APPENDIX TO

JUDICIAL COMPLAINT

FILED AGAINST

JUDGE LEWIS A. KAPLAN

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Contents

APPENDIX [1]

I. INTRODUCTION

A. Relevant Background: *Aguinda I* and *Aguinda II.*

In 1992, many indigenous people from the Ecuadorian Amazon filed litigation in New York City against Texaco Corporation to remedy the contamination from the oil pollution caused by Texaco. The case was known as *Aguinda et. al. v. Texaco (Aguinda I). Aguinda I* was dismissed after many years based on *forum non conveniens,* The plaintiffs then sought relief in their own courts with the assistance of Mr. Donziger, who had been part of the case from the outset. Chevron had acquired Texaco by the time the Ecuadorian litigation began. The case at issue in this complaint involves Judge Kaplan's actions in Chevron Corporation's efforts to prevent the implementation of the judgment of the Ecuadorian Courts which had adjudicated a live controversy on a 200,000 page record developed over years of litigation, including reports on thousands of oil samples from the Lago Agrio region of the Ecuadorian Amazon. *Aguinda v. Chevron/Texaco (Aguinda II).*

B. Chevron Attempts to Attack the Decision in *Aguinda II* before it Is Issued.

After years of litigation in *Aguinda II*, the Ecuadorian judiciary issued a decision and judgment (against Chevron) in 2011. However, almost a year before the decision was issued, Chevron began a campaign to try to discredit the pending decision. They started by instituting 28 U.S.C. §1782 proceedings throughout the United States to seek information from experts and others who provided support to the Lago Agrio Plaintiffs to try to preemptively undermine any resulting award. Plans to discredit any negative judgment had been set out long before that, with a chief plan being to discredit the lawyers who prosecuted the case. (Exhibit 1, Singer memo 2008).

C. Judge Kaplan Agrees with Chevron's Challenge of the *Aguinda II* Decision Without Considering the Record in Ecuador or the Fact that the Ecuadorian Courts Affirmed the Decision

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[1] This Appendix expands on the allegations in the Complaint and provides supporting references to the Docket and Exhibits. Because of the urgency regarding the Criminal Contempt charges, this Appendix is organized so as to address Judge Kaplan's misconduct with respect to these charges first. Judge Kaplan's bias against and (what Complainants allege is his personal vendetta against Mr. Donziger) is shown in stark relief by the way he has handled the contempt charges.

In approving of Chevron's attacks on the judgment and allegation that the judgment was fraudulently obtained, Judge Kaplan failed to apply rules of comity, never asked to examine the actual record in the trial and never evaluated whether the evidence in the record in Ecuador supported the judgment[2]. The proceedings Judge Kaplan presided over in New York allowed Chevron to collaterally attack this judgment at the same time the higher Courts in Ecuador affirmed the Ecuadorian judgment. The Ecuadorian plaintiffs believe the judgment is amply supported by the evidence. The fact that Judge Kaplan never considered whether the verdict was supported in the record is part of the evidence of his improper bias as discussed herein.[3]

D. A Special Investigation Committee Should Be Established or Transfer

As noted *infra*, your complainants allege the behavior of Judge Kaplan set forth in the complaint and supported herein[4], violated the Canons of Judicial Ethics, especially the Canons requiring impartiality expected of a judge. This judicial complaint specifically addresses these violations through a description of Judge Kaplan's mistreatment of human rights and environmental attorney Steven Donziger and the indigenous clients he represents.

We believe that the actions of Judge Kaplan set forth in the complaint were aimed at defaming and discrediting human rights lawyers in general, and Steven Donziger in particular, as well as his indigenous Ecuadorian clients. The message sent to human rights lawyers by Judge Kaplan's misconduct is that human rights lawyers who try to sue or challenge large corporations for their human rights violations will suffer such severe negative consequences that they should not dare to do so.

Because of Judge Kaplan's actions, Mr. Donziger has had to file numerous appeals and writs of mandamus to this Court. Chevron's and Judge Kaplan's responses to all appeals and motions begin with the "mantra" that Mr. Donziger and his clients have been found by Judge Kaplan to have engaged in many nefarious/illegal activities. This type of professional defamation, complainants assert, may have prejudiced this Court against Mr. Donziger and his clients. Complainants believe the allegations in the complaint are so severe as to require a special investigation committee. Or, if because of this Circuit's prior rulings on appeals in the case, the members of this Circuit do not believe they can

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[2] The later assembled Arbitration Tribunal suffered from the same infirmity of never considering the evidence to support the decision and relying heavily on the decision of Judge Kaplan in the RICO case which this complaint shows suffers from judicial misconduct.

[3] As will be clear Judge Kaplan's opinion has as its central tenet that the Lago Agrio plaintiffs ghostwrote the opinion for Judge Zambrano, a highly contested fact.

[4] Complainants will provide both documentary exhibits and citations to the docket of the District Court or the Second Circuit.

be impartial, the Circuit may request the Chief Justice to transfer this complaint to another Circuit for evaluation.[5]

II. JUDGE KAPLAN HAS COMMITTED MISCONDUCT BY VIOLATING THE CANONS OF JUDICIAL ETHICS REQUIRING JUDGES TO BE IMPARTIAL.

A. Impartiality Is Required of All Judges

Under the Judicial Conduct and Disability Act, cognizable misconduct of a judge is conduct that is prejudicial to the effective and expeditious administration of the business of the courts. These rules are necessary to ensure a basic tenet of the legal system: to promote confidence in the courts as a place where litigants can receive impartial justice by an unbiased judge. Violations of specific standards of judicial conduct are cognizable bases for finding judicial misconduct.

Canon 2A of the Code of Conduct[6] requires federal judges to show respect for and comply with the law, and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3 requires that a judge should perform the duties of the office fairly, impartially and diligently, given that the duties of judicial office take precedence over all other activities. A judge must perform these duties with respect for others, including litigants before her or him, and cannot engage in behavior that is harassing, abusive, prejudiced, or biased. While the Canons in the Code of Conduct themselves do not define impartiality, the ABA Model Code of Judicial Conduct defines the term to mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[7]

B. Impartiality of Judges Is Required Throughout the World

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5 See, *In re Charges of Judicial Misconduct,* 769 F.3d 762 (D.C. Cir. 2014). The Complaint in that case was filed by thirteen groups and individuals raising concerns of lack of impartiality based on race, national origin and disability status against Judge Elaine Edith Jones of the Fifth Circuit. The Chief Judge of the Fifth Circuit asked the Chief Justice to transfer the investigation to a different circuit which he did. The Complainants raise this option because in addition to other appeals, there were two very substantial motions to recuse which were denied by Judge Kaplan and which were appealed through petitions for Mandamus in 2011 and 2013. The Second Circuit, however, denied these petitions without opinion. Case 11-2259, Document 75, 09/19/2011, 394883, Page1 of 2; Case: 13-772 Document: 182 Page: 1 09/26/2013 1052373. Based on this history, Complainants are concerned that this Circuit may have been prejudiced by what Complainants believe are the biased findings against Mr. Donziger.

6 https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#:~:text=Canon%202A.,as%20a%20judge%20is%20impaired.

7 https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct

Impartiality of a judge is the cornerstone of justice and is required of judges throughout the world. All major human rights declarations and human rights treaties—many of which have been ratified by the United States—require such impartiality and unbiased treatment in the administration of justice.[8] Impartiality and independence of the judiciary are understood to be essential safeguards for the objectivity and fairness of judicial proceedings and are fundamental elements in a system governed by the rule of law.

The International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, addresses numerous protocols and due process considerations in the administration of justice, including the impartiality of the judiciary. The United Nations Human Rights Committee, which interprets the Covenant, has noted that "impartiality implies that judges must not harbor any preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[9]

The test for impartiality must be based on a judge's comments as well as his or her actions. In the instant matter, it is without doubt that Judge Kaplan's comments, combined with his actions as presiding judge over this case, have been so harmful to any notion of fair process and justice that they have drawn the scrutiny of lawyers and jurists worldwide, including your complainants, as well as the media, and have undermined public confidence in the integrity and independence of the federal judiciary.[10]

The Inter-American Commission on Human Rights has stated:

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8 Art. 14 (1) of the Covenant on Civil and Political Rights; Art. 10 of the Universal Declaration of Human Rights; Art. 8, American Convention on Human Rights; Arts. 7 and 26 of the African Charter on Human Rights and Peoples' Rights; Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

9 Human Rights Committee, Communication No. 387/1989 (*Karttunen v. Finland*), UN Doc. CCPR/C/46/D/387/1989, para. 7.2.; *see also* Human Rights Committee, Communication No. 263/1987 (*Gonzáles del Río v. Peru*), CCPR/C/46/D/263/1987, para. 5.2. (noting that the two principles of independence and impartiality of judges form "an absolute right that may suffer no exception").

10 Among the most recent coverage of Judge Kaplan's adjudication of the case against Mr. Donziger includes: Sharon Lerner, *How the Environmental Lawyer Who Won A Massive Judgment Against Chevron Lost Everything*, The Intercept (Jan. 29, 2020), https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger/; Michael Krauss, *Referee Ignores Judicial Findings, Recommends That Steven Donziger Be Re-Admitted To Bar*, Forbes (Feb. 25, 2020), https://www.forbes.com/sites/michaelkrauss/2020/02/25/referee-ignores-judicial-findings-recommends-that-steven-donziger-be-re-admitted-to-bar/#546ff5ce4466; Christine Macdonald, *He Sued Chevron and Won. Now He's Under House Arrest.*, In These Times (Feb. 24, 2020), https://inthesetimes.com/article/22307/held-political-prisoner-by-chevron-stevendonziger-humanrights-housearrest; James North, *How a Human Rights Lawyer Went From Hero to House Arrest*, The Nation (Mar. 31, 2020), https://www.thenation.com/article/activism/steven-donziger-chevron/; Jonathan Watts, *Nobel laureates condemn 'judicial harassment' of environmental lawyer*, The Guardian (April 18, 2020), https://www.theguardian.com/world/2020/apr/18/nobel-laureates-condemn-judicial-harassment-of-environmental-lawyer; Sharon Lerner, *Judge Rules That Attorney Steven Donziger Must Remain Under House Arrest Until September*, The Intercept (May 20, 2020), https://theintercept.com/2020/05/20/steven-donziger-house-arrest-chevron/.

> The impartiality of a tribunal must be evaluated from both a subjective and objective perspective, to ensure the absence of actual prejudice on the part of a judge or tribunal as well as sufficient assurances to exclude any legitimate doubt in this respect. These requirements in turn require that a judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias.[11]

The universality of the principle of an impartial judiciary is reflected in other regional human rights instruments and in customary international law, which looks to a judge's actual or perceived bias, neither of which is permitted.[12] The European Court on Human Rights has applied a similar test when assessing whether the impartiality principle has been violated under the European Convention on Human Rights,[13] namely in cases where judges have failed to recuse themselves from proceedings in which they have already adjudicated and/or shown bias.[14] In fact, the Court found that, "when (a judge who ruled over criminal proceedings) not only takes up the prosecution case but also, in addition to his organizational and managerial functions, constitutes the court, it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure."[15]

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11 *Report on Terrorism and Human Rights*, Inter-Am. Comm'n. H.R. OEA/Ser.L/V/II.116, ¶ 229 (Oct. 22, 2002); *see also Palamara Iribarne v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 135, at ¶¶ 145-47 (Nov. 22, 2005) ("the impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy").

12 African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *adopted* 27 June 1981, *entered into force* 21 October 1986), Art. 7(1) ("every individual shall have the right to have his cause heard" and shall have "the right to be tried within a reasonable time by an impartial court or tribunal"); European Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended by* Protocols Nos. 11 and 14 on 4 November 1950, ETS No. 5, *entered into force* 3 September 1953, Art. 6(1) ("in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law").

13 The European Convention on Human Rights has been interpreted to include two requirements, one subjective and one objective. The subjective component requires that "no member of the tribunal should hold any personal prejudice or bias." *Case of Daktaras v. Lithuania*, 77 Eur. Ct. H.R., ¶ 30 (10 October 2000). The subjective test used by the Court "consists in seeking to determine the personal conviction of a particular judge in a given case." *Tierce and Others v. San Marino*, Eur. Ct. H.R., Series 2000-IX, ¶ 75 (25 July 2000).

14 *Case of Oberschlick v. Austria (1)*, 204 Eur. Ct. H.R. 13, Series A, ¶¶ 15, 16, 22 (23 May 1991); *see also Case of Castillo Algar v. Spain*, Eur. Ct. H.R. 3124, Reports 1998-VIII (28 October 1998); *Case of de Haan v. the Netherlands*, Eur. Ct. H.R. 1379, Reports 1997-IV (26 August 1997).

15 *Id.* The Inter-American system has applied a similar rule to arrive at the same conclusion. *See Herrera Ulloa v. Costa Rica,* Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 170 (Jul. 2, 2004) (judicial independence has both subjective level [whether the tribunal is actually partial or not] and the objective level ["whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality"]).

C. Lawyers and Lawyers' Organizations Throughout the Country and World Have Been Alarmed By Judge Kaplan's Treatment of Mr. Donziger and his Clients.

This complaint is filed by lawyers and bar and related organizations worldwide who have watched with growing alarm since 2010 the increasing punitive lengths to which Judge Kaplan has gone, beyond all bounds of reason and judicial ethics, to destroy attorney Steven Donziger both personally and professionally. In so doing, his rulings have prevented the 30,000 indigenous clients Mr. Donziger has represented since 1992 from obtaining the remediation of the environment and their lands ordered by the courts in Ecuador against Chevron Corporation, based on Texaco's despoiling their environment and causing unfathomable suffering. Judge Kaplan's actions have resulted in Mr. Donziger facing charges of criminal contempt, despite the basis for those contempt citations being on appeal. Mr. Donziger has been under house arrest for more than a year.

III. JUDGE KAPLAN VIOLATED HIS ETHICAL OBLIGATION TO BE IMPARTIAL

A. Judge Kaplan Acted As De Facto Counsel for Chevron

The Complainants allege the statements and actions of Judge Kaplan over the last ten years are not impartial, and indeed they show him to have taken on the role of de facto counsel for Chevron rather than a judge adjudicating a live controversy before him. These actions have violated his duty under the canons of judicial conduct to do impartial justice.

A review of the record shows that throughout this litigation, Judge Kaplan's rulings have been in "lock step" with Chevron's requests and interests. On at least one occasion he appeared to suggest litigation strategy to them. Such suggestion unequivocally signaled his intention to rule in Chevron's favor on that suggestion regardless of the evidence.

Judge Kaplan has made rulings regarding the legitimacy of the Ecuadorian judgment—which was adjudicated over years of contested litigation **and in which he played no role,** without citing any of the evidence in the record created in Ecuador which supports the judgment. Judge Kaplan accepted Chevron's characterizations of highly contested evidence. Judge Kaplan accepted all of Chevron's allegations against the Lago Agrio Plaintiffs and Mr. Donziger, despite their denials of wrongdoing, while at the same time ignoring the evidence of Chevron's malfeasance which should have undermined the credibility of Chevron's witnesses against the Lago Agrio Plaintiffs and Mr. Donziger.

(Exhibit 2, Amicus Brief of Amazon Watch and Rainforest Action Network by Earthrights International).

B. Judge Kaplan's Lack of Impartiality Was Noted At the Outset, Including His Hostility to the Ecuadorian Plaintiffs' Efforts to Promote Public Awareness of their Plight

As noted, the litigation against Mr. Donziger began almost a year *prior* to the Ecuadorian judgment being issued in 2011, in the context of Chevron-initiated 28 U.S.C. §1782 proceedings. Judge Kaplan, from the outset of his assignment to this case, showed his clear bias and belief that the indigenous plaintiffs should not have implemented a strategy to increase public awareness of the pollution and contamination which Texaco created by operating without any environmental controls in a wide area of the Ecuadorian Amazon. The lack of remediation which this case sought to rectify, subjects the inhabitants to dangerous conditions to health and safety. Not only has Judge Kaplan protected Chevron from accountability for the actions of its predecessor, he has allowed the plaintiffs to continue to suffer the effects of this pollution at the same time as vilifying and financially ruining those who sought to bring this corporation to account. [16]

C. Judge Kaplan's Improper Partiality Toward Chevron Began In 2010 Beginning with the §1782 Proceedings, and It Continued With Judge Kaplan Suggesting Chevron file a RICO Case Against Mr. Donziger and Others, and Continues to This Day With Criminal Contempt Charges

Judge Kaplan's judicial misconduct began with his *carte blanche* endorsement of Chevron's "fishing expedition" into the Ecuador case by granting subpoenas in the context of a 28 U.S.C. §1782 proceeding. As if granting a litigant before him the opportunity to collaterally undermine a case then being adjudicated in a foreign jurisdiction did not raise enough concerns about comity, Judge Kaplan continued to act as if he were counsel for Chevron even suggesting in open court that he believed Chevron could file a RICO case against the indigenous plaintiffs and their attorneys, including Mr. Donziger. (see *infra*)

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16 Judge Kaplan's rulings have encouraged a movement by other corporations to engage in SLAPP (strategic lawsuit against public participation) suits around the country against protesters, including against climate change, who seek remediation and to hold accountable those responsible for directly contributing to and advancing climate disaster. *See* Rex Weyler, *Chevron's SLAPP suit against Ecuadorians: corporate intimidation*, Greenpeace (May 11, 2018), https://www.greenpeace.org/international/story/16448/chevrons-slapp-suit-against-ecuadorians-corporate-intimidation/.

When Chevron filed the RICO case they did so with the certainty that even prior to filing or developing any legal arguments, Judge Kaplan would provide Chevron a favorable outcome. Since his ruling in Chevron's favor on the RICO case, Judge Kaplan has engaged in unprecedented behavior for a federal judge to assist Chevron in their well-funded fight to not pay Mr. Donziger's indigenous clients and to prevent Mr. Donziger himself as counsel from assisting with the enforcement of the judgment outside of the United States.[17]

As of the date of this complaint supported in this Appendix, Mr. Donziger has been under house arrest for over a year awaiting trial on criminal contempt charges for which he has been told he will receive a sentence of no more than six months in jail in an attempt to deprive him of a jury trial. **Due to the clear violations of Judicial ethics with respect to the criminal contempt proceedings, we begin by addressing this aspect of Judge Kaplan's misconduct first.**

IV. THE GENESIS OF THE CRIMINAL CONTEMPT CHARGES AGAINST MR. DONZIGER: LEVYING COSTS OF SPECIAL MASTERS ON MR. DONZIGER

A. After Judge Kaplan Appointed Former Colleagues as Special Masters Despite Mr. Donziger and his Clients Objections, Judge Kaplan Imposed Significant Costs of the Special Masters On Mr. Donziger After the RICO Verdict and Entered A Default Judgment When He Could Not Pay

On October 10, 2010, after denying Mr. Donziger's motion to quash Chevron's broad ranging subpoenas for his files,[18] during the 28 U.S.C. §1782 proceedings, Judge Kaplan appointed a former colleague, Max Gitter, an attorney with the firm Cleary Gottlieb[19], to act as Special Master to, *inter alia*, conduct the deposition of Donziger. (Dkt. No. 86,

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17 As a result of the decision of the Second Circuit affirming the RICO judgment, Judge Kaplan(it is believed) referred Mr. Donziger to the New York bar. The bar immediately suspended his his law license without a hearing. He received that hearing years later. The referee, John Horan, issued a decision on February 24, 2020 recommending Mr. Donziger's license be reinstated. (Exhibit 3, Horan decision). Unfortunately Mr. Horan's decision was ignored by the First Department which disbarred Mr. Donziger relying on collateral estoppel.

18 As noted above. before the Ecuadorian Court issued its ruling, Chevron, worried that the record supported a verdict against it, embarked on a plan to try to discredit it before it issued. Their strategy was to engage in fishing expeditions through subpoenas for evidence throughout the country. In New York Chevron subpoenaed "outtakes" from the documentary about the case known as "Crude". (see *infra*).

19 Cleary Gottlieb acted as counsel for Chevron at least in 2005. (Exhibit 4)

10-mc-00002).[20] Mr. Gitter's role as Special Master was later expanded, as discussed below. (Dkt. No. 161, 10-mc-00002).

In the subsequent RICO case, during discovery and over the objections of Donziger and his clients, Judge Kaplan appointed two Special Masters (one of whom was again Mr. Gitter), to expedite the discovery process and to preside over depositions including Mr. Donziger's deposition which lasted 18 days. Despite objections from Mr. Donziger and his clients, Judge Kaplan's appointment order required the RICO defendants to pay 50% of the fees for the Special Master. (Dkt. No. 942, 11-cv-0691). Mr. Donziger communicated to the Court that neither he nor his clients believed that any Special Masters were necessary and that they did not have the funds to pay for them. On June 13, 2013, Judge Kaplan ruled that Chevron would pay the full costs for the Special Masters in the interim, **subject to an allocation to be determined at a later date.[21] (Dkt. No. 1253, 11-cv-0691).** The proposed later date ended up being February 28, 2018, when Judge Kaplan imposed costs on Mr. Donziger of $813,602.00. $741,526.47 of these costs represented the allocated costs for the special masters **which Chevron had already paid.** (Dkt. No. 1959, 11-cv-0691). Mr. Donziger appealed the order imposing the costs.

Despite having appealed the order imposing these costs, Chevron with Judge Kaplan's full support, defaulted Mr. Donziger and his clients, and again gave Chevron another *carte blanche* to engage in oppressive discovery under the guise of collecting the default judgment. In reality Chevron was seeking information beyond Mr. Donziger's personal finances. People associated with Mr. Donziger were also deposed and harassed for information. The docket in this case shows increasingly burdensome requests for more and more invasive discovery, quite out of proportion to the contested claim for payment. Chevron sought to find out whether and how Mr. Donziger was trying to raise money to support efforts to enforce the judgment against Chevron outside of the United States. Chevron in addition to seeking all sources of funds raised by Mr. Donziger also sought all communications Mr. Donziger was having with his clients and/or co-counsel. None of these requests for discovery were denied by Judge Kaplan. With virtually every further request for discovery Chevron requested Mr. Donziger be held in contempt of court if he objected to or failed to provide the discovery.

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[20] The issues surrounding the appointment of his colleague will be a subject of a specific aspect of this complaint regarding making appointments and the power he was given to rule on objections including objections regarding attorney-client privilege. In his order, Judge Kaplan divided the costs between the parties without consideration of a capacity to pay and presuming a solo practitioner representing indigenous plaintiffs has the same capacity as a multi-billion dollar oil enterprise with over 150 lawyers representing them.

[21] The fact that Judge Kaplan claimed that the allocation of costs would be done later is a "tell" that he had already decided the RICO case before any testimony was taken.

Judge Kaplan's orders placed Mr. Donziger in an untenable position as counsel. If he complied with the discovery requests seeking privileged and confidential information that Chevron could not obtain in normal discovery, he would violate attorney-client privilege and he would share information that could permanently damage his clients and their efforts at enforcing their judgment. However, if he objected to the ordered discovery, Judge Kaplan would label him—and did— as obstructionist and in violation of the court's orders.

If Mr. Donziger decided to appeal the orders, he would still be—and is—nonetheless subject to contempt while the appeals are pending as he was not able to obtain stays of the orders from Judge Kaplan resulting in little hope that he would be granted a stay by this Court, especially in light of Judge Kaplan's continual claim that Mr. Donziger had been found, (by him) to have engaged in nefarious actions which the Circuit Court did not overturn as "clearly erroneous".[22]

B. Despite His Later Turnabout, Judge Kaplan Had Stated In His Stay Order On the RICO Injunction that Mr. Donziger Was Allowed to Continue To Work On the Case and Raise Funds. Then He Changed His Position In Order to Hold Mr. Donziger in Contempt

After Judge Kaplan issued his judgment in the RICO case, which prevented Mr. Donziger and his clients from enforcing the Ecuadorian judgment anywhere in the United States, and which prevented Mr. Donziger from benefiting from the judgment, Mr. Donziger on behalf of his clients filed a motion to stay the judgment. (Dkt. No. 1888, 11-cv-0691). Principle among the arguments was that Judge Kaplan's judgment would cause irreparable harm to Mr. Donziger, depriving him of a means to earn a livelihood and the means to effectively prosecute judgment collection actions in other jurisdictions. (Dkt. No. 1888, pp. 16, 18). Mr. Donziger's indigenous clients argued that absent a stay, they would not have sufficient funds to finance an appeal or engage in any other legal activities to enforce the lawful judgment ordered by the Ecuadorian tribunals. (Dkt. 1888, p. 18).[23]

Even though Judge Kaplan denied the stay he did make explicit statements of significance to the instant contempt charges as follows:

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[22] Judge Kaplan and others claim that Mr. Donziger and the other defendants never challenged Judge Kaplan's findings of fact. However in his Brief to the Second Circuit most of the first 70 pages contest the factual findings. The legal arguments focused on questions of law regarding the proper application of RICO in this context among others.

[23] The appellate courts of three separate nations (the United States - in fact this Court - Ecuador and Canada) have found that it is lawful to enforce the Ecuadorian judgment, just not in the United States.

- "Thus, at least as long as no collections are made in respect of the Lago Agrio Judgment and funneled to Donziger as retainer payments, the NY Judgment ***would not prevent Donziger from being paid, just as he has been paid*** at least $958,000 and likely considerably more ***over the past nine or ten years.***" (Dkt. No. 1901, pp. 7-8) (emphasis added).

- "The practical effect of [the judgment]... ***is not to prevent him from working on the case nor to prevent him from being paid his monthly retainer for his labors.*** It is to prevent him from benefiting personally, at Chevron's expense, from property traceable to that fraudulent judgment." (Dkt. No. 1901, pp. 10-11) (emphasis added).

- "This case always has been financed on the movants' side by outside investors, not the individual defendants. There has been no showing that the money to pay for the appeal is not on hand already or, in any case, could not be raised ***just as millions have been raised before.***" (Dkt. No. 1901, p. 14) (emphasis added).

- Mr. Donziger's clients "are virtually unconstrained by the [RICO] Judgment in their ability to attempt to fund their litigation efforts against Chevron by continuing to sell shares in anything that may be recovered for whatever investors are willing to pay," (Dkt. No. 1901, p. 20) and **"Nothing in the [RICO Injunction] prevents Donziger from continuing to work on the Lago Agrio case**. Period." Dkt. No. 1901, p. 6-7). (See Exhibit 5).

