise identity does not comport with the doctrine's equitable roots. A party could circumvent this requirement simply by naming additional parties in the foreign litigation. By contrast, a functional focus on the similarity between the parties in the two proceedings simply allows the district court to determine the injunction's efficacy. If none of the parties subject to the court's injunction appears in the foreign court, then the injunction may be a rather impotent tool. Yet as both *Davis* and *Paramedics* illustrate, antisuit injunctions can be effective even when the parties to the proceedings are not literally identical.

The second criterion is whether the United States action would be dispositive of the foreign action. As one district court in this Circuit recently observed, the "meaning and rationale" of this consideration "are not well developed in the case law." *In re Vivendi Universal Securities Litig.*, 2009 WL 3859066 at *5 (S.D.N.Y. Nov. 19, 2009). Indeed since *China Trade* employed the

phrase, no decision of this Circuit has declined to issue an antisuit injunction on the ground that the United States proceeding would not be "dispositive" of the foreign proceeding. *See China Trade,* 837 F.2d at 36 (finding injunction not warranted on the basis of other equitable considerations); *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 126 F.3d 365, 371-72 (2d Cir. 1997) (same); *LAIF X*, 390 F.3d at 200 (same).

From *China Trade*, the phrase traces back through district court decisions in this Circuit, *e.g., American Home Assurance Co. v. Ins. Corp. of Ireland Ltd.*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984), and ultimately to a Florida district court decision, *Western Elec. Co., Inc. v. Milgo Elec. Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978). *Western Electric* cited only domestic injunction cases in support of this formulation and did not consider whether the concept made sense in the international context. 450 F. Supp. at 837. In contrast to the domestic context, no United States action ever can be literally "dispositive" of a foreign action – the other action remains on the docket of the foreign court which is not formally bound by the injunction.

As with their argument on the first threshold requirement, Appellants again urge a rigid rule literally requiring the United States action to resolve the foreign proceeding completely. (Appellants' Brief at 41-45). That approach would create tension within this Circuit's doctrine, would be inconsistent with the equitable

underpinnings of antisuit injunctions and would throw this Circuit out of alignment with the prevailing contemporary view among other federal courts.

First, in at least two other cases involving parallel proceedings, this Circuit has not employed the rigid approach urged by the Appellants. In *Harvey Aluminum, Inc. v. American Cyanamid Co.*, a foreign antisuit injunction case that predated *China Trade*, this Circuit held that a district court had the authority to enjoin a foreign proceeding "involving the same issues" and did not require that the United States proceeding formally dispose of the foreign proceeding. 203 F.2d 105, 108 (2d Cir. 1953). More recently, in *Royal & Sun*, a case involving whether to issue a stay *lis alibi pendens* (another equitable tool for managing parallel proceedings), this Circuit simply required that the parties be "litigating substantially the same issues in both actions." 466 F.3d at 94.

Consistent with precedent, a functional approach makes more sense. "[R]equiring issues to be precisely and verbally identical would lead to counter-productive, and perhaps unintended, results." *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 915 (9th Cir. 2009). Taken literally, no injunction could ever be justified because, as noted above, no domestic action can completely dispose of a foreign action. Moreover, just like a rigid requirement of absolute identity of parties, a formalistic approach to dispositiveness would license similar obstructionist tactics through creative pleading in the foreign forum. *See Applied*

Medical, 587 F.3d at 916; *Laker*, 731 F.3d at 945. *Cf. Paramedics*, 369 F.3d at 653 (rejecting argument that unique foreign-law claim raised in foreign forum meant that United States action was not "dispositive"); *Gallo*, 446 F.3d at 991 (same).

Finally, a functional approach harmonizes this Circuit's precedent with other decisional law on this point. At least three other circuits have described this requirement in terms of whether the domestic and foreign litigation involve functionally similar issues. *Quaak*, 361 F.3d at 20 (requiring the issues to be "substantially similar"); *Applied Medical*, 587 F.3d at 916; *Laker*, 731 F.2d at 945 (upholding injunction even though United States litigation would not have disposed of all claims in foreign court).[3] Echoing this approach, most district courts in this Circuit have employed this functional approach to the second threshold requirement. *Vivendi*, 2009 WL 3859066 at *6 n. 12 (collecting cases).

