Gupta / Wessler *Issues & Appeals*

June 24, 2016

Catherine O'Hagan Wolfe
Clerk, U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
New York, NY 10007

Re: *Chevron Corp. v. Donziger* (Nos. 14-0826, 14-0832) – Supplemental authority under Rule 28(j)
RJR Nabisco, Inc. v. European Cmty., — S. Ct. —, No. 15-138 (June 20, 2016) (attached)

Dear Ms. Wolfe:

The Supreme Court's *RJR* decision underscores why Chevron cannot win this appeal. It further limits private RICO actions by requiring proof of a quantifiable, redressable and "*domestic* injury," Op. 18—something Chevron has steadfastly refused to identify. Dkt. 317, at 40-45.

But even beyond RICO's injury requirement, *RJR* is important because it mandates the approach we urge here. Based solely on a concern that "providing a private civil remedy for foreign conduct creates a potential for international friction," the Court refused to allow a private plaintiff to bring such a claim "without clear direction from Congress." Op. 20-21. The mere "potential for international controversy," in other words, was enough to warrant a clear-statement rule. *Id.*

What was true there is doubly and triply true here. Allowing a preemptive attack on a foreign money judgment under RICO wouldn't just create "a *potential* for international friction," *id.*—it would, as this Court has recognized, "*unquestionably* provoke *extensive* friction," "encouraging challenges to the legitimacy of foreign courts in cases in which the enforceability of the foreign judgment might otherwise never be presented in New York." *Chevron v. Naranjo*, 667 F.3d 232, 246 (2d Cir. 2012).

This international-friction-avoidance principle is no less important when "applying the common law." *In re Maxwell*, 93 F.3d 1036, 1046-47 (2d Cir. 1996). Absent clear evidence to the contrary, courts will "shorten the [law's] reach" to avoid "entangle[ment] in international relations." *Id.* Nothing remotely resembling clear evidence exists here. As Judge Wesley observed at argument (Tr. 42-43), no American common-law case has *ever* allowed "a collateral attack on a foreign state's judgment." To the contrary, the Recognition Act and "the common-law principles it encapsulates" foreclose Chevron's collateral attack. *Naranjo*, 667 F.3d at 241; *see Harrison v. Triplex Gold Mines*, 33 F.2d 667, 672 (1st Cir. 1929) ("We cannot lend ourselves to such a proceeding.").

As *Harrison* makes clear, the outcome is no different when the collateral attack is dressed up (in wolf's clothing) as an *in personam* common-law claim, which "is only another way of attempting to reach the same result." *Id.*; *see* Dkt. 469 at 1-4 (discussing *Harrison*).

Respectfully submitted,

/s/ Deepak Gupta
Deepak Gupta
Counsel for the Donziger Appellants

Gupta Wessler PLLC
1735 20th Street, NW, Washington, DC 20009
P 202 888 1741 F 202 888 7792
guptawessler.com