Judge Kaplan's statements clearly allowed Mr. Donziger and his clients to seek funds for him to live and to finance the appeal and the case.[24] However, five years later Judge Kaplan held Mr. Donziger in civil contempt of court for not complying with discovery requests for information from his computer, phone or other electronic devices seeking information about the very things expressly permitted by Judge Kaplan's statements as part of the stay order, namely, for trying to raise "money in exchange for shares of his ostensible client's interest in [the judgment] and [then presumably using] a substantial

[24] Complainants suggest that Judge Kaplan's reference to the amount of money Mr. Donziger had allegedly obtained for his work on this case over twenty four years smacks of personal jealousy and another basis of his bias. This reference to an amount of money a Plaintiff's lawyer might make stands in stark contrast to the approximately $2 billion Chevron has spent on its lawyers in defending itself in the litigation in Ecuador and in pursuing harassing litigation against Mr. Donziger and without any comment from Judge Kaplan. Chevron's targeting of Mr. Donziger was revealed in documents produced in the litigation in Ecuador which quoted Chevron as stating that the indigenous plaintiffs would suffer "a lifetime of appellate collateral litigation," if they pursued enforcement of the judgment until "they give up." Chevron also stated that their "long-term strategy is to demonize Donziger," including writing entries in Wikipedia on Mr. Donziger. Judge Kaplan refused to consider any of these documents. (Exhibit 6: emails dated March 26, 2009 and Chevron press release dated October 8, 2007)

share of the money thus raised for his personal benefit." (Dkt. No. 2209, p. 42). Judge Kaplan tried to justify this bait-and-switch approach by arguing that his decision denying the stay order did not technically modify the judgment, thus Mr. Donziger should not have relied upon Judge Kaplan's statements on the record in the stay order. (Dkt. No. 2209, pp. 43-44).

Judge Kaplan's later disavowal of his statements on the record had the tangible result of increasing the amount of the judgment against Mr. Donziger by another $666,000.00 to account for money Mr. Donziger successfully raised to assist in enforcing the Ecuadorian judgment and for his own support.

For doing exactly what Judge Kaplan said he was permitted to do, Judge Kaplan punished Mr. Donziger by holding him in civil contempt for refusing the order to turn over his computer and other devices that contained privileged and confidential information to be searched by Chevron's designated forensic expert. Mr. Donziger objected to the impropriety of Judge Kaplan's orders and appealed them as based on an effort to stop him from trying to help his clients enforce the judgment outside the United States and to protect his attorney-client privilege, work product and on constitutional grounds based on freedom of association. The appeal of that order is still pending.[25] In the interim Judge Kaplan ordered an initial $2,000 fine to **double** each day that Mr. Donziger refused to comply with that order. Within ten days alone, the fine was well over one million dollars. Within two months, the total would have neared one billion dollars! Research shows that at the largest fine imposed for civil contempt has not exceeded $50,000, and that was imposed against a bank, not a human rights lawyer. The magnitude of this fine and the punitive nature in which it was imposed on a litigant is another example of the violations of the judicial canons and lack of impartiality.

C. Judge Kaplan Moves To Hold Mr. Donziger in Criminal Contempt

After Mr. Donziger appealed the orders which were the basis of the civil contempt, Judge Kaplan asked the U.S. Attorney for the Southern District of New York to prosecute Mr. Donziger on criminal contempt charges, grounded in the same facts that were on appeal to this court. The U.S. Attorney's office declined to take up Judge Kaplan on his "suggestion." (Dkt. No. 2277). Upon the refusal of the U.S. Attorney's office, Judge Kaplan then took it upon himself to begin the prosecution, acting as though he were counsel for Chevron.

[25] It is scheduled for oral argument on September 15, 2020, six days after the date currently set for the trial on the criminal contempt case.

D. After The U.S. Attorney Declined to Prosecute Judge Kaplan Appoints A Private Firm Which Represented Chevron and the Oil and Gas Industry to Prosecute Mr. Donziger.

When the U.S. Attorney declined to prosecute, Judge Kaplan then appointed a *private firm* to act in the role of public prosecutor. By doing so, he replaced the public function of a prosecutor who acts on behalf the public, to a hand picked private firm. If Judge Kaplan was indeed concerned at any point about the appearance of impropriety or a compromised process for Mr. Donziger, then he could have, and should have, asked the Chief Judge of the District to appoint an outside prosecutor under F. R. Crim. P. 42 and recused himself from further action on the case. Instead, Judge Kaplan appointed Rita M. Glavin, Brian Maloney, and Sareen Armani, attorneys with the firm of Seward & Kissell, LLP, to prosecute the criminal contempt charges that he insisted be brought against Mr. Donziger for the same charges at issue in the civil contempt matter which is on appeal. (Dkt. No. 2277). As time has gone on Mr. Donziger has discovered more and more information about Seward & Kissel LLP's representation of Chevron and the oil and gas industries. The matter of the improper appointment of this law firm is the subject of a mandamus petition currently pending in this Court. (Exhibit 7, Mandamus Petition)

Section 3B(3) of the Code of Conduct for Judges provides that, "A judge **should exercise the power of appointment fairly** and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. Judge Kaplan appointing the Seward & Kissell violates this canon. In essence, Judge Kaplan appointed Chevron's counsel to criminally prosecute a lawyer and litigant who had obtained a judgment against Chevron. (See *infra*)

E. Judge Kaplan Handpicks A Colleague To Preside Over the Criminal Contempt Proceeding Despite Rules Which Require A Random Selection

Even though Judge Kaplan ultimately recused himself from presiding over the criminal contempt charges after deciding who prosecutors would be, he did not allow for random assignment of the case to another judge in the court, as required by Rule 16 of the S.D.N.Y. Rules for the Division of Business Among District Judges. Again, instead of following established protocols for judges, Judge Kaplan attempted to control every aspect of Mr. Donziger's prosecution. Judge Kaplan hand-picked Judge Loretta Preska to preside over the criminal prosecution. The selection alone and manner in which Judge Preska was chosen continues to perpetuate far more than the appearance of impropriety. (See also references to this in Exhibit 7, Mandamus Petition)

F. Mr. Donziger Has Been Under House Arrest Since August 6, 2019

On August 6, 2019 Judge Preska ordered Mr. Donziger to be under house arrest based on an alleged policy of holding pre-trial detainees under house arrest, and an unfounded claim he is a flight risk, even though he has surrendered his passports, lives with his family in New York, and travel worldwide has been on lockdown due to COVID-19. Judge Preska has insisted that Mr. Donziger's charges will not carry any more than a maximum six months' sentence in order to deprive him of a jury trial. By the time he comes to trial, he will have been under house arrest for more than double the time of his possible incarceration.

Judge Kaplan's actions and the fervor with which he has pursued criminal contempt charges against Mr. Donziger would cause any objective observer to question his impartiality, and they have. Nevertheless, Judge Kaplan continues to rule on matters in the civil case involving Mr. Donziger, including those that impact his criminal case.

At this point, there is no semblance of impartiality left in the litigation against Mr. Donziger, nor reason for *any* litigant to trust the judicial process in this case. There is certainly no reason for any litigant now or in the future to believe they will receive impartial justice before Judge Kaplan if they seek to hold corporations accountable for committing human rights violations.

V. THE ACTIONS OF JUDGE KAPLAN WITH REGARD TO THE CONTEMPT RULING FOLLOWED HIS BIASED ACTIONS FROM THE BEGINNING OF THIS CASE SHOWING COMPLETE PARTIALITY TO CHEVRON IN VIOLATION OF THE CANONS OF JUDICIAL CONDUCT

A. Judge Kaplan Gives Chevron *Carte Blanche* to Attack the Ecuadorian Courts through §1782 Proceedings Beginning With Ordering 600 Hours of Outtakes From the Movie "Crude" to be Turned Over to Chevron.

The record in this case shows that Judge Kaplan was predisposed to Chevron's claim to preemptively discredit a potential judgment against them through discrediting the lawyers for the Lago Agrio Plaintiffs. He did this from his first ruling enforcing a wide ranging subpoena on documentary filmmaker Joseph Berlinger as part of a §1782 fishing expedition.

In April of 2010, almost a year before the judgment in Ecuador issued, and well before the filing of the Chevron RICO lawsuit, (see *supra*) Judge Kaplan was asked to rule on whether to quash a comprehensive subpoena issued by Chevron to the documentary

filmmaker Joseph Berlinger, for among other things, 600 hours of "outtakes from the documentary film which he made entitled "Crude". "Crude" depicted the oil pollution in the Ecuadorian Amazon and highlighted the efforts of the Lago Agrio Plaintiffs to obtain justice. These subpoenas presented Judge Kaplan with a narrow, rather mundane question: whether or not to allow some amount of discovery, to assist a foreign case. It was not a chance to comment on the Ecuadorian proceeding.

B. Judge Kaplan Was the Only Judge to Involve Himself In the Underlying Case in Ecuador in Violation of the Rules of Comity

Chevron had filed similar §1782 proceedings before other federal courts throughout the country. These courts, presented with Chevron's §1782 subpoenas, were appropriately impartial and circumspect in avoiding comments or rulings on the merits. *See, e.g.*, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047, 2010 WL 3923092, at *11 (D. Colo. Oct. 1, 2010) ("[T]he Court *intends to avoid any analysis of the merits of the underlying litigation . . . .* that are *committed to the jurisdiction of the Ecuadorian trial court.*" (emphasis added)); *Chevron Corp. v. Mark Quarles*, No. 3:10-cv-00686, Dkt.. 108 at 2-3 (M.D. Tenn. Sept. 21, 2010) ("[T]his proceeding, initiated pursuant to 28 U.S.C. § 1782, *is not an opportunity to put on a full trial . .. . Chevron had an opportunity to litigate this matter in the United States and strongly opposed jurisdiction in favor of litigating in the Ecuadorian courts.* While fraud on any court is a serious accusation that must be investigated, *it is not within the power of this court to do so*, any more than a court in Ecuador should be used to investigate fraud on this court." (emphasis added).)

C. There was No Legal Basis For Judge Kaplan To Have Granted the Broad Discovery to Chevron Regarding the Outtakes of "Crude," Yet Judge Kaplan Ordered Complete Outtakes Be Produced Based On A Stated Bias Against The Ecuadorian Judiciary and The Elected President

Judge Kaplan, however, having no record of the case in Ecuador in front of him, or having any record from which he could form an opinion as to whether there were any ways in which the prosecution of the case in Ecuador violated any Ecuadorian law or practice, decided based on very thin reeds that there could be some taint on the upcoming judgment. He then set out to assist Chevron to discredit any potential verdict against them should it occur.

Judge Kaplan referred to only three "out of context" items from the public movie "Crude" which Chevron brought forward that he thought "concerning," which he used as his bases for denying Mr. Berlinger's motion to quash. These were: (1) footage of the

Lago Agrio plaintiff's counsel in an allegedly neutral focus group with a person who worked with the expert on the assessment of damages, in which Chevron alleged Plaintiff's counsel had interaction with a supposedly neutral expert; (2) a depiction, without context, of Plaintiffs' counsel trying to prevent the judicial inspection of a laboratory used by the plaintiffs to test, and a claim that counsel said "this is not something you would do in the United States but this is how the game is played, it's dirty"; and (3) a scene where the representatives of the plaintiffs visited the office of President Correa and stating "We've achieved something important in this case. Now we are friends with the President." *In re Chevron Corp.*, 709 F. Supp. 2d 283 (S.D.N.Y. 2010).

Three out of context snippets from a movie about a case which had gone on for 18 years, with seven in the Ecuadorian Courts, is hardly a record upon which to speculate or suspect that a judgment that was yet to issue was procured through nefarious means. Such a record should not have been sufficient to grant Chevron unlimited access to parts of the documentary that had been left on the cutting room floor.

Indeed, during oral argument on Mr. Berlinger's motion to quash the subpoena, counsel for the Lago Agrio plaintiffs put the case in its proper wider context when he stated this is a "hotly contested case" with over 200,000 pages of evidence, 63,000 samples and over 100 judicial inspections," (Exhibit 8, April 30, 2010 Transcript p 33)[26] making the point that this Court should respect comity and the process in Ecuador. However when counsel stated the Lago Agrio plaintiffs had asked the Court in Ecuador if it believed §1782 material would assist it in its deliberations, and asked Judge Kaplan to wait to see what the Ecuadorian Court ruled, Judge Kaplan scoffed at the idea, expressing a jaundiced view of the Ecuadorian courts by saying **"If this was the High Court in London, you can be sure I would wait".** (Exhibit 8, April 30, 2010 Transcript p.36) This predisposition to prejudge a decision from a Court from a developing country shows he would distrust the opinion from Ecuador if it required Chevron to pay regardless of its content or evidence to support it.

Judge Kaplan's hostile predisposition to *sua sponte* prejudge a decision from another country on a case not before him, with no access to a record and accepting as fact the

[26] Counsel also gave context to each/ of the cited bases for the subpoena. The meeting with Beristain, who later became an expert, was part of a meeting set up by an NGO called Accion Ecologica which was investigating the effects of pollution in the Amazon. Counsel happened to be present. As to the meeting with the president, counsel stated Chevron (and its predecessor Texaco) had been meeting with Ecuadorian government officials for many years including presidents, but when they did it, it was "lobbying", but when Plaintiffs did it, it was called collusion and fraud. (Exhibit 8 April 30, 2010 Transcript pp 38-41) As to the incident to block a judicial inspection, the Court was provided a sworn affidavit that Chevron had gone to Quito to get an *ex parte* order from a judge which was not the procedure for doing this and the plaintiffs sought to counter Chevron's interference. (Exhibit 8, April 30, 2010 Transcript p 42)

characterizations of evidence of only one party shows Judge Kaplan's bias from the beginning of these proceedings – a bias that would taint the remaining proceedings. Clearly Chevron was hoping to find something, anything that could be used to try to escape liability for Texaco's actions.

Even more concerning is that Judge Kaplan stated in open court, that he saw this case in a "broader" political context where he criticized the political process and decisions of the Ecuadorian people in having democratically elected Rafael Correa as President at that time, noting in his opinion that a socialist government "is not as well disposed to private oil interests as its predecessor." *In re Chevron Corp.,* 709 F. Supp. 2d 283, 299. Judge Kaplan's commentary on the outcome of a foreign electoral process (which was not an issue before him), the political ideology of an elected leader of a sovereign nation, and whether or not such ideology would economically benefit a litigant before him shocks the conscience and is offensive to any notions of justice that courts in this circuit, and indeed this country, stand for. The fact that Judge Kaplan—while on the bench—not only commented on the political orientation of a foreign elected leader, but presumed its Courts would follow the President, seriously compromised the integrity of the bench itself.

Judge Kaplan issued an opinion denying Mr. Berlinger's motion to quash Chevron's subpoena to Mr. Berlinger, giving credence to Chevron's speculation about the Ecuadorian court's purported collusion with plaintiffs. Claiming "sunlight was the best disinfectant" *In re Chevron Corp., supra at* 299. Judge Kaplan gave Chevron access to 600 hours of "outtakes" from a movie, which are by their very nature snippets taken out of context."

Because Judge Kaplan had no evidence before him on which he could claim he developed opinions, Judge Kaplan's bias cannot be said to be based on information in the record that he obtained during the proceeding on the motion to quash. In this way he cannot claim his bias was based on what he learned in the context of the case as allowed by *Liteky v United States,* 510 U.S. 540 (1994), Judge Kaplan showed his fixed predisposition if favor of Chevron by questioning the legitimacy of the Ecuadorian judiciary.

Even if Chevron had a legitimate basis for concerns about the validity of an Ecuadorian judgment, this issue was not before Judge Kaplan, nor was he presented with a *forum non conveniens* motion, nor was this case filed in his court and assigned to him. If Chevron believed they were not going to receive a favorable judgment in the Ecuadorian trial court, they had appellate procedures there to take advantage of, which in fact they did.

Mr. Berlinger ultimately appealed Judge Kaplan's denial of the motion to quash, and while this court issued an order on July 15, 2010, to limit the outtakes to specific subjects, Chevron was not satisfied and not only sought additional information, but also served Mr. Donziger with a subpoena for all of his privileged documents on the case.

D. Judge Kaplan Grants Chevron Access to Mr. Donziger's Full File Regardless of Attorney Client Privilege

In addressing Mr. Berlinger's motion to quash, Judge Kaplan made it known that he strongly disapproved of the Lago Agrio Plaintiffs' public awareness campaign, which the movie "Crude" was part of, and which Mr. Donziger was involved in as part of his role as lead U.S.-based counsel. Judge Kaplan selected quotes that he disliked from the outtakes, and amplified them. For example Judge Kaplan referred to an outtake where Mr. Donziger stated this case was not a legal case, but rather a political battle. Rather than understand the political context in which cases such as the Lago Agrio one exist, Judge Kaplan interpreted the reference to "political battle" to mean that Mr. Donziger and the plaintiffs' legal claim was not meritorious. His conclusion was rather Mr. Donziger and the plaintiffs were engaging in a "pressure campaign" to obtain a settlement. [27]

Judge Kaplan's comment about Mr. Donziger's assessment of the political context of the case, and his passion to help his clients achieve justice, was said with such disdain that his hostility to Mr. Donziger in the courtroom was palpable. If Judge Kaplan believed he could no longer be an impartial judge in these proceedings—as was obvious to everyone in the courtroom—then he should have immediately recused himself and requested reassignment of the case to another judge.

However, Judge Kaplan did not recuse himself. After viewing one of the outtakes from "Crude" where there was a discussion about possible a "global settlement" which might include dismissal of the pending criminal cases against the individuals who had allegedly made allegedly fraudulent remediation agreements with Texaco, Judge Kaplan

[27] Another aspect of Judge Kaplan's bias appeared in his refusal to consider the way in which Chevron had engaged in politically corrupt actions to pressure a judge they did not like to recuse himself and claiming that independent laboratories were actually run by Chevron. See Exhibit 2 the amicus brief of Amazon Watch and Rainforest Action Network written by Earthrights International in support of the writ of certiorari in which Chevron's misconduct in the Ecuador proceeding is chronicled with citations to the record. This brief also contains reference to the evidence submitted by Ecuador to the subsequent arbitration panel in the case filed against them by Chevron. This evidence shows that Judge Kaplan relied on perjured testimony in his RICO decision. The fact that after Judge Kaplan was informed of the perjured testimony and the other exculpatory evidence from the arbitration proceeding and had gone on to be more punitive towards Mr. Donziger only reinforces Complainant's claim of improper bias. (*see infra*)

at a hearing in Chevron's presence raised the possibility of Chevron bringing a RICO action.

Judge Kaplan said:

> The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it. . . . So the name of the game is, arguably, to put a lot of pressure on the courts to feed them a record in part false for the purpose of getting a big judgment or threatening a big judgment, which conceivably might be enforceable in the U.S. or in Britain or some other such place, in order to persuade Chevron to come up with some money. **Now, do the phrases Hobbs Act, extortion, RICO, have any bearing here?** (Exhibit 9 September 23, 2010, Trans. at 24) (emphasis added).

The implication from these comments are that Judge Kaplan viewed the efforts of the plaintiffs to try to increase public awareness of their case and attempts to hold Chevron accountable for Texaco's poisoning their land, food and water sources as improper "pressure."

Judge Kaplan, however, had no such concerns about Chevron's attempt to defame, target and harass Mr. Donziger, or his clients. In fact, as was revealed during discovery, Chevron's strategy as commented to media outlets was "to fight this until hell freezes over . . . and then we'll fight it out on the ice." According to an internal Chevron memo, that included a media strategy that would:

- "relentlessly use blogosphere;
- develop relationships with news reporters/editors, supportive business groups, trade associations, think tanks, elected and regulatory officials;
- Write Wikipedia entries for Amazon Watch, Donziger; and
- [Make] Ecuador the next major threat to America . . . the next Cuban missile crisis in the making." *See* Exhibit 1, Singer memo October 2008.

The right of anyone, including the Lago Agrio plaintiffs, to seek to publicize their plight and enlist public support for their cause is an important way that marginalized groups have historically advanced important civil and human rights demands. There would be no progress in protecting human rights if affected peoples whose rights have been violated did not denounce such abuses when they occur, and that includes the long and rich tradition of human rights defenders and lawyers that stand up for their clients' rights to be compensated for public and/or private wrongs.

Neither litigants nor lawyers are required to leave their right to speak at the courthouse door. Social change to protect human rights is indeed both a political and legal process, yet Judge Kaplan claimed that the indigenous plaintiffs—through their counsel, Mr. Donziger—saw their case as a political battle only, and he openly let it be known that he did not approve of the political orientation and positions of the elected leadership in Ecuador nor of Mr. Donziger, a litigant before him.

Thus, prior to Chevron filing the RICO case against Mr. Donziger, Chevron commenced serving massive and overbroad discovery requests on Mr. Donziger, asking for essentially every document, record or email he had ever sent or received during the course of the Ecuador litigation. Whatever documents Chevron was unable to receive by normal discovery processes in nearly two decades of litigation in Ecuador, Judge Kaplan gave them.

Chevron claimed in the §1782 proceeding they were entitled to the **entire universe** of Mr. Donziger's file. This included thousands upon thousands of documents in the action including all privileged communications. Chevron claimed they were entitled to these documents based on the "crime-fraud" exception to attorney-client privilege. Judge Kaplan, while never explicitly finding a crime fraud exception, found a way for Chevron to obtain these documents. He continually claimed that Mr. Donziger's role as lead U.S. based attorney was not that of an attorney but as a public relations specialist, even though his file was filled with documents discussing legal strategy. Mr. Donziger filed a wholesale objection to the document request in light of his position as adversary counsel in ongoing litigation. Judge Kaplan in ruling against Mr. Donziger's objections required him to produce his entire file "forthwith". Given the expansive scope of documents requested by Chevron, Mr. Donziger requested adequate time to do his due diligence as counsel and review the tens, if not hundreds, of thousands of documents at issue in order to construct a privilege log. In response, Judge Kaplan stated, "Don't tell me about how long Mr. Donziger needs. **I know the game here**." (Ex. 9 September 23, 2010 Transcript, p. 35) (emphasis added).[28]

Mr. Donziger both filed a motion for reconsideration of this order as well as an emergency appeal. He was granted a stay by the Second Circuit. In the meantime he

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[28] Despite the fact that this case had been strung out by Chevron for 18 years by then, Judge Kaplan later made clear that he believed the "game" by Mr. Donziger was to stall the proceedings. (**"[I]t's a giant game here. It's a giant game. The name of the game is to string it out." Ex. 9, p.26** (emphasis added)). He used the excuse that two of the petitioners in the New York case were potential defendants in criminal cases against them for improper actions in conjunction with a settlement with Texaco previously and that they were facing imminent actions against them. However Judge Kaplan never restricted the document requests to any documents which might implicate these criminal charges if any. Instead Judge Kaplan decided to give Chevron the entire file of an adversary counsel.

scrambled to review hundreds of thousands of English and Spanish documents and prepare a privilege log running into the tens of thousands of entries while the Second Circuit stay was in effect. He provided this log to Chevron within hours of the stay expiring. Despite this effort, on November 22, 2010, Judge Kaplan abruptly ruled that the failure to file the log earlier resulted in the extreme sanction of waiver of all claims of privilege over the *entirety of Mr. Donziger's 17-year legal file in the case*. (Exhibit 10, November 22, 2010 Transcript p. 13). Chevron would go on to take possession of Mr. Donziger's hard drive and use privileged communications and opinion work product (mental impressions and strategic discussions) against him throughout the years of litigation that followed.

While the undersigned will not expand upon the profound concerns of forcing attorneys to turn over to their adversaries privileged communications it should nonetheless be of extreme concern to this court and the profession that Mr. Donziger was ordered to do so. Attorney-client privilege is one of the oldest forms of privilege in this nation, and must be treated as sacred. Disregarding and disrespecting it with such wanton ease to satisfy the interests of an opposing litigant is alarming.

VI. JUDGE KAPLAN VIOLATED CANON 3B(3) IN HIS APPOINTMENTS OF SPECIAL MASTERS

As noted above, Section 3B(3) of the Code of Conduct for Judges provides that, "A judge ***should exercise the power of appointment fairly*** and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered." (Emphasis added). The commentary to this section makes clear that special discovery masters fall within its scope.

Judge Kaplan, in appointing Max Gitter on October 20, 2010, to be special discovery master early in the case, violated this canon. Mr. Gitter had been a law partner of Judge Kaplan, and at the time of his appointment, Mr. Gitter's firm was the designated underwriters' counsel for Chevron Corporation. (See Exhibit 4). In fact, Mr. Gitter made no secret of his identification with Chevron. On the first day of Mr. Donziger's deposition, in a telling slip of the tongue, Mr. Gitter referred to Chevron as "we." (Exhibit 11, Donziger Dep. I [11/29/2010] 221:12-24) ("The picture was false, as we know, because ***we*** got an order from the magistrate judge on a motion for clarification referring to the misleading press release that led to this poster being put on the web." (emphasis added)).[29]

[29] This may not have been a slip of the tongue at all, as the Special Master continued to refer to himself and Chevron as "we" or "us" throughout the depositions: *E.g.* Ex. 11(a), Donziger Dep. I (11/29/2010) 284:8-25; Donziger Dep. III

In effect, Judge Kaplan chose to appoint Chevron's own lawyers to oversee discovery disputes of their client, doing away with any notion of fair and transparent process that may have remained and that any litigant should expect of the federal courts. Mr. Gitter did not merely resolve discovery disputes; rather he rapidly became what his firm already was: Chevron's counsel. Mr. Gitter, as Special Master, actively participated in the examination of witnesses on Chevron's behalf. (Exhibit 11, Donziger Dep. II [12/01/2010] 564:16-23; Donziger Dep. VII [12/23/2010] 1970:13-1972:8; Donziger Dep. III [12/08/2010] 790:3-25 (rephrasing questions of Chevron's counsel)).

At times, Mr. Donziger found himself fielding questions from a veritable tag-team consisting of Chevron's counsel and Mr. Gitter. A sample of such inappropriate questioning includes:

> "THE SPECIAL MASTER: Let's go back. Let me do it. Do you want to do it or shall I do it? Let's just finish this whole thing up. Go back a little bit.
>
> MR. VINEGRAD[30]: I would like to do it.
>
> THE SPECIAL MASTER: Go ahead, do it yourself." (Ex.11 , Donziger Dep. II [12/01/2010] 564:16-23).
>
> "THE SPECIAL MASTER: Excuse me, I want to ask some questions now. Are you finished with this clip?
>
> MR. VINEGRAD: Go ahead, Mr. Gitter.
>
> THE SPECIAL MASTER: Are you finished with this clip?
>
> MR. VINEGRAD: Not quite.
>
> THE SPECIAL MASTER: You finish first.
>
> MR. VINEGRAD: Please, you are the Special Master. You ask the questions.
>
> THE SPECIAL MASTER: That is okay. I want you to finish first." (Ex. 11, Donziger Dep VII [12/23/2010] 1970:13-1971:3).