After evaluating the threshold criteria, this Court typically then considers a number of "additional factors" to decide whether the exercise of a court's equitable

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[3] One circuit purports to reject this functional approach to the "dispositive" criterion. *See Cannon Latin America, Inc. v. Lantech (CR), S.A.*, 508 F.3d 597, 601-02 (11th Cir. 2007). *Cannon* made this point about a cause of action only available under foreign law and does not concern judgment enforcement proceedings.

power is warranted. These include "whether the parallel litigation would (1) frustrat[e] … a policy in the enjoining forum; (2) … be vexatious; (3) … threat[en] … the issuing court's in rem or quasi in rem jurisdiction, (4) … prejudice other equitable considerations; or (5) … result in delay, inconvenience, expense, inconsistency or a race to judgment." *Karaha Bodas*, 500 F.3d at 119 (*quoting Ibeto Petrochemical*, 475 F.3d at 64) (*quoting China Trade*, 857 F.2d at 35) (alterations in *Ibeto Petrochemical*). *Accord Quaak*, 361 F.3d at 19 ("[I]n every case a district court should examine the totality of the circumstances in deciding whether a particular case warrants the issuance of an international antisuit injunction. If, after giving due regard to the circumstances (including the salient interest in international comity), a court supportably finds that equitable considerations preponderate in favor of relief, it may issue an international antisuit injunction.") (citation omitted).

Reflecting this highly fact-sensitive approach, this Circuit has applied these "additional factors" in a variety of contexts. Some decisions have upheld (or approved the issuance of) an antisuit injunction. *See, e.g., Karaha Bodas*, 500 F.3d at 120-27; *Ibeto Petrochemical*, 475 F.3d at 64-65; *Paramedics*, 379 F.3d at 652-55; *Davis*, 767 F.2d at 1038. Others have vacated (or approved a decision not to issue) an injunction. *See, e.g., LAIF X*, 390 F.3d at 199-200; *China Trade*, 837

F.2d at 36-37. A review of those fact-sensitive decisions reveals several unifying principles.

First, this Circuit is more likely to approve an antisuit injunction when the case implicates important national interests in the United States and comparatively weak interests in the foreign forum. *See also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543-44 (1987) (observing, in the context of whether to require resort to Hague Evidence Convention, that comity requires a particularized analysis of "the respective interests of the foreign nation and the requesting nation"); Restatement (Third) of Foreign Relations Law §442(1)(c) & cmt. c (requiring similar interest balancing in the context of deciding whether to order discovery in violation of foreign law). For example, in *Davis*, the Court approved an antisuit injunction against litigation in the Cayman Islands designed to block the disclosure of bank records. There, the Court weighed the "strong national interest [of the United States] in safeguarding the integrity of its criminal process" against the Cayman Islands' "substantial interest in regulating the progress of litigation in its own courts." 767 F.2d at 1037-38. *Accord Karaha Bodas*, 500 F.3d at 126 (stressing federal policy favoring international arbitration); *Ibeto Petrochemical* (same), 475 F.3d at 64-65; *Paramedics*, 369 F.3d at 654-55 (same). By contrast, in *LAIF X*, this Court approved a district court's decision not to enjoin Mexican proceedings involving a

share ownership dispute between foreign investors in a Mexican corporation. It noted that Mexico had "a strong interest in determining who is a shareholder of a Mexican corporation and whether particular transactions were permissible under the bylaws of a Mexican corporation"; such a case did not implicate any strong public policies of the enjoining forum. 390 F.3d at 200. *Accord Computer Assocs.*, 126 F.3d at 372 (noting that litigation in France over French copyright did not implicate United States action involving United States copyright); *China Trade*, 837 F.2d at 37 (noting that party bringing parallel proceedings was not "attempting to evade any important policy of this forum").

