

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

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

This Document Relates To: All Actions

Master File No. 09-cv-118 (VM)

EXPERT DECLARATION OF MICHAEL WALLACE GORDON

I, MICHAEL WALLACE GORDON, declare the following:

A. Introduction

1. I am the John H. & Mary Lou Dasburg Professor of Law Emeritus at the University of Florida, College of Law, Gainesville, Florida, where I have jointly served as an Affiliate Professor at the Center for Latin American Studies.
2. My education, included in the curriculum vitae attached and incorporated by reference in this declaration, includes a B.S. in Industrial Administration and a J.D. from the University of Connecticut, an M.A. in Economics from Trinity College, a Maestria en Derecho (Master's Degree in Law) from the Universidad Iberoamericana, Mexico City, and a Diplome de Droit Compare (Comparative Law) from Strasbourg, France.
3. I served on the Board of Directors of the American Society of Comparative Law from 1980 until 2007, and served a term on its executive council and on the editorial board. In 2004, I received the annual Law & Policy in Latin America award for contributions to Latin America at a ceremony in San Jose, Costa Rica, and was later that same year named Distinguished International Educator at the University of Florida.
4. Over the past 45 years, I taught various courses relating to international litigation, international business transactions, comparative law, and Latin American legal systems.
5. I have been a visiting professor in Latin America at the law faculties of the Universidad Francisco Marroquin (Guatemala), Universidad de Costa Rica, and the Escuela Libre de Derecho (Mexico City).

6. I have been a Senior Fulbright Professor in Guatemala, Mexico and Germany, and held the inaugural Fulbright Distinguished Chair in International Commercial and International Litigation Law at the Universidade Catolica Portuguesa (Lisbon) in April 2007.
7. I have been a visiting professor at Duke, George Washington (Alverson chair), LSE (Centennial Professor in Law), Alabama (Stone chair), Konstanz and Frankfurt (Germany), and King's College (England).
8. I have lectured at law faculties and bar associations in this hemisphere in Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay and Venezuela; in other nations including The United Kingdom, France, Germany, the Netherlands, Belgium, Spain, Italy, Russia, Hungary, Ukraine, Georgia, Armenia, Azerbaijan, Sudan, Kenya, Serbia, Croatia, Montenegro, Macedonia, Oman, India, China and Hong Kong. I lectured throughout the United States on Latin American law for the Council on Foreign Relations.
9. Among my publications is a West casebook on International Civil Dispute Resolution (2d ed. 2009), which includes chapters on proof of foreign law and the enforcement of foreign judgments. I also translated the Mexican Civil Code from Spanish to English (this civil code is typical of civil codes of various Latin American nations). I am a co-author of the West casebook International Business Transactions (10th ed. 2009), which includes materials I wrote on proof of foreign law and the enforcement of foreign judgments.
10. I have spent 45 years doing research, writing and consulting on numerous aspects of foreign law and legal systems, and international litigation. I have prepared affidavits on various issues of international litigation for cases in courts in the United States (principally

California, Illinois, Mississippi, New York, Tennessee, Texas, Washington and Florida), and abroad, including Bermuda, Canada and Spain.

11. I have provided affidavits as an expert on the civil and/or commercial laws of Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Mexico, Panama and Venezuela, for courts in California, Florida, Illinois, New York, Tennessee, Texas, Bermuda and Ontario. I have additionally provided opinions on issues in cross-border civil litigation involving China, France, Germany, Haiti, Honduras, Monaco, the Netherlands, Nicaragua, and Spain.
12. I was a Scholar in Residence at Bellagio, Italy, and have been elected to the Académie Internationale do Droit Comparé (Paris) and the Academia Mexicana de Derecho Internacional Privado y Comparado.
13. I have been asked to provide a declaration on whether a U.S. judgment, in favor of either the plaintiffs or the defendants, in a class action judgment or court-approved settlement precluding absent class members who fail to opt-out from bringing individual actions, would be recognized in Mexico, El Salvador, Panama, Colombia, Venezuela, Ecuador, Peru, Chile, Bolivia, Uruguay, Argentina, Brazil and the Dominican Republic. In the preparation of this declaration I have read the following materials provided to me by counsel for the plaintiffs.
 - a. Second Consolidated Amended Complaint dated September 29, 2009;
 - b. *Anwar v. Fairfield Greenwich Ltd.* 2010 U.S. Dist. LEXIS 86716 (S.D.N.Y. August 18, 2010) (granting in part and denying in part defendants' motions to dismiss);
 - c. Declaration of Alexis Mourre dated February 28, 2011;
 - d. Declaration of Dr. Fernando Gascon, dated February 28, 2011;

e. Subscription Agreement (Non-United States of America Subscribers Only)
Fairfield Sigma Limited;

f. Subscription Agreement of Fairfield Sentry Limited.