(12/08/2010) 763:16-765:3; Ex. 11(b), Donziger Dep. VII (12/23/2010) 1806:9-1807:14, 2012:4-17; Ex. 11(c) , Donziger Dep. XI (01/18/2011) 3220:11-20; Ex. 11(d) , Donziger Dep. XII (01/19/2011) 3512:4-10).

30 Mr. Vinegrad represented the individual Ecuadorian petitioners under investigation for criminal fraud.

At times in the deposition, the tandem questioning by Chevron and Mr. Gitter makes it almost impossible to distinguish between them:

> "THE SPECIAL MASTER: Did you say it on film? The question is, did you say it on film?
>
> THE WITNESS (Mr. Donziger): I don't remember, sir.
>
> THE SPECIAL MASTER: When did you review the outtakes that you saw in preparation for this deposition?
>
> THE WITNESS: On different occasions starting many weeks ago. There is a lot of outtakes.
>
> THE SPECIAL MASTER: I know, because I saw a lot of outtakes. Are you unable to answer the question? And the question is, is it true, are you unable to answer that question? The question is – you know, it makes a declarative statement, you are on film on numerous occasions saying in effect you are out to get in this lawsuit as much money as you can; isn't that true? The entirety of the question is, isn't that true, and are you telling us you cannot answer that question? Is that what you are telling us?
>
> THE WITNESS: That's what I'm saying right now . . .
>
> MR. VINEGRAD [Chevron lawyer]: Do you remember being at a meeting in the Selva Viva office in Ecuador in March of 2007 with a number of plaintiffs' experts and others in which you said "we could jack this thing up to $30 billion in one day?" Do you remember doing that? Yes or no.
>
> THE WITNESS: I remember reading about it in one of your – one of Chevron's briefs.
>
> Q. That's not my question. Do you remember making that statement at that meeting? Yes or no.
>
> MR. KAPLAN [Donziger lawyer]: May we have an instruction, that Mr. Vinegrad, as passionate as he might be, not pound the table?

(Ex. 11, Donziger Dep. II [12/01/2010] 473:24-475:21). Mr. Gitter did not confine his questioning to the scope of the § 1782 actions, but *sua sponte* expanded the scope of the subpoena and cross-examined Mr. Donziger about the prior litigation in New York known as the *Aguinda I* litigation. For example:

> Q. And is it your testimony that you have scientific evidence that those constituents are found in harmful levels in the Oriente and that you have linked them to TexPet's operations?
>
> THE WITNESS: Yes.
>
> MS. NEUMAN [Chevron Lawyer]: I can break for the day, Mr. Gitter.
>
> THE SPECIAL MASTER: Is it also your testimony that those constituents are not found in the – as a consequence of the production by PetroEcuador? Yes or no, please. . . .
>
> THE WITNESS: That's not what the case is about. . . .
>
> THE SPECIAL MASTER: Can you answer the question, please? Whether it is or not.

(Ex. 11, Donziger Dep. VI [12/22/2010] 1704:7-1705:5).

Perhaps nothing better demonstrates the actions of Mr. Gitter in his capacity as Special Master and Chevron's counsel than when he expanded the § 1782 deposition to permit a line of questioning that could only be relevant to a RICO action—*a case that had not yet been filed*. On the tenth day of Mr. Donziger's deposition (and some 18 days prior to the filing of the RICO complaint), Chevron attorney Randy Mastro and Mr. Gitter stepped outside of the room for an *ex parte* meeting. Upon their return, an extensive line of questioning ensued about a document which discusses a litigation funder and the law firm Patton Boggs, LLP. When Mr. Donziger's attorney objected that there was no need to go into personal matters related to that document, Mr. Gitter revealed that he was aware that the RICO complaint was coming:

> THE SPECIAL MASTER: I think you will find – I could be surprised – but my hunch is you are going to see some filing about the subject of the relevance – wait a second, hear me out, Mr. Kaplan – **there will be a filing in my judgment at some point that will show you the relevance that I was satisfied about**. And I believe, I could be wrong, but I believe the

> questioning which you think was about a personal matter is actually related to that subject.
>
> Mr. Mastro, am I correct about that?
>
> MR. MASTRO: You are absolutely correct. But it won't come as a surprise to Mr. Kaplan or Mr. Maazel that I'm not going to discuss it with them today.

(Ex. 11, Donziger Dep. XI [01/14/2011] 3219-3235; Donziger Dep. XI [01/18/2011] 3332-3334, (emphasis added)).

Not only did Mr. Gitter ask improper questions on Chevron's behalf, he manipulated Mr. Donziger's answers in Chevron's favor. On several occasions after Mr. Donziger responded to questions requiring clarification, Mr. Gitter struck all qualifying language —many times *sua sponte*, and not in response to any objection by Chevron—altering the responses to only "yes" or "no" in place of the properly qualified responses given by Mr. Donziger. (Ex. 11, Donziger Dep. II [12/01/2010] 527:19-528:10; Donziger Dep. II [12/01/2010] 656:5-657:6; Donziger Dep. II [12/01/2010] 676:5-17; Donziger Dep. III [12/08/2010] 788:2-13; Donziger Dep. III [12/08/2010] 846:10-20; Donziger Dep. VI [12/22/2010] 1435:24-1436:15).

On the record, Mr. Gitter as Special Master repeatedly coached Chevron's lawyers on how to ask questions of Mr. Donziger so that they would obtain answers more helpful to Chevron. (Ex. 11, Donziger Dep. II [12/01/2010] 652:20-24 ("THE SPECIAL MASTER: Please ask the question in a beautiful way so that he cannot give you the kind of, you know, open-ended, self-serving [responses], and I mean that in the kindest way.")); Ex. 11, Donziger Dep. II p. 653 ("THE SPECIAL MASTER: "The more beautiful way is to break it up into two or three questions so that you get – go ahead, please, do it, otherwise you are going to get the same problem…").

All of this conduct by Mr. Gitter, and more, was brought to the attention of Judge Kaplan, who took no action to either remove Mr. Gitter, or restrain his advocacy of Chevron's interests, underscoring yet again his own bias in the proceedings.[31] The actions of Mr. Gitter in carrying out his duties as Special Master demonstrate firm allegiance to Chevron, and to Judge Kaplan's preferences, rather than the impartial decision-making that is required and expected of Special Masters who play a critical role in the administration of justice. The spectrum of bias that ran between Judge Kaplan and

[31] It is worth noting that Judge Kaplan's financial disclosures indicate that he has held a financial interest in Chevron corporation through ownership in mutual funds.

Mr. Gitter was explicitly objected to by Mr. Donziger, yet Judge Kaplan refused to address it, remove Mr. Gitter or recuse himself. (11-cv-0692, Dkt. # 285, fn. 9).

VII. JUDGE KAPLAN'S APPOINTMENT OF A LAW FIRM WHICH REPRESENTED CHEVRON TO SERVE IN A PUBLIC PROSECUTION FUNCTION OF CHEVRON'S OPPONENT VIOLATES BASIC NOTION OF FAIRNESS AND IMPARTIALITY AND CANON 3B(3)

As noted above, Canon 3B (3) has also been violated by Judge Kaplan's appointment of a law firm with known ties to Chevron and the oil and gas industry to act as the "people" in the criminal prosecution of Mr. Donziger. In fact, Seward & Kissell, LLP represents the very adversary whose goal is the personal and professional destruction of Mr. Donziger. The most basic of conflicts checks would have revealed that they could in no way serve as a neutral arbiter in a case involving their institutional client, and Judge Kaplan knew this.

Chevron's obvious goal is to ensure that lawyers like Mr. Donziger never again have the audacity to seek to remedy massive human rights violations committed by them or any other multinational corporation. They seek immunity from accountability to the people and lands they have destroyed. Their harassing litigation of Mr. Donziger—enabled by Judge Kaplan—is to discourage members of the bar from representing marginalized and vulnerable communities that otherwise would have no representation, have no capacity to pay for counsel and face multiple barriers to accessing justice. Judge Kaplan's complicity in the chilling of the exercise of human rights defenders should be of the utmost concern to this Court, and the alarming precedent it could set as the world continues to pay attention to what happens in his courtroom, to Mr. Donziger and his clients. As noted the matter of the appointment of Seward & Kissel is the subject of a petition for mandamus. (Exhibit 7)

VII. JUDGE KAPLAN'S APPOINTMENT OF JUDGE PRESKA TO OVERSEE THE CRIMINAL CONTEMPT CHARGES SUBVERTED ESTABLISHED PROTOCOL OF THE COURT FOR RANDOM SELECTION OF JUDGES, RESULTED IN A HAND PICKED CHOICE IN VIOLATION OF CANON 3B(3)

Complainants take the opportunity to raise a separate Canon 3B (3) violation with the Court, which concerns the hand-picked appointment of Judge Loretta Preska by Judge Kaplan to preside over Mr. Donziger's criminal contempt case. The Federal Courts have clearly established protocols for assigning judges randomly to matters. This protocol

promotes public confidence in the process and ensures accountability and transparency. Instead, Judge Kaplan chose Judge Preska personally to adjudicate over matters which had already been compromised in judicial integrity and public confidence. By doing so, the independence and impartiality expected of federal courts was undermined yet again. Judge Kaplan had no reason not to abide by the random selection process, and by circumventing the process and hand-selecting a judge to adjudicate a matter he was clearly heavily invested in, he created the impression that he wanted to retain some level of involvement and/or influence over the issues that Judge Preska would be adjudicating. The appearance of impropriety alone is enough to challenge any litigant's faith in the judicial process and their expectations of a fair and unbiased process.

VIII. JUDGE KAPLAN OPENLY STATED HIS SUPPORT FOR CHEVRON DURING CHEVRON'S MOTION FOR A TEMPORARY RESTRAINING ORDER (TRO)

On February 8, 2011, six days before the judgment in Ecuador issued in favor of Mr. Donziger's clients, Judge Kaplan heard Chevron's motion for a temporary restraining order to restrain any enforcement of the Ecuadorian decision should it be issued against Chevron. In a discussion of the weighing of equities, Judge Kaplan gave short shrift to the plaintiffs having waited 18 years to get a judgment, and ultimately weighed the equities in Chevron's favor by stating:

> On the other hand, we are dealing here with a company of considerable importance to our economy that employs thousands all over the world, that supplies a group of commodities, gasoline, heating oil, other fuels and lubricants on which every one of us depends every single day. I don't think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and finds that there isn't any gas there because these folks have attached it in Singapore or wherever else. (Exhibit 12, Transcript of February 8, 2011 p. 49-50).

The statement inferring that gas stations in the United States might not have gasoline because indigenous plaintiffs lawfully sought to enforce a judgment in Singapore if Judge Kaplan did not grant Chevron's motion for a TRO is offensive to the very notions of law and justice that are available to <u>any</u> prevailing party, <u>anywhere</u>.

The praise for Chevron as an economic actor while ignoring devastating loss of life, health and land for plaintiffs, and even more – enjoining a judgment from a foreign court– ignores principles of comity upon which legal systems worldwide rely.

IX. JUDGE KAPLAN'S BEHAVIOR DURING PRE TRIAL PROCEEDINGS IN THE RICO CASE CONTINUED HIS HOSTILITY TO MR. DONZIGER AND IN FAVOR OF CHEVRON

Judge Kaplan's hostility towards Mr. Donziger the pre-trial phase of the RICO case was so extreme that it caused Mr. Donziger's lawyer, famed litigator John Keker,[32] to withdraw, noting that the case had "degenerated into a Dickensian farce," due, in part, to Judge Kaplan's "implacable hostility to Donziger." (Dkt. 1110, p. 1 (Exhibit 13)). Testifying years later, Mr. Keker noted that "Judge Kaplan had made it clear that he was determined to see Mr. Donziger, I think, convicted of the charges Chevron was making." (Exhibit 14, Horan trans., p. 340). He testified that in his view, Mr. Donziger did not get a full and fair opportunity to litigate the issues. (*Id.* at 342). Chevron's scorched earth policy was described in an article cited in Mr Keker's motion to withdraw as counsel, noting that "Chevron intends to "fight until hell freezes over, and then fight on the ice.'"[33] Chevron's CEO, John Watson, acknowledged as much in February 2013, stating that the litigation "will end when the lawyers give up."[34] Chevron knew that it could get away with these tactics in court because Judge Kaplan had already shown his intention to prevent Chevron from having to pay out damages procured through years of litigation and culminating in a judgment in Ecuador.

X. JUDGE KAPLAN'S DECISION IN THE RICO CASE WAS PREDETERMINED BEFORE TO BE AGAINST MR. DONZIGER AND HIS CLIENTS BEFORE THE TRIAL COMMENCED OR EVIDENCE PRESENTED.

A. Counsel for Mr. Donziger and Members of his Legal team were Appalled at Judge Kaplan's Behavior, which Prejudiced their Client and Impacted their Ability to Effectively Represent Him.

Shortly before the trial in the RICO case was scheduled to start, Chevron decided to drop any demand for damages from Mr. Donziger and seek only equitable relief. Over Mr. Donziger's objection, Chevron claimed that seeking only equitable relief did away with need for a jury and Judge Kaplan sided with Chevron. The impact of this litigation tactic was to prevent Mr. Donziger from having a jury trial so that he could have persons

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32 After serving as a second lieutenant in the Vietnam war, Mr. Keker went to Yale Law School, where he was on law review. After graduating, he clerked for Justice Earl Warren on the Supreme Court. He presently runs a litigation firm that employs approximately 100 lawyers. (Ex. 14, pp. 337-339).

33 Patrick Radden Keefe, *Reversal of Fortune*, New Yorker (January 9, 2012), available at: https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe.

34 Christopher Helman, *Chevron's Expensive Problems*, Forbes Magazine (Feb. 13, 2013), https://www.forbes.com/sites/christopherhelman/2013/02/13/chevrons-expensive-problems/#57d499594b08.

unfamiliar with the history of the case and allegations against him serve as an impartial jury of his peers.[35] Deepak Gupta, Mr. Donziger's appellate lawyer, described what he saw during the RICO trial:

> I want to say this delicately because it's not my habit to say anything adverse about—I have the greatest respect for the federal bench. I clerked for a federal judge. I practice before the federal courts. I have never seen a judge whose disdain for one side of the case was as palpable on the bench in ways that I think may not have always come through in the paper record. But it was fairly obvious that Judge Kaplan had great personal animosity for Steven Donziger.... I felt like a great injustice was being done. (Ex. 14, Transcript of Donziger Bar Hearing, p. 357).

The hostility Judge Kaplan displayed toward Mr. Donziger, his clients, and anyone else associated with his defense was not lost on other trial observers. Members of Mr. Donziger's and the Ecuadorian trial teams have indicated that should this Court undergo an investigation of Judge Kaplan's misconduct, they are amenable to being interviewed in relation to this complaint and its allegations. Among them include:

Richard H. Friedman
Friedman|Rubin, PLLP
1126 Highland Ave.
Bremerton, WA 98336
Email: rfriedman@friedmanrubin.com
Phone: (360) 782-4300

Zoe Littlepage
Littlepage Booth
1912 West Main St.
Houston, TX 77098
Email: zoe@littlepagebooth.com
Phone: (713) 529-8000

Rainey Booth
Littlepage Booth
1912 West Main St.
Houston, TX 77098
Email: rainey@littlepagebooth.com

[35] Upon information and belief, Mr. Donziger is the first, or among the first, persons to be denied a jury trial in a civil RICO action.

Phone: (713) 529-8000

B. Judge Kaplan's Hostility Towards Mr. Donziger Permeated Pre-trial Matters and Continued a Consistent Pattern of Judicial Impropriety and Unethical Conduct.

Prior to the RICO trial, Judge Kaplan adopted a procedure that required all parties to present their witnesses' direct exams through sworn written statements. With respect to Mr. Donziger as a Defendant, this meant that his counsel was not allowed to conduct a direct exam of him prior to Chevron having the opportunity to cross-examine him. (RICO Trial Trans. 10/21/13, p. 554). Obviously, this gave Chevron an unfair advantage ahead of time when conducting their cross-exam, given that they knew what Mr. Donziger's testimony would be. Judge Kaplan did, however, allow Chevron to walk its star witness, former Ecuadorian Judge Alberto Guerra, through a direct exam before he could be cross-examined by Mr. Donziger's counsel. (RICO Trial Trans. 10/17/13, p. 515).

Judge Kaplan's ultimate reliance on the testimony of Alberto Guerra for the RICO judgment is a further basis to reasonably question his impartiality. By far, the most significant (yet baseless and totally fabricated) charge against Mr. Donziger is that he and the legal team engaged in a scheme to bribe the trial judge in Ecuador, Judge Zambrano, to allow the plaintiffs to ghostwrite Zambrano's decision in the Ecuador case. This is a charge that Judge Zambrano and all the Lago Agrio Plaintiffs legal team and Mr. Donziger have vehemently denied.

From the record at trial, it is apparent that former Judge Guerra, who preceded Judge Zambrano on the case, was the only witness to support the bribe/ghostwriting charge.[36] From the RICO trial record, the following facts appear undisputed:

- Mr. Guerra was a disgraced former judge, who admitted to taking multiple bribes during his judicial career;[37]

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[36] As noted in the Amicus Brief, Ex. 2 "In the fall of 2009, former Judge Alberto Guerra approached Chevron, purportedly on behalf of Zambrano, with an offer to "fix" the case in the company's favor. CA2 App. A- 1865; Pet. App. 407a. Guerra had been assigned to the case at an earlier stage. At the time, Chevron did not report Guerra's alleged offer to the authorities. Instead, when a different judge was assigned to the case in 2010, Chevron successfully orchestrated his recusal, resulting in Judge Zambrano returning to the case. Pet. App. 185a-186a; CA2 Dkt. 353-2 at 96-97. Instead of reporting an alleged bribery offer, Chevron made sure that the judge allegedly involved presided over its case." p. 11)

[37] Despite admitting to seeking bribes, Guerra at trial tried to make himself look good by saying he was dismissed because he confronted Judges Novillo and Yánez, who succeeded him as judges in part for criticizing their practice of asking the experts for 25 percent of their fees in consideration for having appointed them as such." *Chevron Corp. v Donziger* 974 F. Supp. 2d 362, 505 n907 (S.D.N.Y. 2014)

- At all times relevant to accusations against him, Mr. Guerra worked as a part-time law clerk for Judge Zambrano, the trial judge who issued the ultimate judgment in Ecuador;

- Mr. Guerra approached Chevron to offer his fabricated testimony, at a time he had $146 in the bank;[38]

- Early on, while Chevron was preparing Mr. Guerra for his testimony, Chevron paid him in various installments:

    - $18,000 in cash, plus a new computer;
    - $20,000 in cash
    - $10,000 in cash [39]

Mr. Guerra was paid by Chevron for fabricating lies, which Chevron had full knowledge of. Ultimately, Chevron admitted to providing Guerra—*before* his testimony at the RICO trial—with:

- $12,000 per month since 2012;[40]
- Payment for airfare and moving expenses for him, his wife, his son, daughter-in-law and grandchildren to relocate to the United States;
- A new car and car insurance;
- Health insurance for his entire family;
- Immigration lawyers for his whole family.

It would be extremely unwieldy to utilize the limited space here to catalog every lie that Mr. Guerra was caught in or admitted to in the RICO trial, however for the Court's reference, we list in the Charts below some of the more material and glaring fabrications[41]:

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38 Guerra's Bank Statement (July 2011) introduced in the arbitration.

39 See Exhibit 2 pp. 12-14

40 Mr. Guerra earned $6,000 per ***year*** before working for Chevron.

41 This Chart and the one below were introduced as demonstrative evidence in the RICO trial and were supported by citations to the record.

What Guerra said to Chevron	Reality Established at Trial
Was making $80,000 per year at last job	$6,000 per year
Draft judgment was on his computer & jump drive	NONE
Received Memory Aid from Fajardo by email	NO emails / NO email address
Kept record of meetings in his diary	NONE for Fajardo or Donziger
Had phone conversations with Fajardo & Donziger	Phone records showed NONE
As law clerk for Zambrano, wrote 40 orders in Chevron case	9 orders found on jump drives / computer All from before Zambrano's second term
Zambrano paid him $1,500 - $2,000 per month	Random payments: $300 / $500 All deposits after verdict in the case
Lago Agria plaintiffs had agreed to pay him $300,000	**Admitted that was not true**

Ultimately, the primary versions of stories that Mr. Guerra spun were flatly inconsistent with each other in every material respect, as demonstrated here:

	STORY # 1	STORY # 2
When	Friday January 28	2-3 weeks before verdict
Where	Met Zambrano at Quito airport	Took bus to Lago Agrio
Device	Received verdict on flash drive	Verdict was on Fajardo's laptop
Location for work	Guerra's home computer in Quito	Worked & stayed at Zambrano's apartment in Lago Agrio
Length of time spent	Worked Friday, Saturday & Sunday	Worked only a few hours over 2 days
Interaction with Zambrano	Did not consult with Zambrano that weekend: "There was no reason for it"	Maintained phone contact with Zambrano Had dinner together in the evening
Provided to Zambrano	On jump drive	Left edited verdict on Pablo Fajardo's laptop

Mr. Guerra was prepared by Chevron's lawyers for 53[42] days in advance of his testimony, and yet he still could not identify Mr. Donziger, pointing to one of Mr. Donziger's lawyers. (10/23/13, p. 923-924) Despite such a huge flaw in credibility, Judge Kaplan found him to be "an impressive witness" who "came across well on the

[42] Tr. (Guerra) 1049:9-1052:7.

stand." *Chevron Corp. v Donziger et. al.* 974 F. Supp. 2d 362 at 518 As a result, Judge Kaplan predictably found that the Lago Agrio plaintiffs had bribed Judge Zambrano to allow them to "ghost write" his opinion. As a result Judge Kaplan found the decision was based on corruption by the Lago Agrio Plaintiffs and Mr. Donziger even though they denied that there was any such bribe or ghostwriting.

To assist Chevron on appeal Judge Kaplan made hundreds of pages of "findings of fact" in which his comments on the demeanor of the witnesses, their self interest in particular testimony, and surmise from emails and Mr. Donziger's personal diary or other documents in the record. No doubt Judge Kaplan knew his findings would withstand a "clearly erroneous" challenge. In this way, Judge Kaplan was able to impress the Second Circuit with the length and breadth of his opinion regardless whether the decision bore relationship to the truth. Given the requirement that findings of fact not be overturned unless "clearly erroneous" it would have been virtually impossible for the Second Circuit to overturn any of the factual findings and affirmed the decision.[43]

XI. JUDGE KAPLAN NEVER CONSIDERED WHETHER THE ECUADORIAN JUDGMENT IN FAVOR OF THE LAGO AGRIO PLAINTIFFS WAS SUPPORTED BY THE RECORD DEVELOPED AT TRIAL BEFORE THE ECUADORIAN COURTS.

As noted at the outset, Judge Kaplan's decision in the RICO trial did not reference a single piece of evidence that was placed before the court in Ecuador.[44] He obviously had no access to that record, despite his interest in re-adjudicating the case to achieve an alternative outcome that would instead favor Chevron. In the RICO trial, Judge Kaplan repeatedly focused in on how the judgment was procured in Ecuador, despite not having access to evidence, witnesses or documents that were generated, produced and submitted there. At no point did Judge Kaplan inquire as to whether the judgment was supported by the over 200,000 pages of record, nor reference any of the evidence accepted by the court in Ecuador, and which the higher Courts in Ecuador reviewed and affirmed, except with respect to the amount of damages.

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[43] Judge Kaplan added a state law claim on fraud, which acted as an impediment to Mr. Donziger being able to ultimately appeal his decision to the U.S. Supreme Court. With respect to the challenge to factual findings, see footnote 22.

[44] Although the decision of the Court in Ecuador was was introduced into evidence it was used only to compare it to the wording of Plaintiff's proposed findings of fact which had been presented to the Court, to see if parts of Plaintiffs' proposed findings had been adopted by the Court. Although the document containing these findings of fact and conclusions of law was not officially logged into the record, this was not unusual for the proceedings in Ecuador and was shown also in the arbitration that both parties had filed documents with the Court which did not appear on the official docket. See *infra.*

XII. JUDGE KAPLAN REFUSED TO VACATE HIS ORDER IN THE RICO CASE ONCE HE WAS APPRISED THAT KEY TESTIMONY FROM MR. GUERRA AND FORENSIC EVIDENCE FROM JUDGE ZAMBRANO'S COMPUTER CONTRADICTED THE EVIDENCE CHEVRON PRESENTED AT THE RICO TRIAL. INSTEAD JUDGE KAPLAN INITIATED CIVIL AND CRIMINAL CONTEMPT CHARGES AGAINST MR. DONZIGER.

On September 11, 2017, Mr. Donziger filed a letter with the court in opposition to Chevron's requests for attorneys' fees (which should not be awarded under RICO in cases seeking equitable relief only). (Dkt. No. 1936, Exhibit 15). Mr. Donziger notified the Court about the completely falsified testimony of Mr. Guerra at the private international arbitration[45] Hearing (in which Mr. Donziger and his clients were not a party, only Chevron and the Republic of Ecuador), as well as the forensic evidence regarding Judge Zambrano's computers that proved the lack of veracity of Mr. Guerra's assertions of ghostwriting, and supported Judge Zambrano's trial testimony that there was none. Mr. Donziger undertook a sincere effort at correcting the record, given the weight Judge Kaplan placed on Mr. Guerra's testimony and the lack of credit he gave to Judge Zambrano. Despite Mr. Guerra admitting that he lied under oath in the New York trial, Chevron represented to the court that Mr. Guerra's testimony in the arbitration proceeding "corroborate(d)" his trial testimony (Dkt. 1934 at 10).