Second, this Circuit is more likely to approve an antisuit injunction where credible evidence demonstrates that it is necessary to prevent vexatious litigation. For example, in *Ibeto Petrochemical*, the Court found it necessary to enjoin the Nigerian litigation due in part to a showing that Nigerian courts "would not apply" the same law as the arbitrators, which could provoke a race to judgment. *Ibeto Petrochemical*, 478 F.3d at 64. By contrast, in *China Trade*, the claimed necessity for the injunction – namely the risk of inconsistent judgments – was "no more than speculation about the race to judgment" and the party seeking the injunction had not made an adequate showing that a United States judgment would be enforceable in Korea. 837 F.2d at 37. This Court's decisions involving antisuit injunctions in the context of arbitration agreements similarly demonstrate the importance of

credible evidence of necessity. *Compare Paramedics*, 369 F.3d at 654 (approving antisuit injunction where a party's own statements demonstrated that parallel proceeding "was a tactic to evade arbitration"); *with LAIF X*, 390 F.3d at 200 (finding antisuit injunction unnecessary where party requesting it adduced no evidence that its opponent was evading arbitral forum or attempting to sidestep arbitration).

Finally, this Circuit is more likely to approve an antisuit injunction that is narrowly tailored to the underlying "equitable considerations" giving rise to it. For example, in *Davis*, this Court observed that the antisuit injunction was appropriate after "other means of redressing the injury … have been explored." 767 F.2d at 1038. *Accord Laker*, 731 F.2d at 933 n. 81 ("Comity teaches that the sweep of the injunction should be no broader than necessary to avoid the harm on which the injunction is predicated."). Consistent with this principle of narrow tailoring, the Court has stressed the importance of the injunction's duration and scope. *See Karaha Bodas*, 500 F.3d at 130 (stressing that antisuit injunction did not bar the losing party in the underlying arbitration from seeking relief in the district court "in the event that it demonstrates its good faith in seeking an opportunity to challenge the Award in Switzerland."); *Ibeto Petrochemical*, 475 F.3d at 65 (modifying timing of injunction to ensure that it only apply "until the conclusion of the London arbitration and the consequent resolution of the still-pending case in

the District Court"); *In re Millenium Seacarriers, Inc.*, 458 F.3d at 92 (describing order that directed bankruptcy court to determine whether antisuit injunction was overly broad).

B. Equitable Considerations Justify The Limited Antisuit Injunction In This Extraordinary Case.

Applying the above-described equitable factors in this extraordinary case, the preliminary injunction issued by the district court represented a reasonable exercise of its discretion.

The preliminary criteria guiding the district court's exercise of its discretion are satisfied. The parties are sufficiently similar. The individuals subject to the injunction are principally the judgment creditors to the *Lago Agrio* judgment; these same individuals would appear as judgment creditors in any enforcement action. While the injunction includes also Steven Donziger and his law office, their intimate involvement in the procuring of the *Lago Agrio* judgment completely aligns their interests with those of the *Lago Agrio* plaintiffs. *Paramedics*, 369 F.3d at 652. Courts routinely exercise their equitable authority over attorneys appearing before them on parties' behalf, as Donziger and his law office have done in this case. *See, e.g., Cunningham v. Hamilton Cnty*, 527 U.S. 198 (1999) (sanctions order directed against attorney); *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2d Cir. 2010) (disqualification order).

The issues also possess the requisite similarity. Both this case and any foreign enforcement litigation ultimately concern the enforceability of the *Lago Agrio* judgment. While the precise standards for enforcement may vary across jurisdictions, most foreign legal systems set forth exceptions on grounds such as fraud, a biased system or public policy – no different from the law applicable in this action. *See* Appellee's Foreign Law Addendum. *See generally* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 Geo. Wash. Int'l L. Rev. 178, 191 (2008) (describing European requirements for enforcing judgments as "considerably similar to those prevailing in the United States" and listing grounds for non-enforcement to include fraud, public policy and unfair proceedings); Yoav Oestereicher, *The Rise and Fall of the "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments*, 6 Wash. U. Global Stud. L. Rev. 339, 368 (2007) ("Probably the most important exception to the presumption of enforceability is that involving public policy. This provision is traditionally found in all national laws and in all the international conventions, whether bilateral or multilateral. There seems to be a consensus on the need for a public policy exception.") (internal quotations and footnote omitted); Association of the Bar of the City of New York, Committee on Foreign and Comparative Law Survey on Foreign Recognition of U.S. Judgments 23 (July 2001) (summarizing results of survey of foreign judgment enforcement

standards of twelve countries in four different continents and stating that "none of the states surveyed will recognize or enforce a … foreign judgment if it was obtained by a fraud on the originating court").

