**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| CHEVRON CORPORATION,<br>Plaintiff,<br>v.<br><br>MARIA AGUINDA SALAZAR, *et al.*,<br>Defendants,<br>-and-<br><br>STEVEN DONZIGER *et al.*,<br>Intervenors. | CASE NO. 11-CV-3718 (LAK) |

**DEFENDANTS JAVIER PIAGUAJE PAYAGUAJE AND HUGO GERARDO CAMACHO NARANJO'S REPLY TO CHEVRON'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

The Ecuadorian courts have yet to render a final and enforceable judgment in the Lago Agrio litigation. They may never do so. The official final *record* in the Lago Agrio litigation has only become available in the last week or so with which to assess the underlying proceedings. Defendants have not made a single attempt at enforcement anywhere in the world, let alone in New York. Yet Chevron's drumbeat for immediate prophylactic injunctive relief continues unabated, with its assertion that even though one cannot know if there will ever be an enforceable judgment in Ecuador, nor when such judgment will appear, nor what it will look like, the Court must take action now. This abuse of the U.S. judicial system to seek tactical advantage in foreign jurisdictions must end. New York law requires a "final, conclusive, and enforceable" judgment in order for there to be a case under the Recognition Act. *See* C.P.L.R. §§ 5302, 5303. Because, as Chevron itself concedes, its case is using "New York law in seeking an anti-suit injunction applicable to anywhere [in the world]," the absence of a final judgment renders its case a nullity at best, an abuse of process if viewed more realistically. Opp. at 11. In addition, even assuming for the sake of argument that this Court had subject matter jurisdiction over Count 9, it is still not a legally cognizable claim.

**The Court Lacks Jurisdiction over Count 9.**

The "sole reserved route for Chevron to challenge any final judgment resulting from the [Ecuadorian] litigation" is New York's Recognition Act. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 399 (2d Cir. 2011). But the Recognition Act is a law designed to allow expedited enforcement of judgments by a judgment creditor. C.P.L.R. § 5303. Chevron does not explain how, as a judgment debtor, it may use the Recognition Act as a basis for a declaratory judgment. Moreover, even were such a use of the Recognition Act is proper—and it is not—there is no "final, conclusive, and enforceable" Ecuadorian judgment upon which a claim under the

Recognition Act could be made. C.P.L.R. § 5302. Chevron sidesteps this issue, claiming that enforcement may be sought "even though an appeal [from the foreign judgment] is pending or it [the foreign judgment] is subject to appeal." *Id.* However, this means only that a pending appeal will not prevent enforcement where the judgment *is otherwise final and enforceable*. This is the holding of *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999), the very case that Chevron cites. There a judgment creditor was allowed to proceed with enforcement of a foreign judgment because "neither the Court of Appeal nor the Superior Court stayed execution" of the judgment while it was on appeal. *Id.* at 213. Here, there is no final or enforceable judgment, because the Ecuadorian Judgment is stayed indefinitely. Lacking the prerequisite of an enforceable judgment, there is no basis for Chevron to invoke the Recognition Act, and no subject matter jurisdiction for this matter.

**There is no basis for discretionary declaratory judgment review.**

Chevron's justification for discretionary declaratory judgment review is similarly perplexing. Here, even though the Ecuadorian proceedings are far from over and Defendants lack the ability to initiate enforcement proceedings against Chevron in New York (or anywhere else, for that matter), Chevron takes the position that a declaratory judgment action may be brought in advance of injury.[1] Chevron's citation to *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) is unavailing. Indeed, in that case, the Supreme Court noted that there would be no Article III jurisdiction for an action where one party seeks "an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 126. That is precisely what Chevron seeks here since the Ecuadorian Judgment is stayed pending a *de novo* appeal in Ecuador. Given that

[1] Chevron still fails to cite to any threat of enforcement *in New York* that would require a ruling under New York law. Moreover, Chevron provides no support for the notion that a non-existent and purely hypothetical pre-judgment attachment proceeding in Latin America could somehow create a case or controversy under *New York* law. In addition, Chevron's argument that New York is the proper forum for an "anti-judgment enforcement" action because counsel allegedly took actions in New York is wholly unsupported by precedent.

the Court and the parties cannot possibly know how the Ecuadorian Judgment will look should it ever reach a final form, all this Court can offer is an advisory opinion on the enforceability of a judgment that may never come to pass – an advisory opinion on a hypothetical state of facts.