Mr. Donziger pointed out the falsity of Chevron's statements to Judge Kaplan by stating, in part, that "[u]nassailable evidence has emerged in the international arbitration proceeding that absolutely eviscerate the Guerra testimony relied on by this court for its core RICO findings." He notified Judge Kaplan of the falsification by stating the following:

- "Guerra testified under oath before this court that the plaintiffs "delivered" to Ecuador trial judge Nicolas Zambrano the "ghostwritten" decision against Chevron after eight years of proceedings in late January or early February 2011, just days before the Ecuador trial judgment issued. (PX 4800 (Guerra Direct) at 18-19, 21). Your Honor relied heavily on this exact testimony and placed it at the center of his finding that the undersigned and others had been involved in a "bribe" of Zambrano in exchange for an agreement to "ghostwrite" the judgment. (Dkt. 1874 at 245) ("About two weeks before the Judgment was issued in February 2011, Guerra went to Zambrano's apartment where he said he met with

[45] As noted, in addition to the RICO case, Chevron instituted a case in the Permanent Court of Arbitration based on a theory that the decisions in the Ecuadorian Courts were fraudulent. Chevron was armed with Judge Kaplan's findings and Complainants believe the arbitration panel was heavily influenced by the RICO judgment as affirmed.

Fajardo and Zambrano. 'Zambrano gave [Guerra] a draft of the judgment so that [Guerra] could revise it.' He told Guerra that the LAPs' attorneys had written the judgment and delivered it to him.").

- The results of a forensic examination—conducted under the auspices of the BIT arbitration that Chevron initiated against the Republic of Ecuador (ROE)—of the hard drives from Judge Zambrano's courthouse computers categorically and forensically prove that this core of Guerra's testimony is false. It is now undisputed that a file containing substantial parts of the Ecuador judgment in draft form was on Zambrano's courthouse computers at least by October 11, 2010. The results also show that on those same computers, the Word file that became the judgment gradually developed as text was added incrementally and the file was saved hundreds of times. Despite having years to respond to this devastating evidence, Chevron has come up with nothing to contradict it.

- Guerra's story was always suspect given his admitted history of corruption and dishonesty, Chevron's exorbitant and illegal payments to him, and the fact that the details of his story shifted repeatedly to match evolving facts. (*See* Dkt. 1640) (motion to strike Guerra's testimony). Indeed, the false story which Guerra told at trial and which the Court relied on in its final decision appeared only after an earlier and strikingly different version of the story was disproven by new facts. Guerra tries to gloss over this in his witness statement, stating that "[i]n trying to recall these events initially, I assumed I had received the document on a flash drive given to me by Mr. Zambrano in the Quito airport, as Mr. Zambrano often provided me flash drives along with the court files. But later on, I specifically recalled that I worked on that document in Mr. Zambrano's residence in Lago Agrio using Mr. Fajardo's computer." (PX 4800 at 18-19). In fact, the earlier story was not merely an assumption, but a detailed explanation by Guerra of being given the draft judgment on a flash drive and then working on it for several days over the course of a specific weekend at his house in Quito. That is what Guerra initially told Chevron's investigators. Chevron "disappeared" this version after its forensic team could not find a trace of the judgment on Guerra's computer. To maintain the flow of payments from Chevron, Guerra then had to shift to a story that left no digital trace, and the story of being given the judgment on Pablo Fajardo's laptop was it. Now that story, too, has been proven false by the forensic examination. This new evidence directly and frontally destroys the core findings of the RICO judgment and nothing in Chevron's opposition—despite its varied attempts at misdirection and spin—changes that fundamental fact. The RICO judgment is unreliable and under equitable principles must be given no weight."

While Chevron's experts have strained to find inconsistencies between the results of the forensic examination and various minor and largely irrelevant details of Judge Zambrano's RICO testimony, the basic and indisputable fact is that the draft judgment was found on Zambrano's courthouse computers as early as October 2010, utterly destroying any possibility that Mr. Guerra's story is true (aside from his own admission that he lied).

Mr. Donziger then called Judge Kaplan's attention to the fact that aspects of the judgment were based on documents that were not officially in the record:

- "Chevron tries to argue that materials not found in the record but in the possession of the plaintiffs were used verbatim in the 188-page judgment, as if this proves "ghostwriting" despite the collapse of the Guerra testimony. In the BIT arbitration, the U.S. legal team for the ROE categorically demonstrated that both parties (Chevron and the Fajardo legal team) occasionally provided the court with materials that were never logged in the official record, either because of logistical problems or other challenges. The ROE went as far as to cite to videotape of both parties handing materials to the judge that were never logged to prove the point that this was an occasional practice engaged with full knowledge of the parties and the court, and was not in the least bit nefarious.

- Perhaps Chevron one day may make the less bombastic and more grounded allegation that such informal practices in Ecuador amount to a cognizable due process claim; regardless, the proof that *both parties* engaged in such practices and that they were common in Ecuador destroys the argument that the judgment's reliance on allegedly 'unfiled' documents proves the bogus 'ghostwriting' allegation."

Mr. Donziger also addressed the issue of Judge Zambrano's "old versus new" computer:

- "Chevron also attempts to salvage the collapsed Guerra testimony by raising the same bogus arguments related to his two computers. Chevron in its opposition puts huge emphasis on the fact that while Judge Zambrano said he typed the judgment into what he called the "new" computer, it initially appeared it had been typed into the so-called "old" computer in his office. This apparent inconsistency, which could easily be explained by inexact memory by an individual who clearly had little technological savvy, was also a key part of the findings by this Court. Dkt. 1874 at 194-95. In its opposition, Chevron slyly persists on this point, noting that "only Zambrano's 'old' computer contained versions of the document in question," but failing to mention that the forensic results in the BIT arbitration

> revealed that ***the old and new computers were networked together*** such that Zambrano was able to edit a document that was "on" the old computer while sitting at his new computer. Again, the evidence shows that Zambrano opened and saved the Word document that became the judgment hundreds of times."

The fact that the draft judgment was *found* on the courthouse computers by itself fatally undermines Mr. Guerra's claim that the judgment was "ghostwritten" by Mr. Donziger or the plaintiffs. And, as indicated, the forensic evidence is even stronger than that. It shows a clear picture of the judgment being developed over time on those computers starting in October 2010, or months before Mr. Guerra claims it was delivered to the trial judge. The only rebuttal Chevron's expert, Spencer Lynch, offered the court before these facts was the observation that various USB drives were attached to the courthouse computers from time to time. Lynch then posited that it would be impossible to "rule out" that the judgment was not copied—piece by piece—from files on USB drives during late 2010 and early 2011. There is no way this far-fetched speculation is sufficient to support the claim that the judgment was ghostwritten. Lynch's new USB conspiracy theory contradicted Mr. Guerra's version of the judgment being "delivered" by the plaintiffs in late January 2011—a discrepancy Chevron never even addressed. It will indeed never be possible to "rule out" every new and far-fetched conspiracy theory Chevron can conjure up to avoid liability. More importantly and to this Court's concern, Judge Kaplan had **no** reason to have engaged in this costly and wasteful second-guessing of a matter that was never before him in order to assist Chevron in reaching a judgment that favored it and attempting to nullify the judgment of Judge Zambrano...

Judge Kaplan never responded to any of these claims. However in his opinion imposing the Special Master's Costs on Mr. Donziger (11-cv-0691 Dkt.# 1959) Judge Kaplan stated he would have ruled the same way regarding remedies absent Guerra's testimony, citing most prominently that the Plaintiff's had ghostwritten Judge Zambrano's opinion (in the absence of a bribe to do so). That is, even though Mr. Guerra's admitted lies, and the forensic evidence were flatly inconsistent with ***every*** version of the ghostwriting/ bribery story Mr. Guerra told, and **despite Mr. Guerra being the only link between Zambrano and the Lago Agrio Plaintiffs on that issue** Judge Kaplan doggedly kept to his claim that the Zambrano opinion had been ghostwritten by the Lago Agrio Plaintiffs.[46]

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[46] In this opinion on costs Judge Kaplan also claimed there was enough basis to find the Ecuadorian judgment to be a fraud in the absence of Guerra's testimony because it was based on the report from an expert who the Court found had been provided information for his report by Plaintiffs. Despite Zambrano claiming no reliance on that expert report the Court found Zambrano did rely on it because he relied on the number of oil pits that came from the expert report when it did not. Further Judge Kaplan claimed that the effort to prevent a judicial inspection totally corrupted the decision. This cannot be true given the large number of samples and inspections done.

XIII. CONCLUSION

This Complaint of judicial misconduct by Judge Kaplan cannot possibly compress the ten years of litigation that Mr. Donziger and his clients in Ecuador endured in a short document. Chevron has spared no expense to try to destroy Mr. Donziger, the chosen legal representative of a class of plaintiffs, and Complainants allege show them to have been in judicial partnership with Judge Kaplan since they initiated their harassing and wasteful proceedings.

Given this long history of judicial abuse, the undersigned are concerned about what litigants may expect when they appear before Judge Kaplan and whether they – depending on the claims they bring and who the defendants are – will receive fair process or audience before Judge Kaplan given his inappropriate behavior and rulings. These proceedings initiated by Chevron against Mr. Donziger were always intended to harass him, as Chevron admits, at the cost of personal, economic and professional destruction to a human rights attorney. Such behavior should find no favor with the courts, much less encouragement.

We respectfully request an impartial investigation of the facts alleged in this complaint be carried out by dispassionate actors with no knowledge of the allegations or parties. For those complainants that are practitioners before this court and federal courts in general, many of the undersigned have reservations about Judge Kaplan's behavior and the implications for counsel who represent their clients, however sympathetic or unsympathetic they may appear to be before the court.

As the foregoing should show, Judge Kaplan's conduct from the minute he began presiding over this case he acted as another counsel for Chevron in violation of the Canons of Judicial Conduct. He continues to this day to do Chevron's bidding. While there is no indication that Chevron has provided anything of value to Judge Kaplan, we respectfully request that based on the strong evidence of partiality towards Chevron that the investigation of Judge Kaplan include a thorough investigation of his relationship with Chevron.

EXHIBIT 1

14 October 2008

To: Kent Robertson

From: Sam Singer

Re: Ecuador Communications Strategy

Overview

I have reviewed all the recommendations from each of the team members and analyzed the various approaches and have selected what I believe are the best and essential strategies from each of the parties. In this document I synthesize the recommendations and present them in the categories below as well as recommended actions for each. This document should serve as a punch-list for you.

Lastly, we make a suggestion on how to distribute the workload so that each of us is helping Chevron to the maximum ability possible while reducing redundancies and overlaps.

Communications Objectives

The communication objectives of each of the teams all is to get improved and balanced media coverage of the Ecuador issue, to preserve the reputation of Chevron; to have the media, public and government officials to challenge the accusations made by the plaintiffs, and most importantly, to achieve an improved outcome for the Company in any litigation.

Messages

Chevron's messaging must be simplified. Our website and media materials are too dense. A simple storyline that is concise, engaging and compact is essential to our success. If we don't have messages that are compelling – and right now we don't – it makes it very hard for us to sell our story to the media and public.

The recommendation is to re-draft the media materials on the website and create new ones that take a complex legal, environmental, health, and business and make it more easily understandable.

Target Audiences

News Media: Latin American media, American news media with an emphasis on foreign correspondents, political environmental, health, and legal reporters and some editorial boards, internet and bloggers.

Elected/Regulatory leaders: as appropriate, seek out elected leaders and regulatory agencies at the national level to educate about our story.

Business organizations/Think Tanks: Seek support and news stories in the publications and webpages and blogs.

Latin America: New opportunities are presenting themselves as Ecuador becomes increasingly authoritarian, anti-business/socialist and aligns itself with China, Russia and Iran.

Message Themes

1. Regional stories that focus on Ecuador's government and economic threats

--Government by Extortion in Ecuador (broaden the scope and generate stories on Cemex, Odebrecht, Agip, Brazilian businesses, banking issues, and debt repayment

--Freedom of speech is threatened in Ecuador by government takeover of TV, press censorship

--Is the strongman of Ecuador, Correa, leading the country down a socialist path?

--Ecuador: the next major threat to America? Alliances by the Ecuadorian government with China for arms and military issues, Iran for energy, and possible alliances with Russia leads one to wonder if Ecuador is the next Cuban missile crisis in the making.

2. Counter attacks against the plaintiffs focusing on their motives, funding and campaign of misinformation

-- Dr. Jeckyll & Mr. Cabrera: Who is Richard Cabrera and what is his background and association with the plaintiffs?

--The Secret Laboratories of Ecuador and why even judges can't know their secrets

--Steven Donziger, the most powerful man in Ecuador? How one American attorney is pulling the strings of an emerging banana republic in Ecuador?

Kohn Swift & Graf (or Con, Swindle and Graft?): the money behind the Ecuadorian lawsuit against Chevron. How much money does the law firm have riding on Steven Donziger and Pablo Fajardo and what's their take?

--The real story of Texaco (and Chevron) in Ecuador: how the case was thrown out in America for fakery and deceit

--Is the case against Chevron really a novel written by John Grisham? What appears to be real is in fact a front for something else.

3. Ecuadorian Justice: No Justica for all?

--Collusion between the government and the plaintiffs, as well as judges who are dependent upon Correa for their livelihoods and lives, makes justice thin as the air in Andes.

-- The history of the indictments that finally came to be on Chevron attorneys: how the case was initially 'dismissed' and came back to life like Frankenstein when the plaintiff's and the Ecuadorian government needed cover for their case against Chevron

4. PetroEcuador: the real culprit

--The history of PetroEcuador and how it caused Ecuador's environmental problems – and how the country and its state-owned oil monopoly could be saved from cleaning up their own mess by Donziger, Kohn Swift and Graf, and other plaintiff attorneys

--Seizing the opportunity to criticize PetroEcuador on current problems the state-owned company faces in its own country.

--The real health threat: dirty water not formation waters.

Materials

Media Kit: we need to produce a straightforward media kit with essential information about the issue. This information kit can be used with all target audiences

Webpage: Chevron needs to revamp and re-organize its webpage with more use of photos and video and make the site more compelling.

Videos: This is a complex story, but it can be made more understandable visually. More videos of various lengths are needed for the Chevron website, but also for posting to other websites, Youtube, etc.

Pictures: We need to organized and get a library available of pictures that tell our side of the story along with the captions that explain them.

Activities

News releases. Produce more written materials that can be issued via Chevron or its website(s). Our opponents are controlling valuable internet 'real estate' because they *and* their various support groups issue news releases constantly – and this leads not only to news coverage, but to a higher SEO for them on the web. These releases must be placed on BusinessWire/PRwire.

Roadshow/deskside visits: Devote time to meet and develop relationships with news reporters/editors, supportive business groups, trade associations, think tanks, elected and regulatory officials and present our side of the Ecuador story.

Blogs: Relentlessly use the blogosphere: an unofficial blog site has been created for Chevron that can be put to significant use. Additionally, Chevron needs to add a blog to its webpage so that it can increase its SEO.

Op/eds: Develop opinion pieces aimed at larger issues than solely Ecuador, but rather focus on the socialist government of Correa, its nationalization of some industries, its abuse of the media, human rights abuses, Farc, and bigger picture issues that disparage the Corra government and cast doubt on

Wikipedia/Googl's Knol: Aggressively write Chevron's side of the story – as well as starting entries for Amazon Watch, Donziger and others on these online encyclopedias. Why should we let them write history when we can write it ourselves?

Support Group: Provide funding to the US Chamber of Commerce or another think tank/organization to create an organization solely devoted to addressing the issues of Ecuador and actively attacking its position on business, the media, international loans, and Socialist policies, and alignments with China, Iran and Russia. Assist them in starting their own website to promote this new organization and news stories that are important to it as well as a lobbying effort.

Advertisements: Place online ads that direct people to stories or websites that we like with teaser ads that induce viewers to click on them.

Conclusion

There are a variety of excellent recommendations by each of the teams which I hope I have captured here in a punch-list format.

To get the maximum from each of the teams, it is advisable to assign specific assignments. For example, H&K naturally is knowledge at national and international media located in NYC, CRC excels at Washington D.C. media and political connections, James Craig is your man in Quito, and we are solid online internet and California/west consultants. The teams work very well together and are thoroughly professional in carrying out Chevron's best interests. Occasionally, there are some minor overlaps, but perhaps physically assigning certain tasks to each team may lead to even increased productivity on your behalf. Then, to get the best brain power from all of us, ask the rest to comment or make suggestions to the group you have charged with a specific task in their arena.

Collectively we must move with alacrity in attempting to get ahead of the curve and produce materials and strategies in advance of upcoming, known news events that impact us so that we can get Chevron approval on materials and issue them in a timely manner.

Please let me know how else we can be of assistance to you and Chevron. Thanks.

EXHIBIT 2

No. 16-1178

IN THE

Supreme Court of the United States

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, and HUGO GERARDO CAMACHO NARANJO,
Petitioners,
v.
CHEVRON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* AMAZON WATCH AND RAINFOREST ACTION NETWORK IN SUPPORT OF PETITIONERS

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May 1, 2017

QUESTION PRESENTED

Chevron's own misconduct demonstrates why courts should not entertain collateral attacks on foreign judgments: because of that misconduct, the District Court accepted what subsequent evidence revealed to be admittedly false testimony, and the known facts now show that the District Court was actually wrong in many of its conclusions regarding the trial in Ecuador. And Chevron's own wrongdoing could itself give rise to a collateral attack on the judgment below, leading to an unending cycle of litigation.

In Ecuador, Chevron paid millions to its agent who faked a bribery scandal, which Chevron used to have the presiding judge recused. And then in New York, Chevron paid its star witness – a corrupt former judge who had previously solicited bribes from Chevron – a relative fortune. That turned out to be money well spent for Chevron, because, as the witness admitted after trial, he lied in his testimony in this case – testimony that formed the bedrock of many of the District Court's key conclusions.

Courts should generally refrain from investigations into foreign trials because they are liable to get them wrong, and because they could result in lawsuits bouncing between different countries: just as Chevron did, the Petitioners here could launch a preemptive attack on the judgment below anywhere in the world, at least anywhere that Chevron is subject to jurisdiction.

While examination of the course of foreign litigation may be necessary where a party seeks to enforce a foreign judgment, a preemptive, collateral

attack on such a judgment is highly inappropriate.

Indeed, the only reason Chevron's massive pollution was litigated in Ecuador, rather than New York, where the Ecuadorian Plaintiffs originally sued, was because *Chevron* successfully argued Ecuador was a more suitable forum. Chevron reversed course only when it appeared it might lose in Ecuador. Since cases already dismissed on *forum non conveniens* grounds will often have a preexisting nexus to that U.S. forum, under the Second Circuit's ruling, *forum non conveniens* dismissal will typically be the beginning, not the end, of U.S. litigation. The loser could simply return to the U.S. to launch a preemptive collateral attack on the foreign judgment.

Since allowing the decision below to stand would have sweeping ramifications for relations among courts worldwide and *forum non conveniens*, this Court should grant *certiorari* on Petitioners' first question presented:

> Do federal courts have jurisdiction to entertain preemptive collateral attacks on money judgments issued by foreign courts?

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Amazon Watch and Rainforest Action Network submit this brief in support of the Petition for Writ of Certiorari.[1]

Amazon Watch is a nonprofit organization focused on protecting the rights of indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people living in and around the "Oriente" region of Ecuador, where the operations of Chevron's predecessor, Texaco, caused one of the worst environmental disasters in history.

For over fifteen years, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities' efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses.

Rainforest Action Network (RAN) is a nonprofit organization that campaigns for the forests, their inhabitants and the natural systems that sustain life through education, grassroots organizing, and non-violent direct action. RAN's work includes informing and educating people about environmental and social justice issues, including legal cases such as the lawsuit in Ecuador against Chevron and Chevron's obligation to compensate its victims in Ecuador. RAN has campaigned around the case to support the Ecuadorians who continue to suffer from

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were provided at least 10 days' notice and consented to the filing of this brief.

the effects of ongoing pollution.

SUMMARY OF ARGUMENT

Allowing preemptive collateral attacks on a foreign money judgment is likely to result in numerous evidentiary errors, and may well result in interminable litigation. The facts here demonstrate both risks. The proper forum for a collateral attack on a judgment is the forum that issued the judgment. That is especially so where, as here, the complaining party chose that forum by way of a successful *forum non conveniens* challenge.

The facts here demonstrate the folly of attempting a definitive re-litigation of a foreign trial, rather than simply determining whether a judgment may be enforced. In that trial, Chevron's hands were anything but clean. After securing dismissal of the original litigation from New York, Chevron tampered with evidence of pollution, lied to the Ecuadorian court, paid millions of dollars to avoid damaging testimony, and sought to entrap a judge in a fabricated bribery scandal, creating the appearance of corruption in order to prevent enforcement if it lost in Ecuador.

And Chevron's tactics before the District Court below led that court to factual errors – indeed, we now know that some of the facts found by the District Court were simply wrong. Central to Chevron's case below was its claim that Petitioners had offered (but never paid) a bribe to the Ecuadorian judge to let them "ghostwrite" the judgment. Despite virtually limitless discovery, Chevron never produced a draft of the judgment, nor any communications by Petitioners evidencing a ghostwriting or bribery scheme. Instead Chevron relied on the testimony of Alberto Guerra, an admittedly corrupt former judge who came with a

multi-million-dollar price tag. The District Court relied heavily on Guerra's testimony, and it is the only evidence for numerous conclusions of fact. But Guerra subsequently admitted to lying on the stand during the RICO trial about central facets of his bribery and ghostwriting allegations. And much of the "corroborating evidence" that supposedly supported Guerra's self-interested testimony has been refuted in later, related proceedings.

Chevron's conduct below highlights the risk that one collateral attack will only beget another; that the loser in the collateral action will challenge *that* ruling in another forum. Chevron's misdeeds could easily give Petitioners a basis to attack the judgment below in a collateral proceeding in another country, leading to yet more judicial chaos.

Instead, collateral attacks on money judgments should be limited to the country that issued the judgment. Of course, U.S. courts can assess foreign litigation in determining whether to allow enforcement in the U.S., but they cannot arrogate to themselves the task of a definitive examination of a foreign trial.

This is all the more so here, where Chevron succeeded in moving the litigation to Ecuador via *forum non conveniens*. Chevron's request that a federal court oversee the Ecuadorian judiciary was a 180-degree reversal from its prior position that the case should be tried in Ecuador, *not* New York. *Forum non conveniens* dismissal usually ends a federal court's involvement. But the decision below encourages losing parties to return here and challenge the foreign judgment – indeed, it encourages any losing party, in litigation anywhere in the world, to

seek a second look in a friendlier jurisdiction. That would undermine judicial efficiency, create perverse incentives and lead to litigation without end.

Making matters worse, the decision below only re-examined events in Ecuador to Chevron's benefit: it judged the judicial process in Ecuador, without bothering to determine whether, as the Ecuadorian court found, Chevron is actually responsible for the harms. Chevron never contested in this action that it dumped toxic oil drilling wastes into streams and unlined pits on a massive scale. Nor has it denied that the Ecuadorian plaintiffs have suffered terribly for Chevron's recklessness.

FACTUAL BACKGROUND

For more than three decades, Chevron (then Texaco) discharged billions of gallons of toxic drilling wastes into unlined pits – and rivers and streams – in a vast, previously pristine area of the Ecuadorian Amazon. Chevron has polluted local indigenous peoples' drinking water to this day. Chevron's neighbors originally sought redress in Texaco's home forum, New York, but the Court dismissed to Ecuador on *forum non conveniens* grounds. An Ecuadorian court eventually found Chevron liable, and that judgment was upheld on appeal. While that case was still being litigated, Chevron filed this action, but it did not, at trial, attempt to deny that it is responsible for massive pollution in Ecuador.

I. After securing dismissal to Ecuador, Chevron engaged in a pattern of corrupt and illegal behavior.

A. Chevron engaged in political pressure and unethical and fraudulent tactics to try to win the case in Ecuador.

After prevailing on *forum non conveniens*, *see Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002), Chevron tried to steer the re-filed Ecuadorian litigation its way. Chevron met with the Attorney General of Ecuador, *see* CA2 App. A-422-23, and aggressively lobbied Ecuadorian presidents "to use their authority to halt litigation." *Id.* A-2202 n.55 (quoting Ecuador's Ambassador); *id.* A-2201-204. Chevron even lobbied the U.S. government to threaten to revoke trade benefits to pressure the Ecuadorian government to make the case disappear. *See, e.g.*, Kenneth P. Vogel, *Chevron's lobby campaign backfires*, Politico, (Nov. 11, 2009), http://www.politico.com/story/2009/11/chevrons-lobby-campaign-backfires-029560.

Chevron also engaged in corrupt litigation tactics, including an extensive campaign to skew the scientific sampling. Chevron set up front companies to analyze samples that were supposed to look like independent labs. CA2 App. A-1585-86, A-1588-90. Before site inspections where the judge would supervise the collection of samples by the parties' experts, Chevron secretly conducted pre-inspection tests to determine how to hide contamination. *See, e.g.*, CA2 Dkt. 150 at 12-13. Chevron used its relationships with the military to create a non-existent security threat to get the court to cancel inspections of sites it knew to be

contaminated. CA2 App. A-1091-93; *id.* A-1093 ("the Court . . . was in fact misled by Chevron Corporation's attorney . . . to suspend a judicial proceeding based on false information"). Chevron repeatedly used delay, disruption, and intimidation tactics in the court proceedings. *See, e.g., id.* A-3212-18.

One key actor was Diego Borja, who worked as a Chevron contractor, CA2 App. A-3265, and was listed on Chevron's "Litigation Team" organizational chart as a "sample manager." *Id.* A-3154; CA2 Dkt. 150 at 17. Borja himself said "my signature is on all the evidentiary documents," CA2 App. A-1576; he "even contracted for the house where they were going to do the analysis," and had been involved "[s]ince 2004." *Id.* A-1600.

Borja was later recorded saying he had evidence of Chevron's illegal conduct in Ecuador, "things that can make the [Ecuadorian Plaintiffs] win this just like that," "conclusive evidence, photos of how they [Chevron] managed things internally"; Borja said he could make Chevron lose "right away." *Id.* A-1572-73. He said he had "proof" that the supposedly independent laboratories where Chevron sent samples to be analyzed "were more than connected, they belonged to them." *Id.* A-1585-86. And he explained how he set up four companies for Chevron "[s]o that things could be managed in an independent way." *Id.* A-1588. According to Borja, if the judge found out how Chevron "cooked things," the judge would "close them down." *Id.* A-1590.