Even under the stricter reading of "dispositive" urged by Appellants, this consideration still is met. This appeal arises on a preliminary injunction, so Chevron is only required to show a *likelihood* of prevailing on the merits. *Citigroup Global Mkts. Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Given the extensive evidence of corruption already adduced by Chevron and the Appellants' failure to rebut or explain any of that evidence, it is at least *likely* (and indeed highly probable) that, if the district court ultimately finds this conduct to render the judgment unenforceable, other foreign courts would concur – either by giving preclusive effect to the United States judgment or by applying independently their own grounds for refusing to enforce a foreign judgment.

Apart from these preliminary considerations, several other "equitable factors" support the issuance of the injunction. *First*, several policies of the enjoining forum support this injunction. "The United States has an interest in protecting its citizens, including its corporate citizens, from trumped-up multi-million dollar claims." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425,

432 (7th Cir. 1993).[4] *Cf. Cole*, 133 U.S. at 121 (upholding a Massachusetts court's injunction against suits filed in New York to attach the assets of an insolvent Massachusetts corporation). Just like in *Allendale* and *Cole*, "extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction, to prevent oppression or fraud." *Cole* 133 U.S. at 121 (*quoting Vail v. Knapp*, 49 Barb. 299 (N.Y. Sup. 1867)). In this case, the district court identified the pervasive and unrebutted evidence of "oppression" and "fraud" utilized to procure the *Lago Agrio* judgment–the preparation and submission of falsified expert reports, the attempted "cleansing" of those reports through the use of other

[4] Appellants cite two decisions (at 50 & n. 76) for the proposition that two other circuits have rejected "similar 'rules based on nationality' as the justification for anti-foreign-suit injunctions." Neither of the decisions cited by Appellants supports that argument. The cited pages from both decisions stand simply for the proposition that the country of incorporation cannot claim an absolute priority in the exercise of *prescriptive* jurisdiction and do not address the entirely different question whether that country has an interest in protecting a domestically incorporated company from the exercise of *enforcement* jurisdiction that would give effect to an illegally procured judgment. *See Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1358 (6th Cir. 1992); *Laker*, 731 F.2d at 935-36.

experts with undisclosed conflicts, the extensive *ex parte* contacts with the judge, the collusion with political elites and the "pressure and intimidation" exerted on the Ecuadorian judiciary. (Special Appendix ("SPA") 87-88) *See also* SPA 7 ("[N]either Donziger nor any of the other key actors has denied Chevron's allegations or attempted here to explain or justify under oath their recorded statements and written admissions."). That evidence provides compelling proof of the need for an injunction to protect Chevron from "trumped-up" multi-*billion* dollar claims.

The United States also has an independent interest in "preserv[ing] the district court's ability to arrive at a final judgment" in this case. *Laker*, 731 F.2d at 938. In this case, the Invictus Memorandum supplies critical evidence that Appellants were poised to execute a strategy that would interfere with that ability. That strategy involves a worldwide campaign to "collect on [the] judgment in multiple jurisdictions around the world, including by *ex parte* attachments, asset seizures and other means as promptly as possible," (SPA 5), in an effort to force Chevron to settle. This could effectively preclude the district court from unearthing the information necessary to determine the depth of the corruption that apparently underpins the *Lago Agrio* judgment. *See also* SPA 62 (quoting Invictus Memorandum that *Lago Agrio* plaintiffs "will look for ways to proceed against Chevron on a pre-judgment basis [such as asset freezes], *largely as a means of*

attaining a favorable settlement at any early stage.") (emphasis added by district court). This exploitation of other countries' laws governing asset freezes and provisional relief does not materially differ from foreign litigation that aims to block the discovery of information necessary for a United States court to adjudicate fully the merits of an important case before it. *See Quaak*, 361 F.3d at 20-21. *Cf. Davis*, 767 F.2d at 1037 (upholding injunction against foreign litigation designed to block discovery of information in prosecution).