B. The Recognition Of Class Action Judgments In Latin America

14. Class actions are relatively new to Latin American nations. Generally, civil litigation is limited in use because contingent fees are disallowed or discouraged and damages are comparatively low largely due to the near absence of punitive damages and restrictions on granting moral damages. However, unlike the highly contentious specific issues of contingent fees and punitive damages, there is no general dislike or mistrust of the nature of class actions. I believe that each of the nations in question allows several forms of action where parties are bound by a decision even though they were not named, but if named were not allowed to opt out. For example, most if not all, Latin American nations allow a form of shareholders' derivative suit which possesses characteristics of a class action. Thus, the concept of a class action is not rejected. There is less known, however, about the acceptance of a class action judgment or court approved settlement where there is an opt-out provision such that failure to opt-out binds those parties. I believe that Latin American courts confronting such a procedure would emphasize whether parties have received adequate notice and opportunity to opt-out. It is my opinion that each of the Latin American nations involved permits recognition and enforcement of foreign class actions, in accordance with the discussion below. It is also my opinion that the recognition and enforcement of class action opt-out judgments and settlements will, in general, with the exception of Brazil, follow

the development explained in the Declaration of Dr. Fernando Gascon on Spanish Law filed in this litigation.

C. General Theory of The Recognition Of Foreign Judgments in Latin America

a. The Bustamante Code as the Foundation for Private International Law Rules of Judgment Recognition and Enforcement

15. The Sixth International Conference of American States, on 25 November, 1928, in Havana, Cuba, promulgated a code of private international law rules named for its principal architect, Antonio Sanchez de Bustamante, a Cuban jurist and former magistrate of the Permanent Court of International Justice. The Code addressed judgment recognition, jurisdiction and choice of law. It was intended to provide a uniform law that would be adopted throughout the hemisphere, replacing the earlier Montevideo Treaty of 1889 which had been ratified only by a few South American countries. All of Central America ultimately adopted the Bustamante Code. Mexico did not, nor did the United States.¹
16. The Bustamante Code was applicable only among the nations that adopted the Code, but it influenced all Latin American nations in adopting general judgment enforcement rules that were applicable to non-Code nations. Some nations that adhered to the Code adopted nearly mirror image provisions that were applicable to judgments from all foreign nations whether or not they were Bustamante Code members. Of those nations I discuss below, the Bustamante Code was adopted in Panama, Brazil, Venezuela, Chile, Ecuador, Peru, El Salvador, and Bolivia. It was not adopted in Argentina, Colombia, Mexico or Uruguay, the laws of which nevertheless reflect Bustamante concepts.

¹ The Bustamante Code is included in an English version as an Appendix in Robert C. Casad, *Civil Judgment Recognition and the Integration of Multiple-State Associations: Central America, the United States of America, and the European Economic Community* 183 (1981 Regents Press of Kansas).

17. The fundamental provisions establishing the conditions for enforcing a foreign judgment are contained in Art. 423 of the Bustamante Code. These provisions established at an early date a strong acceptance of the principle that foreign judgments should be accepted when the conditions are met. Art. 423 provides:

Art. 423. Every civil . . . judgment rendered in one of the contracting states shall have force and may be executed in the others if it combines the following conditions:

1. That the court which has rendered it has competence to take cognizance of the matter and to pass judgment upon it, in accordance with the rules of this Code.
2. That the parties have been summoned for the trial either personally or through their legal representative.
3. That the judgment does not conflict with the public policy or the public laws of the country in which its execution is sought.
4. That it is executory [final] in the State in which it was rendered.
5. That it be authoritatively translated by an official functionary or interpreter of the State in which it is to be executed, if the language employed in the latter is different.
6. That the document in which it is contained fulfills the requirements necessary in order to be considered as authentic in the State from which it proceeds, and those which the legislation of the State in which the execution of the judgment is sought requires for authenticity.

18. Article 424 of the Code addresses the procedure for enforcement. Article 424 states:

Article 424. The execution of the judgment should be requested from a competent judge or tribunal in order to carry it into effect, after complying with the formalities required by the internal legislation.

19. Further provisions provide additional procedural requirements. The first stage of enforcement was the initiation of a preliminary proceeding, usually before the nation's Supreme Court, before the judgment was presented to the proper lower court for enforcement. That is the process called *exequatur* and is present in most civil law tradition nations.

20. The Bustamante Code became the basis for judgment enforcement in most of Latin America.

Countries that adopted it as part of their private international law often did so only with specific reservations. Countries that did not adopt it were often influenced by its principles in the development of their judgment enforcement laws that applied to Code or non-Code nations.

b. The Inter-American Convention

21. Adopted in 1979 in Montevideo, Uruguay, the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Inter-American Convention) built upon the Bustamante Code in adopting a generally accepted universal principle throughout Latin America that foreign judgments would be recognized and enforced when such judgments fulfilled certain conditions. The Inter-American Convention was not adopted by the United States and thus is not the applicable law for those nations in this litigation that have signed and ratified the Convention, which includes eight of the thirteen nations - Mexico, Colombia, Venezuela, Ecuador, Peru, Bolivia, Uruguay and Brazil. It is not in force in Argentina, Panama, Chile, El Salvador and Dominican Republic.² Nonetheless, I briefly outline its requirements as it has impacted Latin American legal principles.