The evidence alluded to by Borja never surfaced, but the court still repeatedly sanctioned Chevron's lawyers for its obstructive behavior. *Id.* A-3217-18; *id.* A-467 ("Chevron was ordered to pay court costs for its

manifest, notorious and evident bad faith"). The Ecuadorian appellate court described Chevron's "overtly aggressive and hostile attitude" in the proceedings, and said its "conduct in the case, rarely seen in the annals of history of the administration of Justice in Ecuador, was abusive to the point that, should this Division overlook such attitude . . . it would be an example setting a disastrous precedent for other litigants." *Id.* A-467.

B. Chevron planned for a future challenge to a judgment by attempting to corrupt the Ecuadorian proceedings.

When Chevron's own manipulated testing showed Chevron's responsibility for contamination, *see* CA2 Dkt. 150 at 20, and with neither the Government of Ecuador nor the court willing to bend to its will, Chevron changed tactics. It corrupted the appearance of the judicial process, so it could later claim any adverse judgment was unenforceable.

In October 2008 – before any evidence of any alleged misconduct was discovered – Chevron's public relations consultant detailed this strategy in a memo: key "message themes" should include "Government by Extortion in Ecuador," "Collusion between the government and the plaintiffs," "judges . . . dependent upon [President] Correa for their livelihoods and lives," and "justice as thin as the air in the Andes." Memo from Sam Singer to Chevron spokesperson Kent Robertson (Oct. 14, 2008), at 2, http://chevrontoxico.com/assets/docs/2008-10-14-singer-memo.pdf. The memo further detailed the need for "attacks against the plaintiffs focusing on their motives," messaging the patently false claim that "the

case was thrown out in America for fakery and deceit," and vilifying Donziger, the "American attorney" "pulling the strings of an emerging banana republic in Ecuador." *Id.* Chevron then implemented this strategy.

1. Borja orchestrated a fake bribery scandal which Chevron used to try to undermine the proceedings.

In the spring of 2009, Diego Borja and convicted drug trafficker Wayne Hansen posed as businessmen and secretly – and illegally – taped a meeting with an Ecuadorian businessman and two meetings with Judge Nuñez, then presiding over the Ecuadorian case. They asked Nuñez whether he would rule against Chevron; the judge refused to discuss the matter. *See, e.g.*, CA2 App. A-3265-68. Borja traveled to San Francisco to deliver the three recordings to Chevron's U.S. counsel, then promptly flew back to Ecuador for another secretly recorded meeting with the businessman. *See id.* A-3154-55; *id.* A-3266. At that meeting, Borja and Hansen discussed a bribe, but Nuñez was not there, and nothing suggests that he ever contemplated accepting a bribe. *Id.* A-3266-67. Borja admitted "there was never a bribe." *Id.* A-3268.

Although the tapes showed no bribery involving the judge, as Borja explained, "you don't only win with evidence, but with media." CA2 App. A-1582. Chevron used the tapes in a major public relations campaign claiming that they revealed "a $3 million bribery scheme implicating the judge" presiding over its case. Chevron Corp., *Press Release: Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009),

https://www.chevron.com/stories/videos-reveal-serious-judicial-misconductand-political-influencein-ecuador-lawsuit.

Borja later explained that the purpose of the Nuñez incident was "to void all the judge's rulings," CA2 App. A-1581, which was also reflected in Chevron's press releases. *See* Chevron Corp., *Press Release: Chevron Seeks Annulment of Rulings by Ecuadorian Judge* (Sept. 11, 2009), https://www.chevron.com/stories/chevron-seeks-annulmentof-rulingsby-ecuadorian-judge (if Judge Nuñez's rulings stand, "Chevron would be denied the right to impartial justice and due process").

Despite Borja's work for Chevron, *see, e.g.*, CA2 App. A-3154, and delivery of the tapes directly to Chevron's counsel, Chevron claimed that the recordings were made "without Chevron's knowledge." Chevron Corp., *Press Release: Videos Reveal Serious Judicial Misconduct*. Chevron also lied to the Ecuadorian court, claiming that Borja's work for Chevron "had already concluded" by the time of the recordings and his "functions had nothing to do with the sampling process." CA2 App. A-3154 (quoting July 13, 2010 Chevron filing).

Chevron's effort to throw out Judge Nuñez's rulings failed. Nonetheless, despite the lack of evidence of his wrongdoing, Nuñez recused himself to avoid the appearance of impropriety. *Id.* A-3218.

Three weeks later, Chevron used the Nuñez incident as part of the basis of its international arbitration claim against Ecuador, alleging the judicial proceedings violated the Ecuador-United States Bilateral Investment Treaty (BIT). *Chevron Corp. v. Republic of Ecuador*, Claimant's Notice of

Arbitration, at 12 (Sept. 23, 2009), *available at* https://www.chevron.com/documents/pdf/ecuador/NoticeOfArbitration.pdf. Chevron claimed that Judge Nuñez had "revealed his bias and pre-judgment of the case," accused the government of "collu[ding]" with the plaintiffs' lawyers, and asserted "Ecuador's judicial system is incapable of functioning independently of political influence." Chevron Corp., *Press Release: Chevron files international arbitration against the Government of Ecuador over violations of the United States-Ecuador Bilateral Investment Treaty* (Sept. 23, 2009), https://www.chevron.com/stories/chevron-files-international-arbitration-againstthe-governmentof-ecuador-over-violationsofthe-united-states-ecuador-bilateral-investment-treaty.

2. Following the Nuñez recordings, Chevron paid Borja millions of dollars.

After Borja's dirty tricks, Chevron ensured that he was sufficiently well compensated so that he would not turn on the company. Chevron has paid Borja *more than $2 million* in benefits. *See* CA2 App. A-3155 (including $5,000-$10,000 as a monthly "stipend," his U.S. taxes, housing expenses, and a car, among other benefits); Pet. App. 657a ("Chevron paid for Borja's and his wife's living expenses for at least two years."). And Chevron provided Borja a fully furnished home, with a pool, on a golf course, in California. CA2 App. A-1591-93.

This plan worked: Borja told a friend months later, from his new home, "I haven't talked to anyone, they have me all cloistered away." *Id.* A-1591. Borja later signed declarations disavowing his earlier recorded

statements where he said he had evidence damaging to Chevron. *See* CA2 Dkt. 150 at 19.

3. Chevron ensured that a judge it could accuse of bribery was assigned to the case.

Following Judge Nuñez's recusal, Judge Nicolas Zambrano took over the case. In the fall of 2009, former Judge Alberto Guerra approached Chevron, purportedly on behalf of Zambrano, with an offer to "fix" the case in the company's favor. CA2 App. A-1865; Pet. App. 407a. Guerra had been assigned to the case at an earlier stage. At the time, Chevron did not report Guerra's alleged offer to the authorities. Instead, when a different judge was assigned to the case in 2010, Chevron successfully orchestrated his recusal, resulting in Judge Zambrano returning to the case. Pet. App. 185a-186a; CA2 Dkt. 353-2 at 96-97. Instead of reporting an alleged bribery offer, Chevron made sure that the judge allegedly involved presided over its case.

II. Chevron's payments to its star witness fundamentally corrupted the proceedings below.

Chevron filed its preemptive collateral attack in New York before the court in Ecuador had even issued its judgment. The testimony of Guerra – Chevron's key witness – was the only direct evidence that the Ecuadorian plaintiffs' lawyers had offered Judge Zambrano a bribe. As with Borja, however, Chevron invested millions of dollars in Guerra to ensure that his testimony was favorable. And it was. But Guerra himself subsequently confirmed that he lied.

A. Chevron's payments to its star witness make it impossible to know the truth.

Guerra approached Chevron again in April 2012, after the Ecuadorian court had issued the judgment, to try to make another deal. This time he succeeded. Guerra, who knew about Borja's handsome compensation, CA2 Dkt. 461-2 at 34, was looking "to negotiate a large payment," Pet. App. 424a, and he did.

In July 2012, Chevron sent Andres Rivero, one of its U.S. lawyers, and a private investigator to Ecuador – with $18,000 in a suitcase – to meet with Guerra. *See* CA2 App. A-2771, A-2804. The cash was supposedly to buy Guerra's computer; Chevron hoped to find a draft of the final judgment, which Guerra claimed he had written. *See id.* A-2764. Recordings of the meeting show Rivero, the investigator, and Guerra negotiating a payment:

> INV #5: You, let's say, tell us how much, how much.
>
> GUERRA: Well, how much are you willing?
>
> ...
>
> RIVERO: I'm an attorney, so then... How... for me it's, uh... I don't mind setting, uh, a, a starting figure right? Starting. Understand? Or, [INV #5] what do you think?
>
> INV #5: Yes, Yes. We have twenty thousand dollars in the...
>
> RIVERO: In hand.
>
> INV #5: In hand, right?

GUERRA: Couldn't you add a few zeroes?

Id. A-2768-69. This money was an incentive to Guerra – a witness – and not the replacement cost of his computer; in fact, Chevron gave Guerra a new computer, in addition to $18,000 in cash, in exchange for his old computer, his personal "day planners," USB drives, and permission to access his emails. *Id.* A-1300. Indeed, by the time it paid Guerra, Chevron's agents had already searched the computer, and were "unable to find the main document"; "Had we been able to find it, we would have been able to offer you a larger amount." CA2 Dkt. 461-2 at 738.

Chevron knew Guerra was unemployed and had no savings. *Id.* A-2737; *id.* A-3002. Rivero made it clear that if Guerra could deliver more, and if he could convince Zambrano to work with Chevron, Chevron would pay Guerra more money. *Id.* A-2786 ("you get yours when a deal is reached with Zambrano, a part of it . . . . The idea is that you get a, some part of the value of that, because we didn't get to Nicolas Zambrano except through you.").

In November 2012, Chevron paid Guerra another $20,000 in exchange for "bank records, credit card records, and shipping records" provided as "contemporaneous corroboration" of the information he told Chevron. *Id.* A-1301.

Though Chevron, through Guerra, offered Zambrano "a minimum of $1 million or whatever he wanted" to cooperate with Chevron, Zambrano refused. Pet. App. 433a. As Guerra was unable to deliver on a draft judgment, *see* CA2 App. A-2814, 2817-19, and unable to deliver Zambrano, the story evolved and hinged more on Guerra's testimony itself. *See, e.g.,* CA2 Dkt. 150 at 55-56. Chevron flew Guerra

to Chicago and spent four days "negotiat[ing]" the perks he would receive in exchange for testifying. *See, e.g.*, CA2 App. A-3031; *id.* A-3058-59. During those negotiations, Guerra – who by that point had been unemployed for months – signed a declaration for Chevron. *Id.* A-3043.

In January 2013, Chevron and Guerra signed a contract detailing the benefits Chevron would provide to Guerra and his family in exchange for Guerra testifying. The benefits were guaranteed for two years, with an option of renewal. *Id.* A-1303. In exchange, Guerra had to "make himself available to testify . . . in any aspect (pre-trial, trial or post-trial) of the Chevron SDNY Case[,]" and to "meet with, be interviewed by, and make himself available to Chevron Representatives and to testify . . . at the request of Chevron in any . . . proceedings related to or concerning the Lago Agrio litigation." *Id.* A-1302. The benefits Chevron agreed to pay Guerra were "compensation" and were separate from and "in addition" to "travel and other expenses" associated with testifying. *Id.* A-1303.

At least twice, Chevron surprised Guerra with promises or payments of even more money, just before he testified. In May 2013, on the day before he was to be deposed, Chevron told Guerra he would receive an additional $10,000, money he did not even ask for. *Id.* A-3065-66. Guerra did not receive the payment right away. Instead, Chevron paid him the $10,000 in October 2013, shortly before his trial testimony. *See id.* A-771-72. Again, according to Guerra, "the payment of $10,000 from Chevron was unexpected." CA2 Dkt. 461-2 at 42. Chevron gave a similar incentive just before Guerra's testimony in the arbitration proceedings, renewing its compensation

agreement for at least another year. *Id.* at 70.

All told, since July 2012, Chevron had given Guerra *at a minimum*:

- $432,000 in monthly payments;
- $12,000 for household items;
- $48,000 in cash in exchange for evidence;
- A new computer;
- Payment of all U.S. taxes;
- Expenses for Guerra and his family to move to the U.S.;
- Health insurance for Guerra and his family;
- A car and car insurance; and
- Payment for an immigration attorney for Guerra and his family, an attorney to represent Guerra in the US proceedings, an Ecuadorian attorney, a tax attorney, and an accountant.

See CA2 App. A-1302-303, A-1370, A-770, A-778; CA2 Dkt. 461-2 at 60, 69.

B. The District Court relied heavily on Guerra's testimony despite its inconsistencies, Guerra's history of corruption and his lucrative witness salary from Chevron.

Guerra's testimony was central to Chevron's allegations and the trial court's findings. In particular, it was the only evidence of a scheme to bribe Judge Zambrano to rule against Chevron.

The District Court acknowledged Guerra's

testimony was inconsistent. *See, e.g.*, Pet App. 417a (noting an "inconsistency" that "is not easily reconciled"); *id.* at 429a. "Each recounting" of Guerra's story "yielded variations in some of the details." *Id.* at 429a; *id.* at 443a ("details of his story . . . have changed"). This included key details that should have been verifiable – for example, "Guerra's testimony regarding how he allegedly received the draft of the Judgment to begin his work on it changed." *Id.* at 430a; *see also id.* at 432a (inconsistencies in Guerra's story of how he had allegedly received a "memory aid" from the Ecuadorians' lawyer).

The District Court noted Guerra "often has been dishonest," and that he had "multiple" times in his professional history "accepted bribes," "lied," and "broken the law." *Id.* at 427a-429a, 443a. And the court noted that "Guerra's willingness to accept and solicit bribes" among "other considerations, put his credibility in serious doubt, particular in light of the benefits he has obtained from Chevron." *Id.* at 429a.

But the court nonetheless found Guerra – who, unlike Judge Zambrano, rehearsed his testimony over 50 times with Chevron's trial team, CA2 Dkt. 461-1 at 8 – to be an "impressive witness," who "testified clearly, directly and responsively," and "rarely hesitated." Pet. App. 427a. As later became clear, *infra* Section II.C., Guerra was just a practiced liar.

Ultimately, largely because it found that Guerra was telling the truth, Pet. App. 443a; *accord id.* at 358a-359a, the District Court found that Donziger and the Ecuadorian plaintiffs' counsel organized a scheme to pay $500,000 to bribe Judge Zambrano – money that was never paid – and that Donziger and his team ghostwrote the Ecuadorian decision. Guerra, of

course, was paid far more than this by Chevron, and as noted above Chevron's also unsuccessfully offered twice this amount to Zambrano if he would testify in Chevron's favor.

C. Since the District Court issued its opinion, Guerra has admitted to lying on the stand and the supposedly corroborating evidence has been thoroughly refuted.

Much of the evidence the District Court relied on subsequently fell apart. Guerra's "credibility," already virtually nonexistent, has been further undermined by his testimony in the arbitration proceedings, where he admitted to lying in this case.

At trial, Guerra testified that Judge Zambrano had an arrangement with the Ecuadorian plaintiffs' lawyers for $500,000 and that Zambrano had promised to give Guerra 20 percent. *See e.g.* CA2 App.A-817, A-782. But in the BIT proceedings, Guerra later admitted that "it wasn't true," and "I did not discuss 20 percent with Mr. Zambrano." CA2 Dkt. 461-2 at 37. Guerra also acknowledged in his testimony that he had misrepresented exchanging drafts of the judgment with Judge Zambrano via flash drive. *Id.* at 58. *See also* CA2 Dkt. 461-1 at 6-8 (summarizing other examples of lies Guerra admitted in his subsequent testimony).

The arbitration proceedings have also undermined much of the supposedly corroborating evidence. There was little evidence to corroborate Guerra's testimony to begin with; while the District Court enumerated long lists of supposedly corroborating facts, many of these were simply the court's own analysis, such as that the Ecuadorians "had huge financial and other

incentives" to want to win, Pet. App. 446a, or that the Ecuadorians admitted that Guerra solicited a bribe from them and did not report this to the authorities, *id.* at 445a – facts that apply equally to Chevron.

Much of the actual evidence concerned an alleged bribery-and-ghostwriting scheme during an earlier period when Judge Zambrano was presiding over the case. Guerra alleged, and the District Court found, that when Chevron declined Guerra's offer to "fix" the case in the fall of 2009, Guerra worked out a deal with the Ecuadorians' counsel to "move the case along in their favor," but not to fix the outcome. *Id.* at 407a-408a. One significant piece of corroborating evidence for this scheme was shipping records showing packages that Guerra exchanged with Zambrano. Pet. App. 403a-404a. The Petitioners challenged the validity of these shipping records, *see* Dist. Crt. Dkt. 1660; in any event, no one alleged, and the District Court did not find, that this scheme related to the judgment, which was issued much later.

The District Court got the facts wrong. Guerra recanted his testimony about the shipping records, confirming in the arbitration case that none of the shipments to Zambrano related to the Lago Agrio case. CA2 Dkt 461-2 at 17.

Guerra's story to the District Court was that he obtained a draft judgment from the Ecuadorians' lawyer "[a]bout two weeks before the Judgment was issued in February 2011," and made only "minor" edits. Pet. App. 422a-423a. Evidence from the subsequent arbitration proceedings indicates that the District Court got this wrong too. Forensic analysis of both Zambrano's computers – which were not available to the District Court – and Guerra's

computer refute Guerra's story. *See* Track 2 Supplemental Counter-Memorial on the Merits of the Republic of Ecuador, in *Chevron Corp. v. Republic of Ecuador*, at 32 (Nov. 7, 2014), https://static.lettersblogatory.com/wp-content/uploads/2015/03/GOEbrief.pdf. As previously noted, Guerra's computer had no draft of the judgment – but Zambrano's computer *did*.

The document that ultimately became the judgment was created on Zambrano's computer in October 2010, saved hundreds of times on Zambrano's office computers, and increasingly had text added over a four month period. *Id.* at 33. No flash drives were connected to the computer and no email attachments were opened in the weeks leading up to the issuance of the judgment. *Id.* at 34, 39. The evidence was "consistent" with Judge Zambrano and his assistant "writing the Judgment over the period between October 11, 2010 and February 14, 2011" and not a third party giving it to Zambrano at the beginning of February 2011. *Id.* at 33-34 (quoting expert report).

Guerra's story was purportedly corroborated by Chevron's textual analysis of the judgment that supposedly demonstrated that parts of the judgment were copied from documents authored by the Ecuadorian plaintiffs that were never filed with the Ecuadorian court, such as the so-called "Fusion Memo." Pet. App. 376a-378a. The Petitioners argued the documents had been produced to the court and Chevron, but omitted from the docket – including documents provided at judicial inspections of contaminated sites. But the District Court found that this contention "cannot be taken seriously." *Id.* 389a. Because passages from their documents such as the Fusion Memo were found in the judgment, the District

Court found "the most logical conclusion" was that the Ecuadorians' team "wrote at least material portions of the Judgment . . . and that they copied from their own internal files in doing so." *Id.* 358a; *id.* 377a.

Again, this appears to have been an incorrect conclusion. "[V]ideo and documentary evidence" submitted in the arbitration showed that documents in fact *were* submitted to the court at the judicial inspections. *See, e.g.*, Dkt. 353-2 at 42. This evidence showed documents submitted by *both parties* were not always entered into the record, and that the record keeping was not consistent, especially for documents provided at judicial inspections. *Id.*; CA2 App. A-2166-68.

The Fusion Memo, for example, was almost certainly submitted. Contemporaneous emails show that the Ecuadorians intended to submit the memo with its exhibits at a particular judicial inspection, at which they ultimately did present on the subject. CA2 App. A-2165-66. The exhibits were all docketed in the record that day, showing they were received at the inspection site, and there are pagination errors in the record surrounding those exhibits. *Id.* A-3271, A-2169. *See also, e.g.*, CA2 Dkt. 353-2 at 43-47 (addressing the other allegedly unfiled documents). The Fusion Memo was submitted and received, but simply incorrectly docketed. Again, when attempting to reconstruct a trial and the process of drafting a judgment in another country, the District Court got it wrong.

ARGUMENT

I. Chevron's schemes in Ecuador and New York highlight why courts do not entertain collateral attacks on foreign judgments.

Courts throughout the world will hear challenges to the *enforcement* of a foreign judgment, but not preemptive collateral attacks. Pet. at 1. Indeed, prior to the ruling below, the Second Circuit justifiably sought to *preclude* parties that lose their case anywhere in the world from preemptively challenging the validity of the foreign judgment in U.S. courts. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 (2d Cir. 2012). As Petitioners note, the ruling below encourages precisely what *Naranjo* sought to bar. Pet. at 17. The Second Circuit got it right the first time.

Chevron's misconduct in this proceeding emphasizes that the Second Circuit's new regime would create chaos. Under that approach, Petitioner could challenge Chevron's acts and preemptively attack the RICO judgment in yet another forum. The parties then would litigate – anywhere Chevron could be found, from Argentina to Zimbabwe – whether Chevron compromised the U.S. proceedings by showering its key witness with money, leading to admittedly false testimony.

Indeed, a collateral attack on the judgment below could easily be premised on the fact that Chevron's arrangements with Guerra (as well as Borja, and its attempt with Zambrano) clearly violated federal law and the rules of ethics. *See, e.g.*, 18 U.S.C. § 201(c)(2) (illegal gratuity to witnesses); 18 U.S.C. § 201(b)(3) (bribery of witnesses); NY Rules of Prof. Conduct 3.4 ("A lawyer shall not . . . offer an inducement to a

witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation . . . contingent upon the content of the witness's testimony or the outcome").

Fact witnesses may only be paid "the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding." 18 U.S.C. § 201(d). *Accord* NY Rule 3.4 (lawyer may pay "reasonable compensation" for "loss of time in attending, testifying, preparing to testify . . . and reasonable related expenses"). But Chevron's contract with Guerra makes clear the payments and other benefits are separate from and "in addition to" expenses associated with testifying. CA2 App. A-1303.

Regardless, the payments are entirely unreasonable. Before Guerra even took the stand in New York, Chevron had already paid him *at least* $168,000 in cash alone, and he knew he would receive at least another $180,000 if he held up his end of the agreement. He also knew he would receive more if, at the end of two years, Chevron renewed his contract.

The District Court declined to strike Guerra's testimony or sanction Chevron for its payments. Just as the Ecuadorian Appeal Division declined to consider allegations of fraud in its ruling, *see* Pet. App. 74a – the District Court declined to consider claims that the payments to Guerra violated federal law and ethical rules. Dist. Crt. Dkt. 1650.

Thus, these claims are equally ripe for collateral attack: what would stop a foreign court from determining that Chevron's conduct and violations of the law irredeemably corrupted the judicial proceedings in the United States, and enjoining

Chevron and its counsel from benefiting from the judgment below? Such a decision would exactly parallel the course of proceedings in this case, and highlight both the absurdity of this tactic and the need for this Court's review.

II. Permitting a preemptive collateral attack on a foreign judgment makes no sense where the case was originally filed in the United States and dismissed on *forum non conveniens* grounds.

Having our courts reach out to judge rulings by other judiciaries when not required to do so by the filing of an enforcement action is troubling enough in the mine run of cases. But the Second Circuit's new invitation to losing parties in foreign cases is perhaps most open where it makes the least sense: to Defendants like Chevron who succeeded in having claims dismissed on *forum non conveniens* grounds to the very forum whose judgment they now challenge. Whether jurisdiction lies for a preemptive collateral attack is a particularly important issue in this context, because such dubious jurisdiction calls into question the efficacy of *forum non conveniens* dismissal.

Where the litigation originated in a U.S. forum, there are sure to be contacts to that forum that make it a likely venue for a boomerang preemptive collateral attack; otherwise, the case probably would not have been brought there in the first place.

A litigant who voluntarily gives up the protections of the U.S. judicial system to litigate in another country cannot expect U.S. courts to oversee the courts of the forum it chose. Indeed, the Second Circuit has recognized that, after a *forum non*

conveniens dismissal, a court "ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to *enforce* here a final and conclusive [foreign] money judgment." *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205 (2d Cir. 1987) (emphasis added). The Second Circuit rejected defendant's proposal that the U.S. court "retain some sort of supervisory jurisdiction" to prevent due process violations in the foreign proceedings. *Id.* In fact, it found the suggestion "impractical" and "border[ing] on the frivolous." *Id.* But just as it makes no sense to enshrine a U.S. court as a co-trial court, it is scarcely better to install it as a post-judgment supervisory appellate court.

Allowing a subsequent preemptive challenge to a foreign judgment would be a recipe for gamesmanship and unending litigation. *Forum non conveniens* would become just a defendants' first bite at the apple; they would inevitably return for another bite if they lost abroad. So too could plaintiffs. And even that would not be the end. As noted above, under the Second Circuit's reasoning, the losing party in the boomerang suit could challenge our courts' decisions abroad, in Ecuador or anywhere else. And if U.S. courts do not respect the tribunals to which they have already dismissed an action, why should other courts honor our proceedings?

In short, by destroying finality, this "*forum non conveniens* and boomerang suit" strategy would preclude the judicial efficiency that *forum non conveniens* is intended to promote. It should be disallowed for the same reasons underpinning the law of the case doctrine: to prevent "the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of

decisions, and promoting judicial efficiency." *United States v. Bates*, 614 F.3d 490, 494 (8th Cir. 2010).

If a party secures dismissal on *forum non conveniens* grounds, and believes its opponent corrupted the foreign proceeding, that party may challenge *enforcement* of the judgment in U.S. courts. But a party that successfully displaces a U.S. forum cannot return to launch a preemptive collateral attack on the foreign judgment. Any other result would permit re-litigation of claims almost every time a calculated risk to seek *forum non conveniens* dismissal goes wrong and the defendant loses abroad.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

DATED: May 1, 2017

Respectfully submitted,

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EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

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In the Matter of Stephen R. Donziger,
(admitted as Stephen Robert Donziger),
a suspended attorney:

RP No. 2018.7008

Attorney Grievance Committee
For the First Judicial Department,

Petitioner,

Before: Referee
John R. Horan

Stephen R. Donziger,
(OCA Atty. Reg. No. 2856052),

Respondent.