Second, Chevron has supplied sufficient proof that the injunction is necessary to prevent vexatious litigation in foreign forums. Again, the Invictus Memorandum provides the critical evidence establishing both the vexatiousness of the planned foreign litigation and the necessity for the injunction. As to vexatiousness, the Invictus Memorandum establishes that the *Lago Agrio* plaintiffs intend to proceed "on multiple enforcement fronts." (SPA 62). *See Karaha Bodas*, 500 F.3d at 120-27 (upholding injunction where award debtor brought proceedings in multiple forums designed to challenge arbitration). As to necessity, the Invictus Memorandum establishes that the *Lago Agrio* plaintiffs plan to proceed "quickly if not immediately." (SPA 62). *See also* SPA 61 (describing Appellants' intention to move "immediately" and "expeditiously").

Appellants seize upon the lack of a presently pending action to claim that an antisuit injunction is not necessary. (Appellants' Brief at 45). This argument is

foreclosed by this Circuit's decisions in *Harvey Aluminum* and *Karaha Bodas*. *Harvey Aluminum*, a case not cited in Appellants' brief, involved an action for specific performance of an agreement to sell certain facilities located in British Guiana. "Fearing that the plaintiffs were about to bring suit in British Guiana" the defendants obtained an *ex parte* order temporarily barring the plaintiffs from commencing such litigation. *Harvey Aluminum*, 203 F.2d at 107. In response, the plaintiffs then sought to dismiss voluntarily their United States action, and the district court, believing it lacked further authority, denied the defendants' request to convert the *ex parte* order into a preliminary injunction. On appeal, this Circuit reversed the district court's decision and held that it had the "discretion to enjoin another action in British Guiana on the ground of vexatiousness." *Id.* at 108. While the Court remanded the case to the district court to decide whether to issue the injunction, its holding and disposition make clear that an antisuit injunction does not always require presently pending foreign litigation.

In *Karaha Bodas*, this Circuit took a similar view. There, the prevailing party in an arbitration obtained a United States judgment enforcing the award. Notwithstanding the award debtor's promise to the district court to satisfy the judgment after the Supreme Court denied review, the award debtor subsequently filed an action in the Cayman Islands, alleging that the arbitration was fraudulent and seeking, among other remedies, damages in the amount of the award. The

district court enjoined the award debtor from maintaining the Caymans action "*or any similar action anywhere*." 500 F.3d at 117-18 (emphasis added). In relevant part, this Circuit approved that order barring the award debtor from pursuing relief in other jurisdictions even though no action was presently pending in those jurisdictions.

This case fits squarely within the principle unifying *Harvey Aluminum* and *Karaha Bodas* that a court may exercise its equitable power to enjoin anticipated action in a foreign forum when it has been presented credible evidence of an imminent plan to commence vexatious litigation in that forum. Indeed, this case presents even more compelling grounds for application of that principle. Whereas both *Harvey Aluminum* and *Karaha Bodas* rested on inferences based on the enjoined party's conduct, this case presents direct, unrebutted evidence of such a plan. The key piece of evidence is the Invictus Memorandum, which lays out in unmistakable detail a plan to act quickly once the appellate decision is rendered in Ecuador. In the face of this extraordinary evidence, the district court did not need to await commencement of an enforcement proceeding before exercising its equitable discretion.