Equally specious is Chevron's assertion that the Court should exercise discretion because "the issues presented will not sharpen over time." Opp. at 7. Quite simply, at this stage, how can Chevron claim, much less prove, that to be true? Even with an appeal pending and a full record just received, Defendants have evidence showing that myriad of Chevron's allegations are false. It may be the case that upon the development of *a full and final* record on appeal that the entirety of Chevron's case falls by the wayside. Chevron is attempting to litigate this matter at a breakneck pace not because the issues in this matter have solidified, but because it recognizes that there could be a sea change in the Ecuadorian Judgment following a *de novo* appeal. Chevron therefore casts premature and undue dispersions on the integrity of the Ecuadorian courts, characterizing the still-undecided appeal as "one more corrupt decision . . . ," *id.* at 8, and also falsely asserts that precedent allows a company like it to bring a declaratory judgment action to prevent "large and/or catastrophic losses." *Id.* at 9.

Of course, Chevron neglects to mention that the case it cites for this novel proposition, *Italverde Trading, Inc. v. Four Bills of Lading*, 485 F. Supp. 2d 187, 213 (E.D.N.Y. 2007), is pure dictum—there, neither party had brought an enforcement or declaratory action under the Recognition Act, and the issue presented was whether a foreign judgment could be raised as a *defense by a judgment creditor*, which the plain text of the Act permits. Moreover, *Italverde* concerned a party exercising self-enforcement *of a final and enforceable* Italian judgment, creating an actual controversy between the parties. Here, what Chevron seeks is unprecedented—the interruption of foreign proceedings before a final judgment is rendered on

the basis that the judgment is unenforceable. Such an action treats "justice" as if it is a commodity belonging exclusively to Chevron, and not the people of Ecuador whose lives and property have been damaged by decades of pollution by Chevron's predecessor-in-interest.

**Chevron and Texaco are one and the same.**

Even if the Court concludes that it may exercise jurisdiction over this matter, judgment on the pleadings remains appropriate. Defendants will not recount the various points made in their Motion, but rather, will focus only on the most egregious of Chevron's misstatements. First, as if it has blinders on to the opinions of the Second Circuit, Chevron continues to assert that it is a distinct entity from Texaco, and that it is not liable for the damages caused by the company it acquired in 2001. However, as the Second Circuit has made clear, "lawyers from ChevronTexaco appeared in this Court and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs' complaint." *Republic of Ecuador*, 638 F.3d at 390 n.3. Were there any confusion about the scope of this holding, the Second Circuit further added for good measure that in exchange for dismissal from New York on *forum non conveniens* grounds, Texaco "promise[d] to satisfy any judgment issued by the Ecuadorian courts, subject to its rights under New York's Recognition of Foreign Country Money Judgments Act . . . . As a result, that promise, along with Texaco's more general promises to submit to Ecuadorian jurisdiction, is enforceable against Chevron . . . ." *Id.* at 390 n.4. Thus, Chevron's challenge to the Ecuadorian Judgment on the ground that the Ecuadorian court lacked jurisdiction over it or on any ground not included in § 5304 of the Recognition Act must be dismissed.[2]