----------X

REPORT AND RECOMMENDATION

Preliminary Statement

By order of the Supreme Court of the State of New York, Appellate Division, First Department, the undersigned was appointed Referee on August 9, 2018, to hold a hearing on the appropriate sanction for Respondent. The same Court had entered an Order of Suspension on July 10, 2018, finding Respondent guilty of professional misconduct in violation of former Disciplinary Rules 1-102 (A)(4), 1-102 (A)(5), 1-102 (A)(7), 7-102 (A)(6), 7-105, 7-110 (A), and 7-110 (B), and the New York Rules of Professional Conduct 3.4(a) (5), 3.5 (a) (1), 8.4 (c), and 8.4 (d). The Order of Suspension is based upon his actions as found in *Chevron*

Corp. v. Donziger, et al., 974 F. Supp. 2d 362 (S.D.N.Y. 2015), aff'd, 833 F.3d 74 (2d Cir. 2016), cert. denied, 137 S. Ct. 2268 (2017). The District Court's decision is referred to hereinafter as the "Kaplan Decision."

On August 16, 2018, the Court entered a further order supporting its previous Order of Suspension, citing 22 NYCRR Section 1240.9 (a) "upon a finding there was uncontroverted evidence that Respondent engaged in serious professional misconduct immediately threatening the public interest," noting that Respondent had filed a written request for a post-suspension hearing pursuant to Section 1290.9 (c), and granting Respondent's application for a post-suspension hearing. The undersigned was appointed to hear this matter and to report his findings to the Attorney Grievance Committee (hereinafter referred to as the "Committee").

Thereafter, Respondent moved for an order permitting the hearings to be public and to lift the confidentiality normally covering these proceedings. The court granted Respondent's motion by Order of November 29, 2018.

The ordered hearings under Section 1240.9 had been convened under the usual confidentiality, on September 26, 2018, at the Committee's Hearing Room, 61 Broadway, New York, N.Y. At this hearing Naomi Goldstein, of Counsel to the Committee, and George A. Davidson, as Special Pro Bono Counsel to the

Committee appeared for the Committee; and Richard Friedman and Aaron Page, admitted *pro hac vice*, and Martin Garbus, a member of the New York bar, appeared for Respondent, who also appeared pro se.

At this opening session, there developed a discussion of the appropriate limits of proof for the parties, under the applicable doctrine of collateral estoppel. The court, in referring the matter for sanction hearings – both on the order of temporary suspension and for ultimate sanction – had applied that doctrine to the factual basis for sanctions.

On October 30, 2018, as Referee, I proposed a procedure for hearing the matter of the interim sanction pursuant to 22 NYCRR 1240.9 (a) and (c), and ultimate sanction, by allowing some latitude in the proof available to Respondent with respect to findings to which collateral estoppel would be applied, and scheduled a resumption of the hearing on December 4 and 5, 2018. Attached as Appendix A to this report is a copy of the proposal made to counsel (without exhibits). Counsel for the Committee objected to the proposal, and moved to stay proceedings and appealed to the Court to rule on the limits of proof as to evidentiary matters barred under collateral estoppel. The proceeding scheduled for December 4 and 5 was stayed pending the Court's decision.

On January 17, 2019, the Court ruled that "...the Referee may not reexamine this Court's determination, based on the doctrine of collateral estoppel, that Respondent committed professional misconduct (M-5635), and the post-suspension hearing is limited to whether the professional misconduct Respondent committed warranted his interim suspension pursuant to 22 NYCRR 1240.9 (a)."

The requested hearing under Section 1240.9 (c) reconvened on September 16, 2019, and continued on September 17, and 18; it further reconvened, by consent of the parties, on October 18, and it concluded on that date. The parties requested until December 11, 2019, to submit final briefs. On October 18, 2019, I again noted on the record that I had ruled the two sanction hearings were to be consolidated, as the mitigation proof to be offered by Respondent in opposition to interim suspension, and aggravation evidence, if any, in respect of any final sanction determination, were conceded, after discussion, to be the same. R. 626 and preceding pages. Accordingly, it is unnecessary to make a separate report and recommendation for a separate post-suspension hearing as earlier requested by Respondent under Section 1240.9 (c). I note in this connection that Respondent continues to insist there is not an "uncontested" factual basis for the interim suspension, nor a threat to the public interest and argued that there should be a separate sanction hearing. The premise of Respondent's continued argument that he is due a full and separate hearing on the interim suspension is that he could

show facts to dispute Judge Kaplan's findings and that therefore there are not uncontested facts as a basis for interim suspension. But this argument runs into the doctrine of collateral estoppel, held by the Court to apply in this case. The doctrine, in effect, means there are not any contested facts present and that a hearing under 1290.9 (a) would not be meaningful; furthermore, that proof of any threat to the public interest would be the same in either case. For that reason I ruled that the two hearings were to be merged into one final sanction hearing.

HEARING AS TO SANCTION

We begin with the well understood view of New York's statutes concerning the sanctioning of attorneys who have been found to have violated the Rules of Professional Conduct ("RPC"), and pre-2009, the Code of Professional Conduct, that the point of enforcement is not punishment but rather bringing accountability for unprofessional conduct to the attention of the Court, and the consideration of whether a Respondent, under the circumstances of each case, is in any sense a threat to the public interest, or to actual or potential clients of Respondent. *Matter of Levy*, 37 N.Y.2d 279, 372 N.Y.S.2d 41 (1975).

In considering what sanction to propose in this decidedly unusual case, which is unprecedented (findings criminal in nature in a civil RICO case) and bears none of the characteristics of a typical attorney grievance matter (although the

Committee raises questions about Respondent's professional accounting practices), some background to the charges brought by the Committee is useful and instructive. The original litigation upon which the Kaplan Decision is constructed began in October 2003, in Ecuador, after several years of efforts to bring the case in the United States. Chevron had agreed, finally, to litigate the case in Ecuador if it were sent there by our own United States District Court in New York. It became known as "the Aguinda" litigation; there was Aguinda I and Aguinda II, and resulted in the Lago Agrio judgment issued in Ecuador. We are concerned with the second case and its aftermath beginning in 2003.

In Ecuador, the Respondent showed himself a master of publicity and dramatization in his ability to engage journalists in a world- wide condemnation of the practices of major oil companies like Texaco, and its successor, Chevron. He befriended Amazon Watch and likened the devastated Lago Agrio site in the Amazon basin where the litigation was centered as similar to the catastrophic aftermath of the nuclear explosion at Chernobyl. At the same time, Respondent respected the local nature of the problem and promoted an Ecuadorian lawyer, Pablo Fajardo, as the plaintiffs' lead attorney in court and, generally, in public. But, it appears from Judge Kaplan's detailed findings that Respondent hardly ever let go of the principal levers of the case whether with the judges assigned to hear it, or with the attendant public relations, press, and other sources of publicity.

In 1999, the Ecuador legislature had passed the Environmental Management Act; this statute authorized citizen action for reparations for environmental damages. For the first time the Ecuadorian judiciary could entertain actions for social benefits by private parties. A rough comparison would be to the Superfund legislation of the United States and the class action litigation that followed.

There were several years of litigation in Ecuador on behalf of the plaintiffs who were, initially, indigenous Americans of Ecuador whose land apparently had been despoiled by Texaco, and not remediated by Chevron (who had purchased Texaco), and perhaps also despoiled by the Ecuadorian State petroleum company itself. Plaintiffs, guided in part by Respondent Donziger, but aided by several American firms and Ecuadorian lawyers, obtained a judgment in favor of the Lago Agrio plaintiffs in the amount of $8.646 billion in compensatory damages and $8.646 billion in punitive damages against Chevron Corp. (to be assessed unless Chevron issued an apology, which it did not), for a total of $ 17,292 billion. This has been referred to generally as the "Lago Agrio Judgment". On appeal, to the Ecuador Courts of Appeal, the punitive damages were struck down, and a final judgment against Chevron in the amount of $8,646 billion was entered in 2011. Throughout this hard fought litigation Respondent, always fronted by Ecuadorian counsel, was active in Ecuador as strategist and fundraiser for prosecuting the action. All appearances in the action were made by Ecuadorian counsel.

Respondent himself has a contingent fee in the proceeds of the Lago Agrio judgment, although under an agreement of retainer dated in 2017 he has received in the interim substantial fees from funders and donors as well.

Chevron had made charges that the judgment was obtained corruptly in Ecuador as part of the appeal process. But none of their charges were upheld, and no court in Ecuador has found the judgment corrupt. However, well before the Lago Agrio judgment in Ecuador finally issued, in early 2011, Chevron began litigation in the United States and attacked Respondent personally, bringing a civil injunctive action for obtaining a corrupt judgment and other alleged wrongs, and seeking money damages against the Respondent, in the United States District Court for the Southern District of New York. Judge Lewis Kaplan was assigned to the case. Also, before the final judgment in Ecuador Chevron brought several separate discovery actions under 28 U.S.C. Sec. 1782, purportedly in aid of the Lago Agrio litigation. Chevron requested a world-wide injunction of the Ecuadorian judgment; Judge Kaplan granted this remedy, and was quickly reversed by the Second Circuit, and a preliminary injunction limited to the United States was allowed. See *Chevron v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), cert. denied, 133 S. Ct. 423.

Upon remand to the District Court, Chevron revised its attack on Donziger and abruptly waived its claims for damages, turning the case into an equity case for equitable relief on the ground that Donziger had procured a corrupt judgment in Ecuador, among other alleged wrongs. The result was a trial alleging what would have been serious felonies in any jurisdiction to be tried before Judge Kaplan as a civil RICO case, without a jury. Judge Kaplan apparently suggested that the case warranted a RICO civil proceeding and a trial before him without a jury. At the time Judge Kaplan did not hide his regard for Chevron and its predicament as a judgment debtor. On the public record he stated: "We are dealing here with a company of considerable importance to our economy, that employs thousands all over the world, that supplies a group of commodities – gasoline, heating oil, other fuels, and lubricants – on which every one of us depends every single day." These comments by Judge Kaplan are quoted from the official transcript by Bloomberg Business Week senior writer, Paul M. Barrett, in *Law of the Jungle*, p. 205, First Paperback edition, Broadway Books, 2014.

The result of this civil equity trial was the Kaplan Decision, as affirmed, which is the foundation of the charges against Respondent. The decision is three hundred and forty three (343) pages in the Federal Supplement, 2d series, and exhaustively recounts the facts as found by the judge. Upon petitioning the Appellate Division of the Supreme Court of the State of New York, First

Department, to suspend Respondent pending a hearing to determine a final sanction, the Committee invoked the doctrine of collateral estoppel, which purports to effectively deny Respondent the ability to dispute any of the underlying facts constituting violations of the Rules of Professional Conduct found by Judge Kaplan. The Committee's motion to suspend Respondent was made nearly two years after the Second Circuit's affirmance, and after the United States Attorney's Office had declined Chevron's effort to persuade that Office to prosecute the case against Respondent as a criminal matter. The chronology of this matter and the disinclination of the United States Attorney's Office to pursue Respondent are facts that in the view of some observers mitigate the finding that Respondent is a threat to the public interest. Apparently, the Appellate Division in ordering his interim suspension did not agree.

EVIDENCE IN MITIGATION

Respondent's Denial of the Charges

Both the District Judge and the Second Circuit Judges in their decisions asserted that Respondents (there were other named defendants in addition to Respondent Donziger) had not contested the underlying facts. However, Respondent and his counsel at the hearing testified that these statements were not accurate and that the Respondents had not, in any way, allowed the facts presented

by Chevron to be treated as uncontested. The testimony of Respondents' highly qualified and experienced appellate counsel, Deepak Gupta, disputed the assertion of both Courts that the facts were not contested. R. 359. He was very clear that the appellate brief to the Second Circuit did contest every material finding of Judge Kaplan. He explained that to undertake a review of the facts of such length (over 500 pages of factual findings) on the only available ground on appeal that they were "clearly erroneous" would have diverted necessary pages and analysis from (in their view) the strong legal objections to the District Court's decision. R. 360-362. However, he agreed to represent Respondent on his appeal from the Kaplan decision because "I felt like a great injustice was being done." R. 357. "I have never seen a judge whose disdain for one side of the case was as palpable on the bench in ways that I think may not have always come through in the paper record. But it was fairly obvious that Judge Kaplan had great personal animosity for Steven Donziger." R. 357.

At the conclusion of Mr. Gupta's testimony, I made it clear that his testimony had been allowed, against the Committee's objection, for the purpose of exploring how Respondent's denial before me should be interpreted, and not to contest the findings of the District Court as affirmed by the Second Circuit. R. 364, 365. Mr. Gupta also expressed his opinion about Respondent's honesty, integrity and whether he posed a threat to the public interest. He said: "To the

extent that I understand what the phrase means, I can't imagine how anyone would think that Mr. Donziger poses a threat to the public interest. This is not someone who is taking the money of clients… This is someone who has pursued a single matter for decades. …I can't imagine how anyone could say that he poses some kind of ongoing threat to the public interest. It's absurd." R. 370, 371.

Respondent himself testified, in answer to detailed questions of his counsel, that he had not done any of the corrupt acts with which he has been charged by the Committee. In view of this testimony, and of an appellate strategy that has had unintended consequences, I allowed Respondent to make his denials of the Charges, in the face of collateral estoppel, to allow him to explain why he has not shown any remorse in the circumstances of this case.

As noted above, there is nothing usual or customary about this case, and it is without precedent. However, it is not my place to challenge Judge Kaplan's findings per se; but it is my place to allow Respondent facing the most serious sanction of disbarment to explain himself as fully as he can without encroaching unduly on the boundary of collateral estoppel. I do not believe a fair hearing can be held otherwise. Only then can a sufficient assessment of his character and fitness be made. In his testimony before me, Respondent was candid and clear and showed no sign of dissembling or evasiveness. He responded directly to his

counsel's questions, to counsel for the Committee, and to myself as referee. His direct testimony is discussed further below.

RESPONDENT'S CHARACTER AND REPUTATION

Several witnesses, all distinguished in their respective fields, testified as character witnesses. Domingo Peas (Uyunkar Domingo Peas Nampichkai), an indigenous leader of the Achuar, an ethnic group within the Amazona people, spoke eloquently of Respondent's value to his community, and of the work he had done on their behalf. There was no question in his mind of Respondent's reputation for integrity. He regards Respondent as "counselor of my lawyers in Ecuador." R. 299. Furthermore, "...He is not a danger to the people...he is a man of respect, and he has earned the respect of my people. For me there is no danger. He has been the connection with my lawyers to be able to defend my people." R. 299. "He is super honest and this is the way that I know him. Otherwise I would never have come." R. 304.

Mr. Paz y Mino, an Associate Director of Amazon Watch, testified to the high degree of confidence he and others associated in advocating for the environment and human rights in that area, have for Respondent and credit his tenacity with keeping the case alive in the face of Chevron's aggression. R. 236. He believes Respondent has the highest integrity and he would not associate with

him if he thought otherwise. Amazon Watch was not a party to the litigation. In his opinion the Chevron case is "...famous for being the largest oil-related disaster in history, and not only that, caused deliberately." R. 229. He noted also that Chevron has attacked Amazon Watch, and he characterized Chevron's attack as "...demonizing Donziger ... and going after the people waging the case." R. 234. He also testified at length about his knowledge of Chevron's tactics of intimidation in environmental matters. R. 232-250.

George Roger Waters, a professional musician, and leader of the group called "Pink Floyd," testified that he had become a supporter of Respondent in about 2016, and has made several donations to him, and once to his wife, but was not an investor in the litigation arising from the Ecuadorian judgment. R. 258-262. He attested to Respondent's reputation world-wide for "great humanity" and described him as "a man of integrity ... who has devoted his entire career since he left Harvard Law School to pursuing human rights issues, to defending people who are largely powerless..." Furthermore, "he is a huge help to the public interest, and presents something of a threat to corporate America which is why he is being demonized and vilified..." R. 257. He was clear that, although he does not keep careful financial records, Mr. Waters is not an investor in Respondent's causes, including the Ecuadorian judgment; he is only a donor to the cause. R. 263, 265.

Rex Weyler, a resident of Manson's Landing, British Columbia, Canada, a widely published journalist and environmental scientist, author of, among many books, *Blood of the Land*, and co-founder of the Greenpeace Environmental organization, testified about his knowledge of Respondent and his work. Beginning his investigation in 2016 into the story of the litigation in the Ecuadorian Amazon, he was introduced to Respondent. He testified that "...the first thing I came upon, because Chevron and their lawyers appear to have been very thorough at getting the story out about Mr. Donziger that he somehow corrupted this process in Ecuador...stories about Mr. Donziger that were not very flattering. I had to take these stories seriously." R. 274. He thereafter concluded that the stories were not true, and had been "fabricated." As he continued his journalistic work he found Respondent to be "extremely honest", "straightforward" and a hard working lawyer. Also, that Respondent has never "...told me anything that did not turn out to be true in my estimation and my research, and he has never led me astray." R. 275. And further, he testified that "Every shred of evidence that I came across told me that Mr. Donziger was an honest man telling the truth." R. 277. Mr. Weyler received "modest" payments for his expenses and his research in Ecuador. He concluded by stating that "Mr. Donziger is a hero in Ecuador. He's a hero in my home."

Zoe Littlepage, one of the lawyers who defended Respondent before Judge Kaplan in the U. S. District Court, testified to Respondent's essential honesty and integrity, R. 311. She admitted that his conduct was not always exemplary, and that initially she had reservations about the allegations against him. She satisfied herself that he was innocent of the charges before signing on to defend him. R. 310-314. She stated further that her assignment was to deal with the critical witness against Respondent, Alberto Guera, on the issue of judicial bribery. She came to believe that Respondent would not and did not participate in the bribery of a judge. I note this not for the truth of her belief, but for her sincerity and willingness to continue to defend Respondent and to vouch for his character in this proceeding. I declined to admit as evidence before me various records of the trial, both factual and legal, pertaining to the judicial bribery and in which she was involved before Judge Kaplan. R. 315-317, 323 et seq.

Counsel for the Committee opened up the subject of Ms. Littlepage's closing before Judge Kaplan by summarizing her comments about Respondent's personality, as that of a "jerk or abusive to those around him or had disorganized finances but could not find that he was responsible for the acts with which he was charged." R. 328. In answering his question to confirm what she said, she responded: "It sounds like me... I thought that there were emails that put Steven in a bad light. Made Steven look very energized, very much like an activist and not a

lawyer, like a jerk saying things in emails, like we all do, that may have been off the cuff. But there was no credible evidence to support that Steven had bribed the judge." R. 329. On re-direct, she went on to elaborate other points she had made to Judge Kaplan. R. 330. I noted that I allowed such testimony, again, to support testimony of others and that of Respondent himself that his denials of the Kaplan findings is based on his belief, and the expressed belief of others, in his own innocence.

Respondent called his former trial attorney in the case before Judge Kaplan, John Watkins Keker of the San Francisco firm Keker, Van Nest & Peters. Mr. Keker, a Marine veteran and a widely admired trial lawyer with national experience, agreed to represent Respondent in February, 2011. His representation lasted until May of that year. When asked why he had moved to withdraw as trial counsel to Respondent Mr. Keker replied: "the handwriting was on the wall that this was a (indiscernible word) by Chevron. Judge Kaplan made it clear that he was determined to see Mr. Donziger, I think, convicted of the charges Chevron was making. Chevron was, through scorched earth tactics, running up huge bills. They had 160 lawyers working on the case from Gibson Dunn. They had 60 law firms working on the case that filed for summary judgment motions. It was simply economically impossible for us to keep up... It was not going to end well...I filed a motion in which I stated why we were withdrawing." R. 341. He called the trial

proceedings a "farce." R. 341. In later testimony he expanded on his view of Judge Kaplan's "unfair" procedural rulings, such as consistently and unfairly (in his view) limiting Respondent's time and ability to be heard or to examine documents. R. 348, 349. Mr. Keker offered his opinion of Respondent's character and his truthfulness: "With me, Steven was straightforward and truthful." R. 342. When asked by Respondent's counsel whether in his opinion Respondent is a threat to the public interest, he responded: "Quite to the contrary, it's ridiculous." R. 347. Further to that point he stated that during the period he has known Respondent and known of his reputation, he has not been a threat to the public interest. R. 347.

Jennifer Wynn, an Associate Professor (tenured) of Criminal Justice at John Jay College, testified that she has known Respondent for twenty years. She is the author of a well-regarded book: "Inside Riker's, Stories from the World's Largest Penal Colony" (St. Martin's Press, 2001). She met Respondent while writing that book and, at the time, Respondent was working on legislation to improve attention to mental health in the New York State jails and prisons. R. 390-395.[1]

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[1] At this point in the hearing I noted for the record that during the period of Ms. Wynn's work about Rikers Island I was Acting Chair of the New York City Board of Correction, and that I was familiar with her work at the time, and that although I had heard of Respondent in connection with mental health issues, I had not had any personal or professional contact with him. R. 399.

According to Ms. Wynn: "Steven is an honest person; he has integrity, he's brave. I'm baffled that he has an ankle bracelet on, baffled... his integrity is unquestionable...a person who is honest and doesn't lie...somebody who has a strong moral compass, who knows the difference between right and wrong..." R. 395. In the professional world she lives in (the university and prison/jail system) there has never been a question about Respondent's integrity and honesty...aside from Judge Kaplan..." When asked if she considered Respondent to be a threat to the public interest she stated: "It was almost hilarious, no, no, he's a Harvard trained lawyer, he's a man who has been dedicated to righting wrongs... It is so outrageous to me that Chevron Corporation which is a massive polluter and this man is on trial, I mean fighting for his freedom... and it's depressing frankly that I even have to be here." R. 396-397.

William ("Bill") Twist was called to testify. He has a business degree from Northwestern University and has worked in financial services and banking. He has been working in Ecuador for the last twenty-five years and has known Respondent for over twenty years in connection with his work in Ecuador. R. 403. Mr. Twist assisted in setting up with John Perkins the "Pachamama Alliance", a non-profit with headquarters in San Francisco "...committed to preserve the Amazon and support indigenous people in that task." R. 404, 405. When he first met Respondent, over twenty years ago, he had already been working in the Amazon

for five years. He saw him every year thereafter in Ecuador and is fully familiar with the Aguinda case and its procedural history. He regards Respondent as a man "... of great integrity, and honor, and skill, commitment, I respect him totally." R. 409. He does not believe Respondent is a threat to the public interest. R. 412.

Mr. Twist posted a bond for Respondent in the contempt case now pending in the United States District Court. "I have absolute trust in his integrity and his honor and his commitment to serve the rule of law and whatever he needs to do to clear his name." R. 412. Mr. Twist is not an investor in the judgment, and has no personal stake or interest in the case, and wants to use his resources to "... right the wrong to bring justice to this case." R 413. He addressed the question of whether Respondent is a threat to the public interest by stating: "... I want to say I'd like to bring a bigger perspective to this whole thing because I think this is a tragedy. I think the threat to the public interest is from the way he is being punished...that he has to wear an ankle bracelet, that he's confined to his home for no reason at all other than punishment. R. 414- 416. He went on to say that "... Steven is the kind of person we are going to need in the future to resolve the kind of issues that we are going to be facing from an environmental standpoint, from a social justice standpoint." R. 416.

Mr. Twist was followed by John Perkins. Mr. Perkins has served as chief economist for a major consulting firm in Boston whose clients include The World Bank, the United Nations, and the IMF; his work was on loans for the development of infra-structure, including infra-structure benefiting major oil companies. R. 426. He is also one of the founders of Pachamamas Foundation. His view of Respondent is that "he appears to be sacrificing his life... and not to be acting for personal gain... and is certainly not a threat to the public interest." R. 436. Mr. Perkins also said that he does not believe the claims made by Chevron that he bribed a judge: "... from knowing Steve he is incredibly honest and would not do anything like that whatsoever." Although Mr. Perkins admitted that he had not read the Kaplan decision in full, but only in summaries. R 437. Mr. Perkins does not believe in the claims against Respondent because "...he is so committed to the cause of helping the people of Ecuador that he would never do anything that might in any way jeopardize that cause." R. 438.

Simon Taylor was the last of the several credible and accomplished witnesses to attest to Respondent's character and reputation for integrity. Mr. Taylor runs an international investigative agency that investigates, among many subjects, illegal trafficking in the animal kingdom; e.g., trade in rhino horns, whales, ivory, and the like. He is the co-founder of Global Witness, which won a Nobel Peace Prize in 2003 for exposing the business of "blood diamonds." R. 446.

Mr. Taylor has concluded, after twenty years of investigations "... in many parts of the world, the operations of this sector (referring to the extractive industries), writ large, are corrupt...based on predatory deals that are illicitly obtained under the table through payments to people in a myriad of different maneuvers." R. 448-450. As a consequence he has established an initiative that requires companies to publish what is actually paid for their operations, aimed especially at these industries. As to Respondent, Mr. Taylor stated: "I have met a lot of people over the last twenty five years involved in what I would consider to be an accountability struggle...and I would describe Steven Donziger as right up there as a first among equals of the kind of people in really tough places... I have enormous respect for what he has done... He is an honest person without any hesitation or doubt." He does not believe Respondent capable of bribing a judge, or of being a threat to the public interest. R. 455. He has read all of the Kaplan Decision and holds to his opinion of Respondent.

STEVEN DONZIGER

The final witness of the hearing was Respondent himself. He addressed each Charge in responding to his counsel. Again, in each instance he denied the Charge, and showed no remorse in doing so. The Charges are, in each instance, as serious as any Charges by the Committee can be. As already noted they are, in

substance, criminal in nature under the laws of the State of New York. In the words of the Committee's counsel the Charges are: 1) coercion of a judge in Ecuador; 2) corruption of an expert in Ecuador; 3) ghostwriting an expert's report in Ecuador; 4) misrepresenting an expert's independence in Ecuador; 5) obstruction of justice (in the United States); 6) witness tampering (in the United States); 7) threatening criminal prosecution to influence a civil proceeding (in Ecuador); and 8) bribing a judge (Judge Zambrano in Ecuador). See the Committee's Notice of Motion to Grant Collateral Estoppel and to Suspend Respondent Immediately, dated October 30, 2017, which formed the basis for the First Department's Order of Interim Suspension dated July 10, 2018.

As is repeatedly made clear on the record, I allowed Respondent to testify in summary denial about the Charges, over the continuing objection of the Committee's counsel, in order to understand the basis for Respondent's consistent assertion that at no point did he, or his counsel, fail to deny these Charges before Judge Kaplan, or on appeal to the Second Circuit. This assertion is supported by the testimony of his appellate counsel, Deepak Gupta, and by Respondent's Exhibit X in this hearing which I admitted over objection. His Exhibit X is styled: "Final Direct Testimony of Steven Donziger" and is his statement of direct testimony before Judge Kaplan which Judge Kaplan took in written form in place of oral testimony on direct. Exhibit X became part of the record on appeal from the

Kaplan Decision and undermines the comment in the opinion affirming Judge Kaplan that appellant did not contest the findings of fact by the trial judge. See, for example, Exhibit X, pp 38, 39, in reference to Judge Zambrano.