Finally, the injunction here is narrowly tailored. Heeding this Circuit's guidance in *Ibeto Petrochemical*, the district judge only directed the injunction "specifically at the parties" (and their legal representatives who procured the Lago

Agrio judgment), tied the duration of his injunction specifically to the underlying harm he sought to prevent ("pending the final determination of this action") and invited the parties to sever the declaratory judgment action in order to facilitate resolution of that matter. *Ibeto Petrochemical*, 428 F.3d at 65. Finally, like the trial judge whose injunction this Circuit upheld in *Davis*, Judge Kaplan issued this injunction "only after other means of redressing the injury sought to be avoided have been explored." *Davis*, 767 F.2d at 1038. Specifically, he entered this injunction only after the Appellants refused to agree to a "temporary order that they maintain the *status quo* – that is, that no effort would be made to enforce the judgment." (SPA 8). *Accord Laker*, 721 F.2d at 942 (approving injunction and after the defendants "ignored [the district court's] invitation" to craft narrower relief). *Cf. Quaak*, 361 F.3d at 21 (approving injunction prohibiting foreign lawsuit designed to block document disclosure and declining to second-guess "district court's judgment" that alternatives were unsatisfactory).

Appellants claim that the injunction will intrude upon comity values (Appellants' Brief at 39-46), and the Republic of Ecuador has filed an extensive brief attempting to defend the integrity of its judicial system. These arguments miss the mark, and the comity considerations are quite weak.

Any impact on Ecuador is minimal. The injunction does not preclude continuation of the proceedings in the Ecuadoran courts. Unlike other antisuit

injunctions addressed by this Court that blocked a foreign proceeding on the merits, this injunction does no such thing. *Compare LAIF X*, 390 F.3d at 200 (declining to enjoin party from continuing proceeding in Mexican court over ownership of Mexican corporation); *China Trade*, 837 F.2d at 39-40 (declining to enjoin party from continuing proceeding in Korea to determine its liability).

Similarly, any impact on countries other than Ecuador is also outweighed by the significant United States interests here. *See First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998) (holding, in the context enforcing a subpoena on a foreign party, that United States interest in unearthing fraud "outweigh[ed] the competing foreign interests in enforcement of local confidentiality laws"). *Cf. Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) (declining to order post-judgment discovery in violation of Romanian law about Romanian judgment debtor's assets in potential third-country enforcement jurisdictions). *Compare LAIF X*, 390 F.3d at 200 ("Mexico has a strong interest in determining who is a shareholder of a Mexican corporation and whether particular transactions were permissible under the by-laws of a Mexican corporation."). Notably, none has appeared before this Court to impress upon it an interest in enforcing foreign judgments. *See United States v. First Nat'l City Bank*, 396 F.2d 897, 904 (2d Cir.

1968). Finally, because no enforcement action currently is pending, those jurisdictions also have not invested any judicial resources that are threatened by the district court's order.

II. SEEKING A DISMISSAL ON THE BASIS OF *FORUM NON CONVENIENS* DOES NOT PRECLUDE A PARTY FROM SUBSEQUENTLY CHALLENGING THE ENFORCEABILITY OF THE FOREIGN COURT'S JUDGMENT.

Appellants also argue that the declaration sought by Chevron – namely that the Lago Agrio judgment is unenforceable – is inconsistent with Texaco's previous position requesting *forum non conveniens* dismissal of the original suit filed in the United States. (Appellants' Brief at 61-76). Whether couched in terms of judicial estoppel or equitable estoppel, that argument is flawed for several reasons.

First, the argument is factually flawed. As this Circuit recently recognized, when this original suit was dismissed, the parties agreed that Texaco preserved, without exception, its right to oppose enforcement of a foreign judgment under New York law. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 396-97 (2d Cir. 2011).