22. Provisions for enforcement of foreign judgments in the subject nations are generally found in each nation's code of civil procedure and are essentially consistent with the Inter-American Convention, even in those nations where the Convention has been signed but not ratified. The principles are similar to those of many other civil law tradition nations, especially Spain,

² The Inter-American Convention on Extraterritorial Validity of Judgments and Arbitral Awards of 1979 is available at www.oas.org.

Portugal (for Brazil), and France. I believe that these principles are drawn more from those of France than Germany.

23. The basic principles of the Convention are found in Article 2, which states as follows:

Article 2: The foreign judgments, awards and decisions referred to in Article 1 shall have extraterritorial validity in the States Parties if they meet the following conditions.

- a) They fulfill all the formal requirements necessary for them to be deemed authentic in the State of origin;
- b) The judgment, award or decision and the documents attached thereto that are required under this Convention are duly translated into the official language of the State where they are to take effect;
- c) They are presented duly legalized in accordance with the law of the State in which they are to take effect;
- d) The judge or tribunal rendering the judgment is competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the State in which the judgment, award, or decision is to take effect;
- e) The defendant has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the State where the judgment, award or decision is to take effect;
- f) The parties had an opportunity to present their defense;
- g) They are final or, where appropriate, have the force of res judicata in the State in which they were rendered;
- h) They are not manifestly contrary to the principles and laws of the public policy (order public) of the State in which recognition or execution is sought.

24. It is my opinion that if a class action similar to the present case were to be tested under the Convention, it could be recognized and enforced. The only provisions that would warrant discussion would be e) and f), notification, and part h), the often difficult to define concept of public order, but I do not believe that they would prevent recognition or enforcement.

25. The Convention is not directly applicable to the present case because the United States is not a party to the Convention. Nor is it directly applicable in Argentina, Panama, Chile, El Salvador or Dominican Republic. However, as with the case of the Bustamante Code, the

principles of the Convention have an effect on the development and interpretation of the judgment enforcement provisions that would apply to a judgment from the United States.

D. Recognition of Class Actions in the Latin American Nations

26. It is reasonable to begin with the assumption that in none of the subject Latin American nations is there specific legislation or judicial precedent that specifically addresses the class action with all notified class members bound by a judgment or settlement except those who have opted out. That assumption should not be the basis for acceptance of the position that any such class action brought in the United States or other foreign nation should not be recognized and enforced. The assumption should rather raise the question as to what such Latin American nation faced with a request to recognize and enforce such a judgment would do.
27. The issue raises a further consideration. The above assumes that a judgment was rendered in favor of the plaintiffs, or a settlement was approved by the court, and the judgment is taken to one or more of the Latin American nations for enforcement. But the judgment may favor the defendant. If the defendant wishes to have a judgment in its favor recognized and enforced by one of the Latin American nations should the result be any different? I believe the answer is “no,” because the recognition and enforcement rules are not specifically limited to judgments in favor of the plaintiff. One difference would be that the defendant would not challenge its own acceptance of service.
28. While I will comment on each of the specific Latin American nations that apparently have residents in the lawsuit, I believe that there is good reason to assume that every Latin American nation will enforce a class action as long as the conditions for enforcement in the

nation's private international law are met. I further believe that such conditions are met where the class action has provided reasonable notice to each member of the class to opt out of the litigation.

29. A principal reason that supports the above position is that the litigation does not involve a suit by a U.S. party against Latin American defendants. The Latin American parties in this litigation are plaintiffs who are likely to benefit from a judgment or settlement in which they have been parties who received reasonable notice, decided not to opt out and remained in as class members who expended few if any personal funds to pursue the litigation. Were they to have opted out, they would have faced initiating separate litigation at their expense. Because there is little if any experience with class action litigation of this nature in the subject Latin American nations, and because the contingent fee is not recognized, the litigation in the United States offers not merely an effective alternative to opting out and initiating litigation at home, but the only probable method to receive some recovery. Coming to the United States to bring an action after opting-out is further unlikely to be successful because there may not be enough plaintiffs choosing such path to interest most plaintiffs' trial attorneys.

30. This action differs from the typical class action where most of the plaintiffs cannot be identified, such as product liability litigation. Plaintiffs' attorneys have the books and records of the two offshore funds and therefore know the identities and addresses of the something less than 1,000 foreign registered shareholders.