[2] As a practical matter, Chevron's invocation of the reverse triangular merger as a panacea for liability makes little sense—were the merger the magical device Chevron describes, companies would reorganize themselves periodically to defeat liability, much like a snake shedding its skin. And, more importantly, Chevron made this argument to the Second Circuit and that Court nevertheless found that Chevron is bound by Texaco's promises. Chevron's latest attempt to wriggle and slither its way out of this holding by claiming that the Second Circuit only held that "Chevron merely was bound to Texaco's submission of itself . . . to jurisdiction" (Opp'n Br. at 22-23) is directly contrary to the Second Circuit's decision. *See Republic of Ecuador*, 638 F.3d at 399 (noting, for example, that if

**Chevron is estopped from claiming that Ecuador lacks impartial tribunals.**

Similarly, even though Defendants concede that Chevron has the right to raise the Recognition Act under appropriate circumstances, that does not mean that it has the right to prevail or avoid dismissal as a matter of law if estoppel applies.[3] Here, Chevron is estopped from challenging Recognition Act factor 5304(a)(1), having, in order to secure a dismissal of *Aguinda*, made clear, unambiguous, and repeated assertions that "Ecuador's Constitution guarantees due process and equal protection," the Ecuadorian judicial system "is neither corrupt nor unfair," and that Ecuadorian courts "treat all persons who present themselves before them with equality and in a just manner." *See* Mtn. Judgment on Pleadings at 18-19. Having forced the parties to litigate in its chosen forum, Chevron may not now assert that contrary to years of claims, its chosen forum was fundamentally unfair. None of Chevron's cited case law supports its "heads I win, tails you lose" view of estoppel. In *Petition of Treco,* 205 B.R. 358 (S.D.N.Y. 1997), for example, the district court refused to apply the doctrine of judicial estoppel where the party to be estopped took a position that "arguably remained unchanged" and the opposing party had fundamentally altered its theory of the case. *Id.* at 364. Similarly, in *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), judicial estoppel was held inapplicable because a series of new, discriminatory laws essentially imposing strict liability against the defendant were passed after the defendant took its initial position. Finally, Chevron's citation to *In re Union Carbide Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987) is especially puzzling, as there, the Second Circuit held that upon dismissing a case on *forum non conveniens* grounds, the Court ceased "to have any further jurisdiction over the matter *unless and until a proceeding may some*

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Chevron prevails on the pending appeal in Ecuador "*Chevron* will have complied with *its* obligation to litigate the matter and pay any resulting judgment" (emphases added)).

[3] Ironically, Chevron attempts to embrace Texaco's reservation of rights to escape estoppel arguments while desperately trying to distance itself from its promises.

*day be brought to enforce here a final and conclusive Indian money judgment.*" *Id.* at 205 (emphasis added). Chevron's entire cause of action is contrary to this holding. Moreover, there was no estoppel issue presented, as Union Carbide did not take the position that Indian courts afforded it due process. To the contrary, the company took the position that the American court system should monitor the courts of India to ensure that Union Carbide's rights were protected during the foreign proceedings, a position that the Second Circuit rejected as "border[ing] on the frivolous."[4] *Id.* In contrast, Chevron *fought* to have *Aguinda* moved away from New York, and actively trumpeted the impartiality of the Ecuadorian legal system to assuage the district court's concerns and have its way. The doctrine of judicial estoppel prevents Chevron from now presenting a diametrically inconsistent assessment of Ecuador's judicial system.

**Defendants are not estopped by unclean hands**

Chevron's assertion that "[t]he LAPs' own inequitable conduct bars their estoppel defenses" should be rejected out of hand. Specifically, Chevron cites to cases that cover equitable estoppel, a doctrine that does not concern the relationship between a party and the court. Moreover, Chevron fails to cite to a single published case that holds a party must be free of unclean hands in order to argue that the doctrine of judicial estoppel applies to an opponent's inconsistent statements before the court. Given that judicial estoppel embodies the over-arching public policy goal of honesty to a tribunal, any other parties' purported conduct is irrelevant.