Respondent testified about his education (Harvard Law School, class of '91), after a few years as an international journalist; his early years of practice with the Public Defender of Washington D.C.; his move to New York City; and becoming a member of the bar in 1997, admitted by the First Department. From 1993 to 1995 he served as executive director of the National Criminal Justice Commission, editing a book published in 1996 called *The Real War on Crime*. Thereafter he was associated with the New York firm Kostelanetz & Fink, and after two years with that firm he became associated with Gerald Lefcourt, a well-known criminal defense lawyer in New York City. Beginning in 1999 he started a solo practice in New York City, aiming to concentrate on representing indigenous and other local communities in Ecuador. His office has been during the last few years in his residence at 245 West 104th Street, New York, New York. Respondent speaks Spanish and was first exposed to Ecuador and its Amazon population in 1993. R. 470. He thereafter joined a fact-finding mission to investigate the region affected by pollution and was an assistant to Christobal Bonifaz, an Ecuadorian citizen who had decided to bring an action against Chevron.

The first action was filed in the United States District Court in the Southern District of New York in 1993. For approximately the next eight years until 2001, the action against Chevron proceeded in pre-trial status with appeals to the Second Circuit and back to the District Court until Chevron finally agreed to submit to the jurisdiction of Ecuador. R. 473. Respondent decided to join forces with a plaintiff's law firm in Philadelphia, Kohn Swift & Graf, and then to be present in Ecuador to assist local counsel in formulating the needed litigation.

This new phase of the case began in 2003. Respondent acted primarily as an administrator, and using his competence in Spanish, serving as an intermediary between the indigenous nationalities and the Ecuadorian lawyers bringing the action. The trial itself was held in the town of Lago Agrio; at the time it had a population of about ten thousand. The courthouse was housed in rented space in a shopping center. Plaintiffs in the class of affected people were both indigenous Amazon people and immigrants from other parts of Ecuador. R. 485, 486. He described the "waste pits" at the drilling site and the effects on streams and water sources. R. 488.

Respondent testified briefly about the ruling by Judge Kaplan in the RICO case that he had waived any privilege he could assert as counsel by failing to produce a privilege log in response to a Chevron subpoena. Respondent's waiver

was followed by nineteen days of deposition. R. 495. He continued with his experience in the RICO case by detailing Chevron's surveillance seven days a week, their use of the Kroll investigation firm, and their continued intimidation group presence at this hearing. R. 500.

Respondent, when asked why he continues his practice as he does, stated that to him the Lagro Agrio case was about cleaning up pollution that is harming people and the environment, and about "corporate accountability." As for the financing of the case Respondent described it as "...traditional plaintiff's side funding model where clients in Ecuador made available a certain percentage of their claim for payment of legal fees, out of pocket expenses and that from 1993 to 2007 the costs of the case were funded by the Kohn firm; in about 2009, Mr. Kohn decided his firm could no longer continue with the case. R. 508. Thereafter, to finance the continuation of the case Respondent brought in "investors" who received a right to receive a certain percentage of the recovery. R. 508.

Respondent's testimony about where the funds of investors went and how they were accounted for was general, somewhat vague, and on the whole not satisfactory as evidence of compliance with the Rules of Professional Responsibility. R. 508, 510. See Rule 1.15. Respondent's casual use of his personal account and his failure to set up a proper attorney trust account are noted,

and not denied by him. However, there was no evidence before me that any investor had questioned or complained about the accounting for their investment or that any of the named plaintiffs or their representatives have complained. There were forty-seven individual plaintiffs in the Lago Agrio case, indigenous to the Amazon region. Apparently there is also a non-profit entity called "FDA" through which Respondent has been paid fees and other costs of the litigation, although he has also referred to his fees as a "cost" of the litigation. R. 738-742.

Respondent testified that after the Kohn firm dropped the case, he took on the responsibility of funding the case. R. 512. The Kohn firm had been running the financial side of the case for several years, but Respondent and Kohn, a very experienced class action plaintiffs' lawyer, disagreed about settlement strategy and about the continuing cost of the case. At that point Kohn unhitched himself from the case. Respondent since then has not kept the kind of accounting records he should have. Respondent apparently rests upon an Agreement dated November 11, 2017, which he claims supersedes his original retainer agreement. Rule 1.5 (b) provides that the financial terms of a retainer should set form the terms in detail. The present agreement does not specify detailed terms such as monthly retainer payments to which Respondent has maintained he is entitled. Respondent's testimony on this subject raises questions about his accountability to his clients for funds raised, fees taken, and costs incurred. Respondent confidently brushed these

questions off, and perhaps he is correct, but better accounting procedures should be instituted. R. 685, 686, 738 et seq.

As to his role in the litigation in Ecuador, Respondent said that Pablo Fajardo became the lead trial lawyer, working with two other lawyers "full time for the most part." R. 515. More specifically, Respondent said: "...day to day I wasn't very involved. All the pleadings were written by local counsel... I did on occasion review pleadings or discuss them with local counsel when they wanted my opinion." R. 515. Respondent offered some context around various facts found by the District Court: "I was, frankly, shocked at some of the activities I watched Chevron's lawyers engage in. Without being hyperbolic... I perceived it to be akin to cheating... trying everything they could to minimize evidence of the harm that they had caused. I saw Chevron's lawyers threatening to put judges in jail if they did not rule in favor of the company." R. 522. Also, " ... when I first saw or became aware that there were ex parte meetings with judges, I was very surprised. I was even a little bit affronted. I didn't understand that this was permissible in Ecuador but I saw Chevron's lawyers doing it on a regular basis." R. 522. He also cited an instance of Chevron planting a false media release (in 2009) about a "scandal" with a judge that never happened but which led to an article in The New York Times. R. 523. "We were up against something very dark, and as a lawyer I had never seen that before... I felt fundamentally their

strategy was since they could not win on the evidence they had to win through other ways." R. 523. Respondent offered this viewpoint not to suggest that he and his local counsel had to adopt similar tactics, but to color his attitude about the case and why he feels so passionately in the right.

The last judge assigned to the trial, after a succession of several judges, was Judge Zambrano. I allowed counsel to ask if Respondent had bribed any judges in Ecuador, over counsel for the Committee's objection. R. 526. Counsel argued that "A direct denial of Judge Kaplan's findings is contrary to the collateral estoppel rule with which this tribunal is bound." R. 527. I disagreed with counsel and stated on the record that a fair application of the collateral estoppel rule, in these unique circumstances, would allow Respondent at least to continue a denial also asserted before the District Court to maintain his innocence in the face of what are tantamount to criminal charges. R. 527. I also took note that the record before the District Court and the Second Circuit appears to show (according to his appellate counsel and Exhibit X) that Respondent did contest the findings of fact, however unsuccessfully. Respondent went on to again deny that neither he, nor any of the lawyers associated with him "... in any way" were involved in bribing judges, or in "ghost writing" the ultimate judgment. R. 527.

THE COURTS OF ECUADOR

Of equal importance in consideration of the appropriate sanction for Respondent are the records of appeals taken by Chevron in Ecuador from the judgment of the trial court. R. 532-534, Exhibits L and O. These show (Exhibit L, R. 533) that Chevron claims of corruption in obtaining the judgment, were considered on appeal at the first level. R. 533, 534. The Court stated: "In relation to the seventh request (by Chevron) for clarification regarding whether or not the defendant's accusations with respect to irregularities in the preparation of the trial court judgment had been considered, it is clarified that, yes, such allegations have been considered but no reliable evidence of any crime have been found. The division concluded that the evidence provided by Chevron Corporation does not lead anywhere without a good dose of imaginative representation. Therefore, it has not been given any merit." R. 535.

Later, in the Ecuadorian highest court for civil appeals, the Court noted (Exhibit O, R. 535): "There is no legal ground or basis to annul the case as Appellant has requested time and again. It is sufficient to point out that the company never demonstrated fraud which it has been claiming without any legal support...the Appellant's incessant harping in this regard departs from procedural good faith." R. 539. According to Respondent the Ecuadorian courts had access to

the full evidentiary record "...and rejected the same Chevron complaints that were brought before Judge Kaplan." R. 542.

A total of fifteen to seventeen judges reviewed the Chevron charges of fraud and concluded "...contrary to Judge Kaplan." R. 543. Respondent also testified that lost, to his prejudice in Judge Kaplan's control of the procedures of the RICO case, were counterclaims that he was not allowed to present. R. 543.

OTHER CHARGES

Concerning other charges against him for cancelling inspections and ex parte meetings, Respondent did what he observed was permissible in Ecuador and what his local counsel advised. R. 545. Inspections were played as a game for delays, and were taking place within the trial. His goal was to move the trial forward, not to delay, and he commented that it was fairly common to threaten to report a judge for inaction. R. 550. In response to Charges 37 to 40 he admitted that "...based on advice of local counsel both what Chevron was doing and what we were doing, was generally paying experts directly and not through the court." R. 557. But he denied that the expert Cabrera (on "global damages") was ever "...paid under the table." R. 558.

Again, this testimony was taken over objection of counsel for the Committee. In the end, I ruled that I should hear why Respondent showed no

remorse and that counsel's objections although dictated by his view of collateral estoppel, constituted a restraint on my task of evaluating Respondent's character. R. 559-560.

As to other charges against Respondent, Charge 45 and 46, witness tampering (in another litigation), and calling for criminal charges against Chevron, these are hard to evaluate without going into the detail of Judge Kaplan's decision. Accepting his findings on these charges, in considering a sanction overall, I have subsumed them into the more serious charges of bribery, coercion, and ghostwriting fraud, rather than deal with them separately. The same could be said about his accounting practices with other people's money. During his cross-examination he was shown to be in apparent violation of the professional rules for holding clients' funds and those on which he may have a claim for his services. R. 738 et seq. His failure to file tax returns may be the result of his distracted life recently; however, it is hard to understand why three years of not filing is excusable with someone so able. But that question should be left to the Internal Revenue Service which is better equipped to judge such matters than the Committee. However, some supervision by the Committee is recommended below even though no complaints have been filed against him by his clients or investors. The Committee is empowered to do this in any event. Of course, his practice is highly specialized and he does not maintain an ordinary practice with a roster of

clients; but he should nonetheless follow the Rules in accounting for his professional practice.

RECOMMENDED SANCTION

Counsel for Respondent in his post-hearing submission "Proposed Findings, Conclusions and Recommendations of Referee," made an effort, much appreciated, to treat each charge separately and suggest the appropriate sanction for each, summarizing the evidence from Respondent's viewpoint about each charge. Normally, I would do the same in reporting and recommending to the Court. The Committee also addressed the several violations of the Rules of Professional Conduct in great detail and with persuasive force, suggesting sanctions for each. Nonetheless, I would view the issue of sanction in these unprecedented circumstances, and addressing the several Charges collectively, as needing to answer one broad question: taking in all the evidence before me, both in mitigation and aggravation, and bound by the findings of the District Court, and conceding that the interim suspension was warranted under 22 NYCRR 1290 (a) on the Committee's presentation at the time, should Respondent's suspension be ended and should he be allowed to continue to practice law in the State of New York? My recommendation is that his interim suspension should be ended, and that he should be allowed to resume the practice of law.

After hearing the evidence in mitigation and aggravation, the sanction of disbarment, while clearly and well-argued by the Committee, impresses me as too extreme. Nor do I think there are precedents which control. There appears to be no case like this. While Respondent is often his own worst enemy and has made numerous misjudgments due to self-confidence that may border on arrogance, and perhaps too much zeal for his cause, his field of practice is not the usual one. Lawyers with his endurance for the difficult case, one which is constantly financially risky and usually opposed by the best paid national firm lawyers available, are not available often. The extent of his pursuit by Chevron is so extravagant, and at this point so unnecessary and punitive, while not a factor in my recommendation, is nonetheless background to it. He has lost the Lago Agrio Judgment, his fee as well, and is besieged with litigation by Chevron and faces severe financial burdens.

Sanctions for an attorney's misconduct are not imposed for punishment but when the Court believes it necessary to "protect the public, maintain the honor and integrity of the profession, or to deter others from committing similar misconduct." 22 NYCRR 1240.8 (b)(2). Respondent's conduct in this unique matter, all arising from one unusually lengthy and difficult environmental pollution case conducted in Ecuador against the most vigorous and oppressive defense money can buy, leads inexorably to a severe sanction but should be judged in its entire context; the

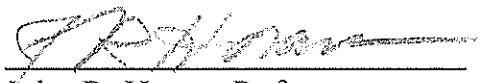
Kaplan decision is entitled to considerable weight but not necessarily, in these unique circumstances, decisive weight.

My recommendation is that Respondent's suspension be continued until the Court reviews this report and accepts it, and if the Court does accept this recommendation, that Respondent's suspension immediately be ended and that he be restored to the bar of this State; but I also recommend that Respondent be subject to an accounting to the Committee for his treatment of client funds, donations, costs of litigation, and personal funds.

Assessment of character is not an exact science, but we can all agree that the essential components are honesty, integrity, and credibility. It is far from clear that Respondent is lacking in those qualities as the Committee argues. We are here engaged in a prediction that despite his flaws noted herein, Respondent has such character and is essentially working for the public interest and not against it, his desire to make a large fee notwithstanding. None of those who testified for these qualities of Respondent are the sort who would carelessly toss off an opinion about character or misrepresent his reputation in the world community. They are inherently credible as witnesses, in my opinion. If his interest in earning a large fee makes his character suspect, the entire bar is suspect.

There is now no real question about whether Respondent is a threat to the public interest, and he does not appear to be a threat to his own clients not withstanding his deficient accounting practices. He does not need to be deterred from repeating the offending conduct and neither do the lawyers at the bar generally; all of us know that such conduct cannot be condoned. The Committee argues that he should be disbarred but I cannot recommend this sanction in view of the totality of the evidence presented at the hearing, and particularly in mitigation; in my view, it would not be just in these circumstances.

Dated: February 24, 2020
New York, New York



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Appendix A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON : FIRST JUDICIAL DEPARTMENT

----------X

In the Matter of Steven R. Donziger,
(admitted as Steven Robert Donziger),
an attorney and counselor-at-law:

Attorney Grievance Committee
For the First Judicial Department,

Petitioner,

Steven R. Donziger, Esq.,
(OCA Atty. Reg. No. 2856052),

Respondent.

----------X

DECISION ON
PROCEDURE FOR
THE POST-SUSPENSION
HEARING UNDER
22 NYCRR 1240.9(c)

In its August 16, 2018 order granting respondent's request for a Post-Suspension hearing, but reaffirming its Order of July 10, 2018, suspending respondent upon a finding that there was "uncontroverted evidence that respondent engaged in serious professional misconduct immediately threatening the public interest," the court appointed the undersigned to hold "the (22 NYCRR) 1240.9 hearing and to report his finding to the Committee."

With the consent of the Attorney Grievance Committee (AGC) and the Referee, the parties have proposed procedures with respect to the Post-Suspension Hearing allowed by 22 NYCRR 1240.9 (c), and requested by respondent.

Respondent Donziger has, by one of his counsel, Martin Garbus, made a proposal in two parts: first he requests the opportunity "... to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings." If respondent is "...successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the ... Committee would present evidence against him, and he would

have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own."

As an "alternative" respondent argues that due process allow him the "... opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him." See letter dated October 19, 2018, submitted by Martin Garbus, and made a part of the record, Exhibit A.

The AGC has presented a proposal which argues that in this case the doctrine of collateral estoppel should preclude any hearing at which the findings of Judge Kaplan, as affirmed by the Second Circuit, are contested. It argues that in this case the Post-Suspension Hearing becomes merged with the Sanctions hearing as the Appellate Division has already found that suspension is warranted pending a sanctions hearing, and a separate Post-Suspension Hearing is not required to serve due process, respondent having already had due process before Judge Kaplan. See letter dated October 22, 2018, by George A. Davidson, Pro Bono Special Counsel, and Naomi F. Goldstein, Of Counsel to the Attorney Grievance Committee, also made a part of the record. The AGC also submitted a memorandum of law as to what evidence is admissible at a Section 1240.9(c) hearing, both documents are attached as Exhibit B.

Having reviewed the record in this case, the decision of District Judge Kaplan, the affirmance of the Second Circuit, the per curiam decision of the Appellate Division, and the submissions of the parties and their citations of law, it is not clear to me that there is an easy answer to the position of respondent. However, as Referee, it is my responsibility to rule on the application of collateral estoppel, and on any other procedural or evidentiary matter before me.

In re Abady, 22 A.D3d 71. To argue that respondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer, is to overlook the substantial differences in the proceedings. There is an obvious asymmetry in the case before Judge Kaplan and the case now underway to sanction respondent notwithstanding similarity or even identity of factual issues.

In particular, in the U.S. District Court, respondent was faced with an equity case without a jury to invalidate a foreign judgment brought against him and others in which the District Judge, in so many words, but in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron. It is doubtful that if an indictment in the same terms had been brought by the United States Attorney, respondent would have elected to have a trial by a single judge and would have waived his right to a trial by jury. Furthermore, in the case before Judge Kaplan the standard of "beyond a reasonable doubt" was not applied to the facts presented. Judge Kaplan applied the civil standard of a preponderance of the evidence as the law requires. Other material differences can be noted, such as the lack of notice to respondent that his status as a lawyer was in jeopardy before Judge Kaplan, or for that matter, notice that he was, in substance, facing potential criminal charges regarding the judgment at issue. For reasons not readily apparent, on appeal to the Second Circuit respondent did not appear to contest the sufficiency of the evidence supporting any of the factual findings of the District Court. Instead, respondent raised jurisdictional defenses to no avail.

Finally, it is open to question, at least initially in this Post-Suspension hearing whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence.

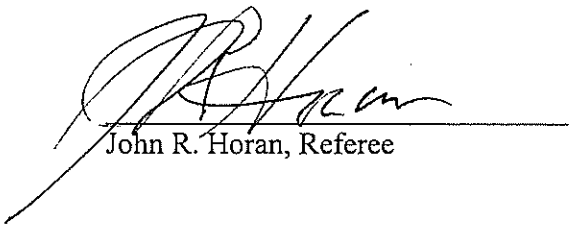
However, I am inclined to allow respondent latitude in his defense to the Charges against him in this proceeding, and to reserve my decision as to whether collateral estoppel should be applied in these circumstances. This leads me to accept both the second part of respondent's First Proposal, *i.e.*, that part stated as "Alternatively, due process requires..." (Garbus letter, page 3) and the Second Proposal, as stated in the Garbus letter. It is not my intention to allow respondent to re-try the case against him before Judge Kaplan, but rather to allow him a hearing to address some or all of those findings in a way that is reasonably fair and practical. Counsel states that he needs two days for this, "approximately." There can be no discernible harm to the "public interest" by this approach. The time to be allowed will be flexible and not restrictive, but not expandable without good cause.

The intention is to have an actual "hearing" pursuant to 22 NYCRR 1240.9(c), where respondent can address the Charges against him as he sees fit, even to the point of disagreeing with, or providing context to the facts in the first instance found by the District Court, and affirmed as found by the Second Circuit, on the ground that a strict application of the collateral estoppel doctrine, in the circumstances before me, may place respondent in an unfair position, and one he likely could not have foreseen as he set out in the Southern District Court to defend the judgment he obtained in Ecuador.

All parties will meet as re-scheduled on December 4; the DDC will be assumed to continue its position that no further hearing is required post-suspension, in this case. The respondent will be prepared to proceed with his evidence, following the guidelines of this

decision. As agreed, the hearing will continue to December 5, and future hearings including the Sanction hearing will be scheduled at the convenience of the parties.

Dated: New York, New York
November 8, 2018



John R. Horan, Referee

EXHIBIT 4

It is still on their website today:
https://www.clearygottlieb.com/news-and-insights/news-listing/california-municipal-finance-authority-in-chevron-municipal-bond-offering83.

California Municipal Finance Authority in Chevron Municipal Bond Offering

June 15, 2005

Cleary Gottlieb represented Banc of America Securities LLC as underwriter in a $19.9 million municipal bond offering by the California Municipal Finance Authority (CMFA). The proceeds from the issuance of the Pollution Control Revenue Refunding Bonds (Chevron U.S.A. Inc. Project), Series 2005 were used to refund a prior series of municipal bonds issued for the benefit of Chevron Corporation, the proceeds of which were used to fund the acquisition, construction and installation of water pollution control facilities at Chevron U.S.A. Inc.'s crude oil refinery in El Segundo, California.

Under a financing agreement between Chevron U.S.A. and the CMFA, Chevron U.S.A., a wholly owned subsidiary of Chevron Corporation, will make periodic payments to the CMFA for the payment of interest on the Series 2005 Bonds. The repayment of principal, interest and any redemption premium on the Series 2005 Bonds is unconditionally guaranteed by Chevron Corporation. Cleary is designated underwriters' counsel for Chevron Corporation.

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CHEVRON CORPORATION,

Plaintiff,

-against- 11 Civ. 0691 (LAK)

STEVEN DONZIGER, et al.,

Defendants.

- x

MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

Appearances:

Randy M. Mastro
Andrea E. Neuman
Reed M. Brodsky
William E. Thompson
Anne Champion
GIBSON, DUNN & CRUTCHER, LLP
Attorneys for Plaintiff

Richard H. Friedman
FRIEDMAN | RUBIN

Zoe Littlepage
Rainey C. Booth
LITTLEPAGE BOOTH

Steven Donziger

Attorneys for Defendant Steven Donziger and Steven R. Donziger & Associates LLP

Julio C. Gomez
JULIO C. GOMEZ, ATTORNEY AT LAW LLC
Attorney for Defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje

from Chevron,[16] and (3) Donziger would suffer a loss of good will and reputational damage absent a stay.[17] The LAP Representatives contend that the prohibition of the monetization of any interest they may have in the Lago Agrio Judgment would render them unable to finance their appeal unless the judgment of this Court were stayed.[18] Both the LAP Representatives and Donziger claim that they will be deprived, absent a stay, of "real property" by the NY Judgment, which would render that supposed injury irreparable.[19]

These arguments cannot be squared with the record in this case, the terms of the NY Judgment, common sense, or all three. There simply is no material threat of *any* irreparable injury if the NY Judgment remains in effect until the Circuit has full briefing, an opportunity to study the extensive findings and record, heard oral argument, and decided the case.

A. The Judgment Does Not Threaten Irreparable Harm to Donziger's Law Practice

Donziger claims that the NY Judgment "threatens to destroy . . . Donziger's law practice" by precluding him from "work[ing] on[] a case to which he has devoted the better part of the last two decades."[20] This argument is empty rhetoric.

Nothing in the NY Judgment prevents Donziger from continuing to work on the Lago

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16 *Id.* at 19-20.

17 *Id.* at 18.

18 *Id.*

19 *Id.*

20 *Id.* at 16.

Agrio case. Period. The pertinent question is whether and to what extent it affects his compensation during the pendency of the appeal and, if so, whether any such effect would cause irreparable injury before the appeal is decided.

1. Donziger's Compensation Arrangements

Paragraph 1 of the NY Judgment imposes a constructive trust on any property that Donziger has received, or hereafter may receive, that is "traceable to the [Lago Agrio] Judgment" or its enforcement. But it is quite unlikely to have any effect on Donziger's law practice or compensation during the pendency of the appeal.

Donziger's compensation is governed by a written retainer agreement.[21] It provides that he is entitled to a Monthly Retainer and, in the event money ever is recovered on the Lago Agrio Judgment, a Contingent Fee that works out to 6.3 percent of the recovery.[22] While any payments of a Contingent Fee would be "traceable to the [Lago Agrio] Judgment," and thus subject to the constructive trust imposed by paragraph 1, the same would not be true of Monthly Retainer payments unless those payments were traceable to the Lago Agrio Judgment. Thus, at least as long as no collections are made in respect of the Lago Agrio Judgment and funneled to Donziger as retainer payments, the NY Judgment would not prevent Donziger from being paid, just as he has

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21 PX 558 (Jan. 5, 2011 retainer agreement).

Similar arrangements were in effect prior to the execution of that agreement.

22 *Id.* ¶¶ 3(a), 3(b), 3(i).

The percentage of any Lago Agrio Judgment proceeds to which Donziger is entitled may have been slightly diluted subsequent to the execution of his retainer agreement in order to give equity to new investors, but this neither matters nor is shown persuasively on the record.

been paid at least $958,000 and likely considerably more over the past nine or ten years.[23]

To be sure, the NY Judgment would change things in respect of the payment of any Contingent Fee to Donziger, as any such payment would be traceable to the Judgment and thus subject to paragraph 1. But there are two problems with any suggestion that preventing Donziger from collecting a Contingent Fee during the pendency of the appeal would inflict irreparable injury by depriving him of the ability to work on the case or to earn a living, much less destroying his law practice.

First, Donziger has been litigating the case, making a living, and conducting his professional and business activities for years without receiving any contingent fees. The fact that the payment of any Contingent Fee, should any ever be due, would have to await (and would depend upon) the outcome of this appeal is not an immediate threat of irreparable injury.

Second, there is no evidence that the Lago Agrio Judgment is likely to be collected in any material part, if at all, during the pendency of the appeal in this case. Although the LAPs are seeking enforcement of the Lago Agrio Judgment in Argentina, Brazil, and Canada, enforcement has not been granted in any of them. Nor is there any evidence that anything likely would be collected in any of those countries during the pendency of this appeal even if any of them permitted enforcement of the Judgment before the appeal is decided.[24] And while the Lago Agrio Judgment

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23 A forensic accountant reviewed Donziger's financial records to the extent he produced them. Donziger's deficient record keeping precluded the accountant from completely verifying "where, when, and on what" money was spent in the litigation, including Donziger's own compensation. *See, e.g.*, PX 4900R (Dahlberg Witness Statement) ¶¶ 29-32, 55. The documents available, however, indicated that Donziger received roughly $958,000 in monthly payments ranging from $10,000 to $17,500 from 2004 to 2009. *Id.*¶ 60.

24 The Argentine courts rejected the LAPs' efforts to enforce the Lago Agrio Judgment against Chevron subsidiaries in that country absent a showing that the corporate veil should be pierced, and the Brazilian case appears still to be in its early stages. *See* PX 273 (Order

therein."[26] But he is wrong.