E. Exequatur or Homologacion – The Procedure for Enforcement

31. In each of the subject nations there is a procedure for enforcement of a judgment which often draws on the Bustamante Code or on European practice. A judgment or settlement that is approved by the court will have to go through the following procedure, with generally minor variations in some nations.
32. The judgment or approved settlement would be filed with the appropriate court in the foreign nation. That would usually be the Supreme Court for initial approval, followed by execution by a designated lower court. The papers must be authenticated, legalized at a consulate of the foreign nation and translated by an officially recognized translator. Jurisdiction over the judgment debtor may have to be obtained in the foreign nation. The court of the foreign nation will be competent to serve notice and summons.
33. The foreign court may be required to convert the judgment into local currency, usually applying the time the payment is made in determining the conversion rate. Increasingly, nations are allowing judgments to be enforced in the foreign currency.
34. Interest may or may not be allowed, usually not, unless the judgment provided for interest.
35. Attorneys' fees and costs may be allowed, the attorneys' fees are sometimes regulated by an official schedule similar to schedules used until about the 1960s in many states in the United States.
36. The losing party in the process may appeal, sometimes by an ordinary appeal, sometimes (e.g., Mexico's *amparo*), by a constitutional appeal.
37. In my opinion the *exequatur/homologacion* process is not an obstacle to the recognition and enforcement of a judgment or settlement in the present case.

F. Discussion of the Individual Countries

38. Determining the status of class actions with opt-out rights in many nations requires discussion of indicators from legislation, precedent and literature that class actions are treated in a specific manner. The countries are addressed in order of the number of investors of the Fairfield Sentry Fund, and Fairfield Sigma Fund, residing therein, who had registered addresses in said funds.

a. Panama

39. Panama adopted the Bustamante Code without reservation, and signed, but has not ratified, the Inter-American Convention. Panamanian law applicable to non-treaty countries reflects the principles of the Code as updated. Article 582 of the earlier Panamanian Judicial Code stated that “If there shall be no special treaty with the nation in which the judgment was rendered, it will have the same force as is given to judgments rendered in Panama.” Furthermore, Article 584 provided that where no treaties provided otherwise, a foreign judgment would not be recognized unless (1) it was a personal action that (2) was not granted by default, that (3) the underlying obligation was lawful in Panama and (4) a copy of the judgment met requirements of authenticity. A subsequent Judicial Code adopted in 1984 incorporated the essence of the old, including conditions similar to those first stated in the Bustamante Code and updated. They are consistent with those of other Latin American nations and include the following:

- a. The foreign court was competent.
- b. The defendants received personal service of process.
- c. The judgment did not violate public policy or provisions of public interest.

- d. The judgment was final.
- e. The judgment was translated.
- f. The documents are authentic

40. The procedure is that of an exequatur in common with other nations. It is essentially an acknowledgement of the action and does not include any review on the merits.

41. Because of Panama's uniqueness in that it was created by the United States and long contained the Panama Canal within its boundaries, a reasonably well developed set of laws involving commerce and commercial litigation developed. It is to Panama's benefit that class actions are recognized and enforced even though it has yet to develop legislation providing for class actions with opt-out provisions. As in other Latin American nations, because most class actions involve liability of products and mass torts, the lack of contingent fees and punitive damages has curtailed such development. But that does not mean that the recognition and enforcement of class action judgments or settlements with opt-out provisions will not be allowed. In the present case, Panama appears to clearly benefit from the participation by its residents in the action.

42. It is my opinion that foreign money judgments from U.S. courts are enforceable in Panama without reexamination of the merits. It is also my opinion that Panama will recognize and enforce a judgment or settlement in the present class action opt-out litigation.

b. Columbia

43. Colombia did not adopt the Bustamante Code, but signed and ratified the Inter-American Convention. The principles of the Convention are carried over to the provisions applicable to

non-treaty nations. Article 693 of the Code of Civil Procedure grants to foreign judgments that are not subject to a treaty the force of a domestic judgment.

44. Requisites for the enforcement are contained in Article 694, including the following:
- a. The judgment does not affect rights in real property.
 - b. It is not opposed to Colombian laws or public order.
 - c. It was obtained in conformity with the laws of the foreign country and is authenticated.
 - d. It was not within the exclusive jurisdiction of Colombia.
 - e. No conflicting process is pending in Colombia, nor a final judgment granted.
 - f. The defendant was duly served and given an opportunity to be heard.
45. The procedure for enforcement, outlined in Article 695, is that of an *exequatur* proceeding similar to other countries using the same procedure.
46. It is my opinion that foreign money judgments from U.S. courts are enforceable in Colombia without reexamination of the merits. It is also my opinion that Colombia will recognize and enforce a judgment or settlement in the present class action case.

c. Brazil

47. Brazil adopted the Bustamante Code and also signed and ratified the Inter-American Convention. Brazilian legislation provides for the enforcement of judgments by the federal courts, without making any distinction whether the foreign party is from a nation with which Brazil has an enforcement treaty or convention. The conditions are similar to those discussed above, and include non-contravention of Brazilian public order. The Brazilian Supreme Court has established that rules of public order include: (1) proper service by a *rogatory*

letter, (2) the foreign judgment must be well-founded, (3) interest may not be more than twelve per cent annually, and (4) enforcement may not aid the evasion of foreign exchange provisions. The Supreme Court denied recognition in 1986³ to a New York Supreme Court judgment because of a lack of evidence of service of process to the defendant and a lack of specific description of the grounds on which the judgment was based. This case is important because it shows both concerns for assuring that the parties to the suit were provided reasonable notice and, thus, given an opportunity to make a choice. In the class action, that choice is to participate or opt-out. I have no reason to doubt that Brazil, one of the two or three most important commercial nations in the group of thirteen considered in this declaration, will recognize and enforce a judgment or settlement in this case. Brazil's Public Civil Action Law, consistent with a Portuguese law that allows opt-out class actions, gives *res judicata* effect to absent class members in a judgment favorable to the class members.