**Chevron has not pleaded conflicting judgments**

Chevron's claim that the Ecuadorian Judgment conflicts with a prior agreement and final judgment is yet another baseless assertion. In its pleadings, Chevron fails to identify, describe, or otherwise point to a *single* final judgment—Chevron therefore cannot point to a "conflict."

[4] Even Chevron's carefully selected quote from Union Carbide that "fraud 'could conceivably occur in the future'", does not help them because the Ecuadorian Plaintiffs do not argue that Chevron is estopped from arguing that the judgment was procured by fraud. (Opp'n Br. at 21 (quoting *Union Carbide*, 809 F.2d at 198, 204-05)).

Moreover, the settlement agreements "specifically referenced" by Chevron's complaint do not bar the Lago Agrio litigation. As just one example, Clause VII of the Memorandum of Understanding between the Republic of Ecuador and Texaco provides that "The provisions of this [MOU] shall apply without prejudice to the rights possibly held by third parties for the impact caused as a consequence of the operations of the former Petroecuador-Texaco Consortium." Because third parties, such as Defendants, were specifically carved out of the settlements between Texaco and Ecuador, Chevron's arguments of conflict lack merit.

**Chevron has not pleaded extrinsic fraud**

Chevron continues to label its allegations of intrinsic fraud as extrinsic, but this is not the case. "Fraud is extrinsic when it is collateral to the matter decided by the court and deprives the opposing party of an opportunity adequately to present his claim or defense, as where a defendant is induced not to defend by a false promise to discontinue the action. It is intrinsic when it relates to the very matter decided by the court, as when perjured testimony is produced." *DiRusso* v. *DiRusso,* 287 N.Y.S.2d 171, 177-78 (Sup. Ct. 1968). Chevron disingenuously claims that it was denied the opportunity to present certain claims or defenses, but only in the sense that the judges did not rule in their favor or as timely as it would have liked. The true gravamen of Chevron's allegations is that Defendants took actions that were unfair during the proceedings. But Chevron's fraud claims were all raised and rejected during the Ecuadorian trial proceedings, *and/or are being raised and evaluated a second time on appeal.* New York courts, just as those in other jurisdictions, do not provide appellate review of allegations of fraud that were addressed in foreign proceedings. *See CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003); *Society of Lloyd's* v. *Ashenden,* 233 F.3d 473,477 (7th Cir. 2000). Once again, Chevron's citations to case law are inapposite. Contrary to Chevron's selective quotation, *The*

*W. Talbot Dodge*, 15 F.2d 459 (S.D.N.Y. 1926), describes fraud subject to collateral attack as that in which the "master never was summoned, never did appear, and never was heard before the condemnation" due to the fraudulent acts of others, and further notes that kind of fraud "is an extrinsic, collateral act." *Id.* at 462. Likewise, *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987), made clear that an allegation of fraud "which was actually presented and considered in the judgment assailed" cannot be raised to disturb a judgment—"in order to collaterally attack the judgment, it must have been *obtained* by fraud, as distinguished from having been *based* on fraud." *Browning v. Navarro*, 826 F.2d 335, 343 (5th Cir. 1987) (emphasis in original). And finally, *In re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006), in fact presented a classic example of extrinsic fraud, as there, the district court concluded that a party "purposefully concealed the proceedings in Mexico from both the Seventh Circuit and the defendants until it was too late for the defendants to do anything in response." *Id.* at 928-29.

**Chevron has not pleaded a violation of the Recognition Act's public policy prong**

Chevron continues to misstate the Recognition Act's public policy prong, C.P.L.R. § 5304(b)(4). The question the Court must consider is whether "the *cause of action* on which the [foreign] judgment is based is repugnant to the public policy of this state," *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 478 (2d Cir. 2007), that is, whether *the cause of action* is "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." *Sung Hwan Co.* v. *Rite Aid Corp.*, 7 N.Y.3d 78, 82 (2006). Chevron does not suggest that laws aimed at forcing companies to pay damages for environmental despoliation are somehow wicked or immoral, nor could it: such environmental laws are common to our state and federal system, as well as the systems of most other Western nations. Instead, Chevron reinvents the public policy