Second, the argument is legally flawed. The *forum non conveniens* and judgment enforcement inquiries differ in fundamental respects. "Dismissal for *forum non conveniens* reflects a court's assessment of a 'range of considerations,

most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.'" *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (*quoting Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996)). By contrast, the decision not to enforce a judgment on grounds of fraud, public policy or a corrupt judicial system entails a backward-looking assessment about the procedural or substantive decisions made in the foreign forum. *See Hilton v. Guyot*, 159 U.S. 113, 202 (1895) ("[W]here there *has been* opportunity for a full and fair trial abroad … under a system of jurisprudence likely to secure an impartial administration of justice … and there is nothing to show either prejudice in the court, or in the system of laws under which it *was* sitting, or fraud in procuring the judgment … .) (emphasis added); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142–143 (2d Cir. 2000) (denying petition to enforce Nigerian judgment due to lack of impartiality and focusing on state of Nigerian legal system *at the time judgment was rendered*) (emphasis added); Restatement (Third) of Foreign Relations Law §482 cmt. b ("Evidence that the judiciary *was* dominated by the political branches of government or by an opposing litigant … would support a conclusion that the legal system was one whose judgments are not entitled to recognition.) (emphasis added). Consequently, as a neutral arbitral tribunal already has found in this matter, even when a *forum non conveniens* dismissal is entirely justified (as it was

in this case) subsequent events might still appropriately call into doubt the enforceability of a foreign judgment. *See* Appellee's Brief at 68. Such an argument, thus, would not be "clearly inconsistent" with a party's "earlier position" on *forum non conveniens*. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).[5]

Third, Appellants' proposed rule, if accepted, simply would make bad policy. Under that rule, a *forum non conveniens* dismissal would effectively license plaintiffs' lawyers to engage in all sorts of questionable and corrupt behavior to secure a favorable legal result in the foreign forum. They could then turn around and enforce the judgment in the United States without fear that their conduct would have any consequences. Flexible equitable doctrines such as judicial estoppel and the equitable estoppel doctrines do not necessitate such an

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[5] Appellants' also rely on the Ninth Circuit's recent decision in *Hubei Gezhouba Sanlian Indus., Co. v. Robinson Helicopter Co.*, 2011 WL 1130451 (9th Cir. Mar. 29, 2011). In *Hubei*, unlike this case, there was no claim that the judgment had been procured by fraud, nor did the party challenging the judgment contend (much less present evidence) that the foreign legal system lacked impartial tribunals or procedures. *See Hubei Gezhouba Sanlian Indus., Co. v. Robinson Helicopter Co.*, 2009 WL 2190187 at *6 & n. 7 (C.D. Cal. July 22, 2009).

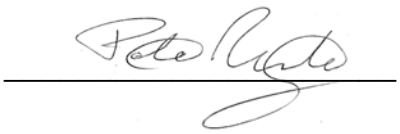
obviously inequitable result, and no party could reasonably rely on a *forum non conveniens* dismissal as a license to commit fraud or to corrupt a foreign legal system. *See New Hampshire*, 532 U.S. at 751 (declining to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel"); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 724 (2d Cir. 2001) (describing equitable estoppel as a "judicial doctrine of equity" that requires, among other things, reasonable reliance on a representation).

CONCLUSION

At bottom, this appeal involves a carefully tailored solution in a case containing extraordinary, unrebutted evidence of a plan to shake down a United States corporation. By holding that the preliminary injunction did not amount to an abuse of discretion, this Circuit can preserve the district court's ability to evaluate expeditiously the credible allegations of fraud and corruption that underpin the *Lago Agrio* judgment. Conversely, vacating the injunction would give the *Lago Agrio* plaintiffs a green light to hatch their plan of asset freezes and other forms of *ex parte* relief in an effort to tie up the assets of a major United States corporation and, effectively, prevent full proof of the fraud and corruption from ever coming to light.

For the foregoing reasons, the preliminary injunction ordered by the district court should be affirmed.

Respectfully submitted,



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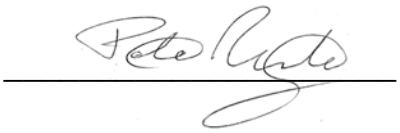

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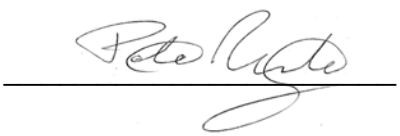

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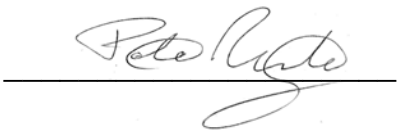

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