48. In 1988, under a new constitution, some of the process was shifted from the Brazilian Supreme Court to lower federal courts, but without a change in the conditions for enforcement.

49. The procedure in Brazil is that of *homologation* or *exequatur* as similarly found in other Latin American and European civil law tradition nations.

50. Given the pattern of Brazilian jurisprudence recognizing foreign judgments, it seems doubtful that any Brazilians would choose to opt-out of the litigation if they perceive that Brazil is likely to recognize and enforce a judgment in this case. That view may apply to each of the other subject Latin Americans.

³ Supreme Court of Brazil, Foreign Judgment No. 3.262 (Sept. 3, 1986).

51. It is my opinion that foreign money judgments from U.S. courts are enforceable in Brazil without reexamination of the merits. It is also my opinion that Brazil will recognize and enforce a judgment or settlement in the present case.

d. **Venezuela**

52. Venezuela has ratified the Inter-American Convention. Furthermore, its rules of private international law involving the recognition and enforcement of foreign judgments are influenced by and consistent with the Convention's principles. The laws applicable to a non-treaty party are contained in the Venezuelan Code of Civil Procedure and the Bill of Rules of Private International Law.

53. Venezuela also participates in the *Acuerdo Boliviano*, which is an Agreement on the Execution of Foreign Judgments. Under that Agreement, the issuing court must have been competent, the judgment must be final, there must have been lawful service and the judgment must not contravene Venezuelan public order.

54. Where no treaty is present, the Bill of Rights of Private International Law provides the conditions for enforcement. They include:

- a. The foreign judgment must concern only matters of private law.
- b. It must be *res judicata* under the foreign laws.
- c. It may not relate to real property in Venezuela or a matter that is within the exclusive jurisdiction of Venezuela.
- d. It must have been rendered by a court of competent jurisdiction.
- e. Proper service must have been made giving sufficient time for the defendants to defend the case.

- f. It may not be contrary to Venezuelan public order or a final decision of a Venezuelan court.
 - g. It may not conflict with a matter involving the same parties currently before Venezuelan courts.
55. There is little jurisprudence on the meaning of public order, but it is generally agreed that a judgment does not violate public order if the main claim could not have been brought in Venezuela.⁴ That appears to mean the substantive nature of the claim, not the form of action such as a class action.
56. The Supreme Court of Venezuela in 1997 granted *exequatur* to a Florida Circuit Court judgment.⁵ There were four co-defendants. The judgment was rendered against only one, but all four asked for enforcement. The Venezuelan court enforced only that rendered against the one defendant. The court held that even though there had been a choice of law designating Venezuelan courts in the original agreement, the judgment did not violate the public order of Venezuela.
57. The process used in the above case was that of *exequatur*, the rules of which were in the Venezuelan Bill of Rules of Private International Law and the Code of Civil Procedure.
58. It is my opinion that foreign money judgments from U.S. courts are enforceable in Venezuela without reexamination of the merits. It is also my opinion that Venezuela will recognize and enforce a judgment or settlement in the present case.

e. **Uruguay**

4 Joaquin Sanchez Covisa, *Orden Publico Internacional y Divorcio Vincular*, in *Obra Juridica de Joaquin Sanchez Covisa*, p. 487-494, and the Supreme Court opinions cited therein.

5 *FCIA v. Inversiones Fielsa, C.A.*, (DCA 1993).

59. Uruguay has ratified the Inter-American Convention. Furthermore, its general rules of private international law involving the recognition and enforcement of foreign judgments are consistent with the Convention's principles.

60. The enforcement of judgments involving non-treaty nations is governed by the Uruguay General Procedure Code. The conditions are as follows:

- a. The foreign judgment must not be contrary to Uruguay's public order.
- b. The judgment debtor must have been informed of the claim and have had a reasonable period of time to present his arguments.
- c. The foreign court must have had subject matter jurisdiction.
- d. The judgment must have been final.
- e. The party requesting enforcement must produce (1) a complete copy of the judgment, (2) evidence of service, (3) an authentication of the judgment, and (4) authenticated copies of the regulation upon which such order is based.

Uruguay will also require assurance that Uruguayan judgments are enforced in the foreign nation.

61. The procedure for enforcement is that of *exequatur* to the Supreme Court, followed by execution before the proper court of first instance.