prong by stating that New York has a public policy against fraud, and that the Ecuadorian Judgment is not recognizable on that basis. This is a blatant attempt to rewrite the public policy prong to add a broader "fraud" inquiry than is provided by the Recognition Act, and once again, none of the case law cited by Chevron supports its interpretation. *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986), was a case that (1) did not concern the Recognition Act and (2) *overturned* a trial court's refusal to recognize a foreign judgment, reminding the lower court of Judge Cardozo's maxim that New York is not "so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." *Id.* at 842-43. Similarly, *Matter of Estate of Weil*, 609 N.Y.S.2d 375 (N.Y. App. Div. 1994), did not concern the Recognition Act, and further, the case was decided on the basis of extrinsic fraud. *Id.* at 376. Finally, Chevron's discussion of *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007), misstates the holding in that case—there, the Second Circuit indicated that in analyzing a foreign judgment under the Recognition Act's public policy prong, the "first step", as plainly called for by the Recognition Act, is to determine the statutes upon which the foreign judgment is based. *Id.* at 478. Then, the inquiry proceeds to whether the foreign law "that sanctions [the conduct at issue] is repugnant to the public policy of New York." *Id.* at 479. Nowhere does *Sarl Louis* endorse Chevron's broad interpretation of Section 5304(b)(4).

**Chevron is not entitled to broad injunctive relief**

Finally, Chevron's analysis on injunctive relief misses the mark. Chevron dismisses *Basic v. Fitzroy Eng'g, Ltd.*, 949 F. Supp. 1333 (N.D. Ill. 1996) *aff'd,* 132 F.3d 36 (7th Cir. 1997), as "one case" that does not have to do with the Recognition Act, ignoring the fact that *Basic* concerned the Declaratory Judgment Act—the primary source of Chevron's purported authority to bring Count 9 in the first place. In *Basic*, a party sought "to have the court declare a

future foreign judgment invalid and unenforceable even before [the opposing party] has the opportunity to have the future judgment entered by the New Zealand court and confirmed in a United States federal court." *Id.* at 1337. A closer factual counterpart to the instant matter cannot be found, and in *Basic*, the court correctly concluded that there was no controversy between the parties, and that "any ruling made by a United States federal court on the prospective effect of a possible New Zealand judgment against Basic—one which may never come to pass—would be premature." *Id.* at 1337-38. The holding in *Basic* defeats Chevron's action, so Chevron ignores *Basic* in favor of arcane and inapplicable law. *Weed v. Hunt*, 76 Vt. 212 (1904) is a 107-year-old Vermont case that has not been cited in 95 years—the case concerned a court's decision to enjoin a default judgment proceeding because the losing party made an error in believing that her appearance was not required. *Id.* at 214. The court in *Younis Bros. & Co., Inc. v. CIGNA Worldwide Ins. Co.*, 167 F. Supp. 2d 743 (E.D. Pa. 2001), enjoined "any action to enforce [a foreign judgment] in any jurisdiction," but Chevron fails to note that the injunction was entered to protect the district court's final judgment dismissing identical breach of contract claims on the merits three years before the Liberian case was even filed. Similarly, *A.P. Moller-Maersk A/S v. Ocean Express Miami*, 590 F. Supp. 2d 526, 533 (S.D.N.Y. 2008), concerned an injunction to shut down foreign proceedings where summary judgment had already been granted on the same claims in a New York court and the contract underlying the parties' dispute contained a New York forum selection clause. However, no case law supports Chevron's efforts to use the Recognition Act to shut down still-pending proceedings in Ecuador.

**Conclusion**

For the foregoing reasons, the Court should grant Defendants' Motion for Judgment on the Pleadings.

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Respectfully submitted,

By: */s/ Tyler Doyle*

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