62. It is my opinion that foreign money judgments from U.S. courts are enforceable in Uruguay without reexamination of the merits. It is also my opinion that Uruguay will recognize and enforce a judgment or settlement in the present class action litigation.

f. **Chile**

63. Chile has signed, but not ratified, the Inter-American Convention, but its rules of private international law involving the recognition and enforcement of foreign judgments are consistent with the Convention's principles. Chile used the principles of the Bustamante Code to form the basis of its recognition and enforcement laws.

64. The conditions for recognition and enforcement are included in the Code of Civil Procedure and include the following:

- a. The foreign nation must recognize and enforce Chilean judgments.
- b. The foreign judgment may not be contrary to the laws of Chile, including Chilean public order.
- c. The judgment may not be contrary to Chilean jurisdiction.
- d. There must have been valid notice.
- e. The judgment must be final.

The Chilean requirement of reciprocity seems stronger than other nations and usually must be met before the other conditions are considered.

65. The procedure for enforcement is that of *exequatur* to the Supreme Court. In the last few years, Chile has retreated from a very strict practice of denying judgments in the *exequatur* process for public policy reasons.

66. It is my opinion that foreign money judgments from U.S. courts are enforceable in Chile without reexamination of the merits. It is also my opinion that Chile will recognize and enforce a judgment or settlement in the present class action litigation.

g. **Mexico**

67. Mexico has ratified the Inter-American Convention. Furthermore, its rules of private international law involving the recognition and enforcement of foreign judgments are influenced by and consistent with the Convention's principles.

68. Mexico's Federal Code of Civil Procedure includes provisions for the enforcement of foreign judgments. Article 569 states:

Article 569. Judgments and private arbitral awards of a non-commercial nature and other foreign judicial resolutions shall be enforceable and be recognized in the Republic in everything that is not contrary to the domestic public order pursuant to the terms of this Code and other applicable laws, for what is prescribed by the treaties and conventions to which Mexico is a party.

Regarding judgments, awards and judicial resolutions that are only going to be used as evidence in Mexican courts, it shall suffice if said documents comply with the necessary requirements to be considered as authentic.

The effects that foreign judgments, private arbitral awards of a non-commercial nature, and judicial resolutions produce in the national territory shall be governed by what is provided in the Civil Code, by this Code [of Civil Procedure] and other applicable laws.

This is the basic provision by which a judgment or settlement in the present case would be enforced in Mexico.

69. The procedure for such enforcement is stated in Article 570.

Article 570. Foreign judgments, private arbitral awards of a non-commercial nature, and judicial resolutions shall be enforced in a coactive manner in the Republic through *homologacion* pursuant to the terms of this Code and other applicable laws, save for what is prescribed by the treaties and conventions to which Mexico is a party.

Homologacion is a specific process similar to *exequatur* in France and other civil law nations, and may be compared to a mini-trial where a judge, usually on the Supreme Court, decides to grant or deny the foreign request.

70. As noted in the general discussion above, two provisions of the Mexican law that would be addressed are whether the parties had reasonable notice and whether enforcement would violate the public order in Mexico. It is my opinion that a Mexican judge would find the decision favorable to the Mexican parties and not in violation of the Mexican public order.
71. The above provisions of the Mexican Code of Civil Procedure are consistent with Mexico's obligations under the Inter-American Convention. The Convention's provisions do not directly affect the relationships between Mexico and the United States because the United States is not a party to the Convention, but the Mexican procedural code is consistent with the Convention.
72. It is my opinion that foreign money judgments from U.S. courts are enforceable in Mexico without reexamination of the merits. It is also my opinion that Mexico will recognize and enforce a judgment or settlement in the present class action litigation.

h. Ecuador

73. Ecuador has ratified the Inter-American Convention. Ecuador had previously adopted the Bustamante Code, the rules of which are generally consistent with the Inter-American Convention. Article 423 of the Ecuadorian Code of Civil Procedure provides the conditions for enforcement as noted in the above discussion of the Bustamante Code.
74. Article 424 of the Ecuadorian Code of Civil Procedure adopted the private international law of the Bustamante Code that allows the recognition and enforcement of foreign judgments.

Article 424 states:

Article 424. The execution of the judgment should be requested from a competent judge or tribunal in order to carry it into effect, after complying with the formalities required by the internal legislation.

This provision is taken directly from Article 424 of the Bustamante Code.

75. The procedure for enforcement differs depending on whether five years have elapsed since the obligation became due. Within the first five years, the process is by executive action. After that it is done by judicial process.
76. The Ecuadorian procedure is essentially that of an *exequator* whereby the judgment is taken before an Ecuadorian court to assure it complies with principles of Ecuadorian enforcement.
77. Ecuador is one of the least experienced of the nations discussed in enforcing foreign judgments, lacking judicial experience in such matters. But it is my opinion that Ecuador's participation in the Inter-American Treaty, and its earlier adoption of the Bustamante Code, provide a basis whereby Ecuador is prepared to recognize and enforce foreign judgments or settlements such as one in this case. It is my opinion that foreign money judgments from U.S. courts are enforceable in Ecuador without reexamination of the merits. It is also my opinion that Ecuador will recognize and enforce a judgment or settlement in the present class action litigation.

i. Peru

78. Peru has ratified the Inter-American Convention. Furthermore, its general rules of private international law involving the recognition and enforcement of foreign judgments are consistent with the Convention's principles.

79. Peru includes enforcement of foreign judgment provisions applicable to all foreign judgments, treaty or non-treaty nations, in both the Peruvian Code of Civil Procedure and the Civil Code. The Civil Code contains the requirement of reciprocity – that the foreign court enforce Peruvian judgments. There is a statutory assumption of reciprocity unless the absence of reciprocity is proven. The Civil Code contains the conditions for enforcement, including:

- a. The judgment may not deal with matters that are the exclusive jurisdiction of Peru.
- b. The foreign court must have had subject matter jurisdiction.
- c. Proper notice must have been given.
- d. The matter must be final.
- e. The matter must not be pending before a Peruvian court.
- f. It may not be incompatible with a Peruvian judgment.
- g. It may not contravene moral rules or public order.

80. The procedure is in the Code of Civil Procedure and is a typical *exequatur* proceeding.

81. It is my opinion that foreign money judgments from U.S. courts are enforceable in Peru without reexamination of the merits. It is also my opinion that Peru will recognize and enforce a judgment or settlement in the present case.

j. **El Salvador**

82. El Salvador adopted the Bustamante Code and has signed, but not ratified, the Inter-American Convention. Its rules of private international law involving the recognition and

enforcement of foreign judgments for non-treaty nations are influenced by and consistent with the Convention's principles.

83. The Code of Civil Procedure for El Salvador, consistent with the Bustamante Code, governs the enforcement of foreign judgments. Article 451 provides that foreign judgments "will have in El Salvador the force that the respective treaties establish." Article 452 governs enforcement in non-treaty states and states:

Article 452. If there should be no special treaties with the nation in which [the judgment] was pronounced, it will have force in El Salvador if it meets the following circumstances:

1. That the order shall have been issued as a result of a personal action;
2. That it shall not have been issued in default;
3. That the obligation with which the action sought compliance is lawful in El Salvador;
4. That the order meets the requirements necessary to be considered authentic in the nation in which it was pronounced, and those that Salvador's laws require for it to be given credence in El Salvador.

84. Provision 452(3) above includes the matter of public order within the concept that the foreign judgment must be one that would be lawful in El Salvador. That does not mean El Salvador must have the same form of action.

85. The procedure for enforcement is contained in Article 453. It draws upon Spanish law. One characteristic of El Salvador is the inclusion of a *pareatis* procedure to what is largely the familiar *exequatur*. *Pareatis* allows a petition to the Supreme Court invariably presented by the winning party. Notice is given to the other party to contest the request for enforcement. It is somewhat like the *exequatur* process from the Bustamante Code.

86. It is my opinion that foreign money judgments from U.S. courts are enforceable in El Salvador without reexamination of the merits. It is also my opinion that El Salvador will recognize and enforce a judgment or settlement in the present case.

k. Bolivia

87. Bolivia signed the Bustamante Code and signed and ratified the Inter-American Convention.

The Bolivian Code of Civil procedure governs judgment enforcement for treaty and non-treaty nations.

88. A judgment may be refused recognition in Bolivia on reciprocity. Additional conditions include the following:

- a. The judgment may not be in violation of public order.
- b. It may not impose any obligations not permitted under Bolivian law.
- c. Service of process must be made properly.
- d. It must not conflict with a prior or simultaneous ruling in Bolivia.
- e. The judgment must be *res judicata* in the foreign nation.

89. The judgment must be processed in Bolivia in a proceeding that is similar to an *exequatur*, but Bolivia may be inclined to re-examine the foreign judgment based on an evaluation by the Bolivian Attorney General.

90. I believe that foreign money judgments from U.S. courts are enforceable in Bolivia without full reexamination of the merits, including a judgment or settlement in a class action such as the present case.

l. Dominican Republic

91. The Dominican Republic has signed, but not ratified, the Inter-American Convention. Its rules of private international law involving the recognition and enforcement of foreign judgments involving non-treaty countries are consistent with the Convention's principles.
92. Because the Dominican Republic was more strongly under French influence during part of the 19th century, its laws are more directly related to French law and the Napoleonic Code than other Latin American nations. The Code of Civil procedure governs the enforcement of foreign judgments and has changed little since its adoption. Without access to the specific laws, however, I can only assume that the country will recognize and enforce foreign money judgments from U.S. courts without reexamination of the merits using a form of *exequatur*. It is also my opinion that the Dominican Republic will recognize and enforce a judgment or settlement in the present case.

m. **Argentina**

93. Argentina has signed the Inter-American Convention. Its rules of private international law involving the recognition and enforcement of foreign judgments for non-treaty nations such as the United States are consistent with the Convention's principles.
94. The conditions that must be fulfilled are as follows:
- a. The decision is res judicata in the foreign nation.
 - b. The court rendering the decision was competent.
 - c. The judgment was the result of a personal action.
 - d. Notice was personally served.
 - e. The decision was authentic.
 - f. The judgment does not violate Argentine public policy.

- g. The judgment is not incompatible with any Argentine judgment.
95. Argentina has enforced two foreign judgments from courts in New York.⁶ They were rendered against two Argentine parties.
96. The enforcement process is a typical *exequatur* procedure as it exists in other civil law nations.
97. It is my opinion that foreign money judgments from U.S. courts are enforceable in Argentina without reexamination of the merits. It is also my opinion that Argentina will recognize and enforce a judgment or settlement in the present case.

G. Conclusions

98. The above references to the specific nations evidence a consistent set of principles for enforcing foreign judgments, regardless of whether the nation has adopted the Bustamante Code and/or the Inter-American Convention. Brazilian law specifically addresses the class action, and it is reasonable to assume that acceptance of the class action will develop in jurisprudence in other nations because there is nothing in the rules expressed above that precludes recognition or enforcement of foreign class actions. It is thus reasonable to believe that the laws of these nations provide a very appropriate framework to recognize and enforce class actions.
99. The issue of reciprocity, recognition in the foreign nation only if recognized in the United States, should not adversely affect the recognition and enforcement of any judgment or settlement in this case. Judgment is a matter of state law in the United States and New York

⁶ Textile Banking Company v. Manulana S.A., et al, National Commercial Court of Appeals, Chamber A, November 30, 1996, Revista Juridica "Le Ley," Vol. 26 at 108.

adopted the Uniform Foreign-Money Judgments Recognition Act,⁷ which is generally considered sufficient to establish in any of the subject Latin Americans that the State of New York would recognize a judgment from the Latin American nation. Furthermore, the participants in both the Fairfield Sigma Fund and the Fairfield Sentry Fund agreed in the subscription agreement in paragraphs 22 and 19, respectively, that New York courts were the proper courts and agreed to the jurisdiction thereof, consenting to service by certified or registered mail.

100. It is my opinion that none of the thirteen Latin American nations discussed in this declaration has a legal system that will reject the recognition and enforcement based on their current legislation or precedent, notwithstanding the fact that none have specifically adopted class actions with opt-out provisions as a means of settling large class disputes. Each nation's nationals and residents would be benefitted by recognition and enforcement of any judgment or settlement that provided a means by which they could participate in a class action in the United States where the defendants are principally located and receive the benefits of both the class action form and the presence of contingent fees. This case is distinguishable from cases involving these countries where one or more of their residents or companies are sued in the United States, often based on tag jurisdiction, and judgments are taken to their countries for enforcement. These cases are rarely enforced because of the rejection of tag jurisdiction and for reasons of public order.

101. It is also my opinion that recognition and enforcement of a U.S. judgment or settlement is compatible with the many instances in these nations where individuals, such as union members and shareholders, are bound by judgments notwithstanding that they individually

⁷ National Conference of Commissioners on Uniform State Laws.

did not participate in the case and in many cases did not receive direct notice. Persons often are bound by notice unless they opt-out, such as where banks change credit card rules that are made a part of the agreement unless the card holder formally rejects. Silence after reasonable notice is not interpreted as opting-out.

102. Many refusals to recognize and enforce foreign judgments are based on unexplained notions of public policy or public order. I do not believe that any of the subject Latin American nations would find the opt-out class action to either violate the nation's specific public order or violate any principles of universal justice. The fact that opt-out class actions have not been universally adopted does not mean they have been universally rejected.

103. I have read the declaration of Alexis Mourre and his opinion that class actions are not inconsistent with the French legal tradition. I believe that the same may be said of the Latin American nations involved in this case – that the class action is not incompatible with the legal systems within Latin America. Latin American legal systems are part of the civil law tradition and pay great respect to French law, as shown by the close relation between the civil law of Latin American legal systems and the French civil law as first expressed in the 1804 Napoleonic Code.

104. The U.S. court before which this case is being litigated is uniquely qualified to hear this matter. None of the Latin American nations would have exclusive jurisdiction over this matter.

105. The issue of notice of the action will not be contested by those named plaintiffs and defendants, nor by parties who have specifically opted-out. A court asked to recognize and enforce a judgment or settlement will give serious consideration to how parties who claim

never to have learned of the action are to be treated. Personal service in the form of handing actual notice of the suit to a person is not universally mandated. Civil law tradition nations, including Latin American nations, have procedures where notice is considered adequate if it is posted conspicuously in some location, such as at the courthouse. I am of the opinion that fair notice procedures as developed in class action litigation will insulate this case from rejection by the subject Latin American nations of any request for recognition or enforcement.

106. I have prepared this affidavit freely and without influence, upon request of Boies, Schiller & Flexner.

107. I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 1, 2011



Michael Wallace Gordon