The point of paragraph 5 – which is narrower than language that was proposed by Chevron in its post-trial memorandum[27] and not specifically objected to by movants in their reply memoranda[28] – was to prevent Donziger and the LAP Representatives from avoiding the effect of the constructive trust imposed on assets in their hands that otherwise would have been direct proceeds of the Judgment by selling, assigning, or borrowing on *their interests* in the Lago Agrio Judgment and thus at least confusing the issue of traceability.[29] Indeed, Donziger's memorandum so recognized when he described paragraph 5 by saying that it would "[d]epriv[e] Mr. Donziger of *his* interest in . . . a case to which he has devoted the better part of the last two decades."[30]

The NY Judgment, including paragraph 5, in fact would deprive Donziger of the ability to profit from the Lago Agrio Judgment that he obtained by fraud. The practical effect of

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26 NY Judgment ¶ 5.

27 Chevron Post-Trial Mem. [DI 1847] at 340-41.

28 *See* Donziger Reply Mem. [DI 1857]; LAP Reps. Reply Mem. [DI 1858].

Movants of course contended that they should prevail in the action. But they did not comment on this proposed form of relief and thus arguably have waived any objection to it. Donziger surely did not claim that this provision, if granted, would prevent him from making a living or destroy his law practice.

29 *See, e.g.*, DI 1847 at 340-44.

Courts generally will impose a constructive trust not only on property that is stolen or misappropriated, but also on property that is "traceable" to property that is stolen or misappropriated. *See, e.g., United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 416 (2d Cir. 2001). "Thus, the victim may recover against the thief regardless of the form into which the thief has converted the stolen property." *Sec. & Exch. Comm'n v. Universal Express, Inc.*, No. 04 Civ. 2322 (GEL), 2008 WL 1944803, at *3 (S.D.N.Y. Apr. 30, 2008).

30 DI 1888 at 16 (emphasis added).

that, however, as we have seen, is not to prevent him from working on the case nor to prevent him from being paid his monthly retainer for his labors. It is to prevent him from benefitting personally, at Chevron's expense, from property traceable to that fraudulent Judgment. But leaving those provisions of the NY Judgment in place pending disposition of this appeal would threaten no irreparable injury. There is no reason to suppose that the Lago Agrio Judgment will be collected in any material part during the pendency of the appeal. Even if there were, Donziger could realize the contingent fee benefits of such collections once the appeal is decided – if he prevails.

B. The NY Judgment Does Not Threaten to Prevent the LAP Representatives From Financing Their Appeal

The LAP Representatives claim that the Judgment's prohibition on monetizing the Lago Agrio Judgment would prevent them from "financ[ing] any appeal of this action."[31] That claim borders on the irresponsible.

First. There is not a shred of evidence that the LAP Representatives or any of the other LAPs ever paid or contributed anything toward the legal fees or legal expenses incurred in this case, the Lago Agrio case, or any of the other litigation involving Chevron, or that there is or ever was any intention that they would do so in the future. The litigation against Chevron has been funded by investors in exchange for shares of any eventual recovery. In fact, the LAPs have raised at least $15.99 million and perhaps $21 million or more from such sources.[32] At least $7.5 million

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31 *Id.* at 18.

32 PX 2143 (Funding for the Enterprise).

LAP Representatives themselves are or ever were entitled to receive anything at all, personally, under the Lago Agrio Judgment.[39] They appear to have nothing to monetize.

In sum, the LAP Representatives have not shown that the provision of the NY Judgment preventing them from monetizing any interest they may have in the Lago Agrio Judgment threatens them with irreparable injury, either by preventing them from appealing here or in any other way. This case always has been financed on the movants' side by outside investors, not the individual defendants. There has been no showing that the money to pay for the appeal is not on hand already or, in any case, could not be raised just as millions have been raised before. And the LAP Representatives have failed to demonstrate that they have retained whatever economic interest they ever had in the Lago Agrio Judgment, if they ever had any, that they could sell or borrow upon to pay any appellate fees but for the intervention of the NY Judgment.

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39 For the sake of completeness, we note that the LAP Representatives and the rest of the LAPs in 2012 entered into a deed of trust (in which they were referred to as SETTLOR ONE) containing this provision:

> "The SETTLORS hereby contribute, assign and transfer to the separate fund of the trust, each and every one of the assets listed in section Ten point One and Ten point Two of Clause Three, subsection Ten, ('Recitals') of this AGREEMENT, in other words: **One**.- SETTLOR ONE transfers as their initial contribution, the amount of one thousand United States Dollars (USD 1,000.00). In addition SETTLOR ONE agrees to contribute to the TRUST all of the monies they will receive in the future as a result of the parts of the ENFORCEABLE JUDGMENT corresponding to damages for COMPENSATION ARISING FROM THE LITIGATION." PX 2459 (Creation of a Commercial Trust for the Administration of Monies) at 9 (emphasis in original).

"COMPENSATION ARISING FROM THE LITIGATION" is defined to include all remediation awards, which are the vast bulk of the Lago Agrio Judgment, but to exclude the 10 percent referred to in the text. *Id.* at 5. Thus, it appears that the conveyance to the trust included any right that the LAPs had to any part of the damages awarded by the Lago Agrio Judgment save the 10 percent referred to, but that the right to the 10 percent resided in the ADF by virtue of the Lago Agrio Judgment itself, not in the individual plaintiffs.

Representatives. The ability of the other LAPs, the ADF, Amazonia and anyone else claiming the right to seek enforcement to attempt to do so even in the United States is unaffected as long as they do not knowingly act in concert with Donziger or the LAP Representatives.[52] Thus, the LAPs (other than the two LAP Representatives) and most of their entourage are virtually unconstrained by the NY Judgment in their ability to attempt to fund their litigation efforts against Chevron by continuing to sell shares in anything that may be recovered for whatever investors are willing to pay. Paragraph 8 threatens the movants with no irreparable injury.

* * *

In sum, Donziger and the LAP Representatives have failed to demonstrate that they face a cognizable threat of irreparable harm, or even the possibility of such a threat, absent a stay pending appeal.

II. Donziger and the LAP Representatives Do Not Have a Substantial Probability of Material Success on Appeal

The movants' failure to demonstrate any real prospect of irreparable injury is fatal to their motion. In any case, however, their prospects of a reversal of any material part of the judgment would be insufficient to warrant a stay pending appeal.[53]

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52 NY Judgment ¶ 4.

53 *Nken*, 556 U.S. at 434 ("It is not enough that the chance of success on the merits be 'better than negligible.'") (citation omitted).

Movants advocate that this Court require only a "substantial possibility" of success on appeal. *See Mohammed*, 309 F.3d at 101 (noting that the Circuit has "also used 'possibility' rather than 'probability'"). The Court need not determine which articulation of the standard applies here because it finds that movants do not meet the standard under either formulation.

EXHIBIT 6

press release

Chevron Calls for Dismissal of Ecuador Lawsuit

SAN RAMON, CA, Oct. 8, 2007 - Chevron Corporation (NYSE:CVX) today filed a petition in an Ecuador Superior Court seeking dismissal of an ongoing environmental lawsuit that has descended into a judicial farce, constituting a denial of Chevron's right to a fair and impartial trial based on evidence and the rule of law.

Chevron's petition to dismiss cites multiple examples of inappropriate interference in the civil proceeding by the executive branch of the government, judicial misconduct and misconduct by the plaintiffs' attorneys as well as their technical staff. The petition also argues that the court has failed to recognize the overwhelming volume of admissible evidence and irrefutable legal defenses that exonerate Chevron and cites the court's lack of jurisdiction, lack of due process and demonstrated bias (see Note to Editors).

"Chevron has acted in good faith throughout this trial, producing significant, scientifically sound evidence disproving the allegations of the plaintiffs' attorneys. A verdict delivered today and based on the only credible and properly submitted evidence presently before the court would exonerate Chevron," said Charles James, Chevron vice president and general counsel. "However, too many improper, unethical and illegal events have occurred, and the court must dismiss this case if it is to preserve any semblance of credibility. For the case to proceed in its current form would constitute a denial of Chevron's right to a fair trial based on evidence and the rule of law."

Chevron's legal team has demonstrated through volumes of credible scientific evidence that the allegations of the plaintiffs' attorneys are without merit. The petition outlines a long list of actions during the trial that, taken together, constitute a denial of justice.

"The court has now abandoned the law of the case and the Ecuadorian Code of Civil Procedure and has denied Chevron due process by acquiescing (likely as a result of political pressure and nationalistic bias) to plaintiffs' requests," Chevron states in its petition. "In the absence of a complete dismissal, therefore, this matter will result in a violation of Ecuador's Political Constitution. ... Moreover, a failure by this court to dismiss this case - followed by any judgment against Chevron on the plaintiffs' unproven claims - would likely constitute a violation of Ecuador's obligations under international law."

Further, the petition states that Petroecuador, which has exclusively owned the oil fields since 1992 and has operated them for more than 17 years, never fulfilled its remediation obligations and has operated the oil fields in a manner that has caused

numerous environmental problems, including frequent spills. Petroecuador officials admitted publicly that Petroecuador - not Texaco Petroleum Co. (Texpet, a third-tier subsidiary of Texaco Inc.) - is responsible for cleaning up the remaining well sites in the former Consortium area that were not remediated by Texpet.

In its petition, Chevron describes the various efforts of the plaintiffs' attorneys and their supporters to politicize the lawsuit by convincing senior members of the government of Ecuador to offer their support to the civil lawsuit. For example, in April 2007, plaintiffs' attorneys, activists and senior members of the Ecuadorian government held a joint news conference and a highly publicized visit to certain former Petroecuador-Texpet consortium sites. With the plaintiffs' supporters at their side during one of these visits, senior members of the administration offered "the national government's full support" to the plaintiffs. Also in April, the executive branch of the government issued a news release announcing the government's intention to provide plaintiffs with "assistance in gathering evidence" against Chevron.

According to Chevron's petition filed before the court, "This manner of interference by the executive branch in a private civil dispute certainly suggests an ulterior motive (i.e., the avoidance of Petroecuador's liability), and it intolerably offends the most basic tenets of due process. ... this illegitimate conduct has unfairly prejudiced Chevron, changed the course of the trial, and caused the court to deny the due process to which Chevron, like all litigants, is entitled."

Chevron's petition argues that the court's failure to follow the law of Ecuador or even its own procedural orders casts serious doubt over its adherence to the rule of law. The failure to address legitimate legal defenses, while simultaneously absolving plaintiffs of any obligation to substantiate their claims with legally qualified evidence, amounts to a clear denial of justice for Chevron. If not addressed by the court, these violations of the most basic and fundamental principles of universal justice will destroy any legal legitimacy for the results of this proceeding and sentence the litigants on both sides to a lifetime of appellate and collateral litigation. Accordingly, Chevron has requested the judge to dismiss the lawsuit in its entirety.

For a complete copy of Chevron's petition for dismissal and additional information on this litigation, please visit http://www.texaco.com/sitelets/ecuador/en/.

Published: October 2007

From: Irwin, William T (WIrwin)

Sent: Thu Mar 26 15:36:41 2009

To: 'Chris Gidez'

Subject: RE: Response language for Crude

Importance: Normal

Asking Donehoo to ID someone. Kent or someone needs to follow with CRC also.

From: Chris Gidez [mailto:Chris.Gidez@hillandknowlton.com]
Sent: Thursday, March 26, 2009 11:27 AM
To: Irwin, William T (WIrwin)
Subject: RE: Response language for Crude

Did you get a body to attend yet. Why not send Wayne Berman? He blends into a crowd well (not).

From: Irwin, William T (WIrwin) [mailto:WIrwin@chevron.com]
Sent: Thursday, March 26, 2009 11:26 AM
To: Chris Gidez; Robertson, Kent S
Cc: Adam Bromberg; Greg Mueller; jbcraig@gmail.com
Subject: RE: Response language for Crude

Understand. We may end up with two response. One for local screenings and one for the broader world.

From: Chris Gidez [mailto:Chris.Gidez@hillandknowlton.com]
Sent: Thursday, March 26, 2009 11:23 AM
To: Irwin, William T (WIrwin); Robertson, Kent S
Cc: Adam Bromberg; Greg Mueller; jbcraig@gmail.com
Subject: RE: Response language for Crude

Just keep in mind this is not intended solely for DC audiences.

Our L-T strategy is to demonize Donziger. This film provides us a great opportunity to do so.

From: Irwin, William T (WIrwin) [mailto:WIrwin@chevron.com]
Sent: Thursday, March 26, 2009 11:16 AM
To: Chris Gidez; Robertson, Kent S
Cc: Adam Bromberg; Greg Mueller; jbcraig@gmail.com
Subject: RE: Response language for Crude

We agree with Chris' premise that we should not tread on Berlinger because there has been effort to put some balance into the documentary. With that in mind even the opening is perhaps a bit harsh for the current climate in WDC. It is important to carefully respond in areas where the film is silent when facts are helpful to Chevron or when there are misstatements. In any communications, we should make sure that we recognize that harm has been done, but that Petro Ecuador -- in charge of the oil fields for 19 years -- is the culprit. Give us some time with this, and we will try to fold these views into the actual text.

From: Chris Gidez [mailto:Chris.Gidez@hillandknowlton.com]
Sent: Thursday, March 26, 2009 9:34 AM
To: Irwin, William T (WIrwin); Robertson, Kent S
Cc: Adam Bromberg; Greg Mueller; jbcraig@gmail.com
Subject: RE: Response language for Crude

I offer some suggested response language below. I don't think we should go too hard on Berlinger (though not give him a free pass). We should direct our statement mostly at Donziger.

With respect to the LOC matter, I see that it is open to the public (though RSVP is required). We ought to send someone, not only to see the film, but to see who is there. I would not be surprised if Donziger, Fajardo or folks from Amazon Watch show up (or even from the Ecuadorian Embassy). If Donziger or Fajardo show up, we could make the case that using a LOC facility is inappropriate insofar as the screening is being used to advance the interests of lawyers in a private civil dispute.

Let me know if you want to discuss.

Here is the suggested response-only statement (I have highlighted passages to use if we need short soundbites):

The film "Crude" would never be seen as a balanced depiction of the complex issues associated with the ongoing lawsuit against Chevron in Ecuador stemming from the past involvement of its subsidiary, Texaco Petroleum Company, in an oil production consortium in that country.

While the filmmaker, Joe Berlinger, may have set out with the best of intentions, his film is little more than a propaganda tool being used by the plaintiffs' attorneys and the activist groups supporting them to raise support for their campaign against Chevron. Indeed, as we understand it, the key protagonist in the film, attorney Steven Donziger, was actually the person responsible for convincing Mr. Berlinger to produce the film, and seemingly

facilitated just about every aspect of it.

The film itself deals more with the campaign that Mr. Donziger and his associates wage against Chevron than the plight of the people of the Oriente. In a revealing moment, one of Mr. Donziger's colleagues admits that he is working on the lawsuit for the primary purpose of enriching his law firm, as opposed to helping the people he purports to represent.

In another passage from the film, Mr. Donziger is seen belittling the testimony that an indigenous Ecuadorian Indian plans to present at a Chevron shareholder meeting.

Elsewhere in the film, Mr. Donziger admits to using pressure tactics against in Ecuadorian judge; something that even Mr. Donziger acknowledges would never be attempted in a U.S. court.

And Mr. Donziger talks about ways in which he can get more money out of Chevron.

Mr. Donziger is also seen as whispering in the ear of Ecuador President Rafael Correa, and discussing ways in which he can enlist President Correa's intervention in the case.

In this regard, the film unintentionally but persuasively validates the concerns Chevron has raised – that the lawyers behind this lawsuit are employing unethical means to corrupt the judicial process in their pursuit of a lucrative payday at the expense of Chevron and its shareholders.

What the film does not address in any significant way, however, is the 18 year record of environmental mismanagement of the government's own oil company, which has exclusively operated the oil fields since 1990.

As a filmmaker and not a journalist, Mr. Berlinger is not held to the normal standards of balance and accuracy expected of the news media. And his film reflects this.

From: Irwin, William T (WIrwin) [mailto:WIrwin@chevron.com]
Sent: Thursday, March 26, 2009 7:26 AM
To: Robertson, Kent S
Cc: Chris Gidez; Adam Bromberg; Greg Mueller
Subject: Response language for Crude

Isn't there already some prepared response language for Crude, and if so, can you please provide so I can look at it from a WDC perspective. Given the McGovern hosted showing 31st afternoon at the Library of Congress, we want

to be prepared.

Chris, same query to you due to time zone efficiencies. Adam/Greg, FYI.

Bill Irwin
Manager - International Government Affairs

Policy, Government and Public Affairs
Chevron
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Washington DC 20005-2225
Tel 202 408 5854
Fax 202 408 5842
WIrwin@chevron.com

EXHIBIT 7

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: STEVEN ROBERT DONZIGER,

Petitioner.

STEVEN ROBERT DONZIGER 11-CV-691 AND 19-CR-561,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF MANDAMUS

Andrew J. Frisch
SCHLAM STONE & DOLAN LLP
Attorneys for Defendant-Appellant
26 Broadway
New York, New York 10004
212-344-5400

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Introduction

At the heart of this petition for a writ of mandamus is a straightforward question: May an appointed prosecutor coverup her firm's attorney-client relationship with an interested party, which dominates an industry to which her firm and its clients are inextricably tied, itself compromising her disinterest in the case? The prosecutor and the District Court in this case say that the answer is "yes." The letter and spirit of the United States Supreme Court's controlling precedent, *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987), as well as ethical norms in this Circuit, are to the contrary. *Vuitton* establishes a "categorical rule" of "rigorous[]" prosecutorial disinterest. *Id.* at 810, 814. The extraordinary misconduct and bias in this case threaten the integrity and reputation of this Circuit and warrant dismissal of the case or, alternatively, disqualification of the prosecutor and remand to a new randomly-appointed District Judge.

While the shift of this case from the civil to the criminal arena required elevated sobriety and care, the opposite has happened. On July 31, 2019, after the United States Attorney declined Judge Kaplan's request to prosecute Petitioner Steven Donziger for criminal contempt for allegedly violating orders issued for the benefit of the Chevron Corporation ("Chevron"), Judge Kaplan

invoked Rule 42 of the Federal Rules of Criminal Procedure and appointed lawyers from Seward & Kissel LLP ("Seward") to prosecute Mr. Donziger. Without recusing himself, Judge Kaplan arranged for Judge Preska to preside over Mr. Donziger's trial rather seek random assignment.

For the first eight months of the criminal case, the Seward attorneys either failed to disclose Seward's attorney-client relationship with Chevron to Mr. Donziger or actively covered it up. Seward did not disclose the Seward-Chevron relationship to Mr. Donziger in August 2019 at Mr. Donziger's first appearance in the case or five months later in December 2019 when Mr. Donziger specifically requested an evidentiary hearing into the scope of the Seward-Chevron relationship. A19, 23, 27.[1] Instead, Seward partner Rita Marie Glavin actively concealed the fact of Seward's attorney-client relationship with Chevron: she berated Mr. Donziger at a conference before Judge Preska in January 2020 for having the audacity to question Seward's disinterest in the case and urged the District Court to advance the scheduled date for trial as punishment for his audacity. As Ms. Glavin put it, "[L]et's get this case going. No more delay, no more throwing mud . . . ." A33.

Almost three months later, in late March 2020, Seward finally and

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[1] "A" refers to the Appendix filed herewith.

begrudgingly disclosed the Seward-Chevron attorney-client relationship to Mr. Donziger only after he moved for Seward's disqualification. A49. In so moving, Mr. Donziger proffered an opinion of Professor Ellen Yaroshefsky, an expert in prosecutorial ethics. A86. Although Professor Yaroshefsky at the time was unaware of the Seward-Chevron attorney-client relationship, she opined that publicly-available information about Seward's ties to Chevron and Chevron's industry partners themselves established that Seward should be disqualified. A86-95.

Mr. Donziger's motion for Seward's disqualification and Professor Yaroshefsky's supporting opinion created too great a risk for Seward that its coverup of the Seward-Chevron attorney-client relationship would be exposed; Seward attempted to mitigate its presumably inevitable comeuppance by making a belated disclosure. A96. Even then, Seward asserted attorney-client privilege on Chevron's behalf, itself defeating Seward's claimed disinterest, and otherwise refused to answer non-privileged questions about the representation, perpetuating Seward's coverup. A120-21.

Judges and lawyers steeped in the traditions of this Circuit know how one of its District Judges might be expected to respond to a prosecutor's delayed disclosure of her firm's attorney-client relationship with an interested party eight

months into a case, let alone deceptions in a Southern District courtroom to cover it up. A Judge might invite the United States Attorney or a supervising prosecutor to answer for the prosecutor's conduct, refer the prosecutor to the Department of Justice's Office of Professional Responsibility, rebuke and possibly sanction the prosecutor, or all of the above. Here, of course, Ms. Glavin's prosecutorial decisions are subject to no prosecutorial oversight whatsoever: she is a Seward partner in a private, for-profit law firm and answers to no one in the United States Department of Justice. She has financial interests as retained counsel for Seward's clients in the oil and gas industry and in encouraging clients to engage Seward based on its service of industry interests.

The only theoretical checks on Ms. Glavin's conduct are Judge Kaplan who appointed her and Judge Preska whom Judge Kaplan arranged to preside over Mr. Donziger's trial. Judges Kaplan and Preska, however, did not even raise a judicial eyebrow in response to Ms. Glavin's dissembling. Instead, Judge Preska denied Mr. Donziger's motion for disqualification, rejected the wisdom of Professor Yaroshefsky's unrebutted expert opinion, and declined even to ask about the underlying facts by questioning Seward's refusal to provide requested information and its assertion of attorney-client privilege on Chevron's behalf. A122-46. Judge Preska thereby permitted Seward to have it both ways:

accepting Judge Kaplan's appointment to prosecute as supposedly disinterested, while protecting Chevron's secrets.

Meanwhile, Judge Kaplan did not refute or otherwise address the inference pressed below that he knew about the Seward-Chevron attorney-client relationship before appointing the Seward attorneys to prosecute Mr. Donziger for allegedly violating orders issued for Chevron's benefit. Judge Preska did not refute or otherwise address the inference pressed below that she and Judge Kaplan knew that Ms. Glavin's indignation in failing to disclose the scope of the Seward-Chevron relationship was manufactured.

This Court has been prejudiced by Ms. Glavin's misconduct. On an appeal to this Court from Judge Preska's order that monitored home confinement was required as a condition of Mr. Donziger's fully-secured $800,000 bond, Mr. Donziger argued that Ms. Glavin's professed concern about risk of flight (for a law school graduate with a wife and child and surrendered passport) was a pretext, and that Seward's industry ties to Chevron and Chevron's partners in the oil and gas industry proved Seward's bias and disinterest. Second Circuit Case 19-4155, Doc 16 at 8-9. When Ms. Glavin appeared before this Court for oral argument on February 11, 2020, at least seven months *after* she was indisputably aware of her firm's attorney-client relationship with Chevron, she knew that this Court and Mr.

Donziger were in the dark about it. Any lawyer faithful to this Circuit's standards of professional ethics would have disclosed the fact of her firm's attorney-client relationship with an interested party for whose benefit the allegedly violated orders were issued. Not here. Ms. Glavin opted to hold the truth close to the vest and cross her fingers that neither this Court nor Mr. Donziger would ever find out.

Ms. Glavin's transgressions are especially unforgivable in light of her role as a senior prosecutor supervising the ill-fated case against United States Senator Ted Stevens. A Special Counsel's investigation into the prosecution of Senator Stevens found that it was "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony." *In re Special Proceedings,* 1:09-mc-00198-EGS, Doc 84 at 1. A prosecutor from the Department of Justice's Public Integrity Section testified to the Special Counsel that Ms. Glavin favored withholding exculpatory FBI 302s from Senator Stevens. As the Public Integrity prosecutor testified, "Ms. Glavin said words to the effect of we'll have to play this one close to the vest or we have to play our cards close to the vest on this one. I was stunned .. . [t]hat that position [Ms. Glavin's interpretation of the Jencks Act] was being taken in the particular case." *Id.* at 99-100.

As a result of misconduct in the prosecution of Senator Stevens, the

Department of Justice went to great lengths to ensure that prosecutors understand the letter and spirit of their ethical obligations. *See* Statement for the Record of the Department of Justice to the United States Senate Committee on the Judiciary, Hearing on the Special Counsel's Report of the Prosecution of Senator Ted Stevens, March 28, 2012.[2] Ms. Glavin appears not to have learned from experience. Her dissembling about the Seward-Chevron attorney-client relationship itself proves that she fully appreciated its materiality.

The District Court turned a blind eye to the fact and appearance of especially unacceptable prosecutorial misconduct. More, even after Seward later disclosed the Seward-Chevron attorney-client relationship, the District Court denied Mr. Donziger's motion to disqualify Seward without (1) probing Seward's refusal to answer questions about the underlying representation of Chevron; or (2) adequately reconciling Seward's claim of privilege on Chevron's behalf with its prosecution of Chevron's longstanding adversary. Even more, Judge Kaplan appears to have appointed Seward to vindicate orders issued for Chevron's benefit despite knowing about the Seward-Chevron attorney-client relationship.

Over the months that the Seward-Chevron attorney-client relationship

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[2] Available at *https://www.justice.gov/sites/default/filesltestimonies/witnesses/attachments/03/28/12/03-28-12-doj-statement.pdf.*

was unknown to Mr. Donziger, Seward was adamantly urging that his fully-secured $800,000 bond be conditioned on monitored home confinement, now in its *eleventh month* and counting, for a misdemeanor punishable by no more than imprisonment of *six months*. Ms. Glavin did so despite Mr. Donziger's proffer of 27 additional sureties, including professors and other accomplished professionals; and the public support of 29 Nobel Laureates and 475 lawyers and legal organizations around the world, including the President of the Paris Bar. *See* 19-cr-561 (LAP), Doc 85. Mr. Donziger proposed reasonable alternatives to monitored home confinement such as a monitored curfew and a daily two-hour monitored window to attend to his family's neighborhood errands and to help relieve his son's isolation occasioned by the pandemic. These reasonable modifications to Mr. Donziger's pretrial release *unopposed by Pretrial Services* were *opposed by Ms. Glavin*.[3] If Ms. Glavin is not actually motivated by allegiance to Chevron, Seward's clients in the oil and gas industry which benefit from Chevron ties, and her former government colleagues who now work for Chevron's counsel Gibson Dunn, it sure looks like it.

John R. Horan, a former Assistant United States Attorney for the

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[3] Mr. Donziger has separately noticed an appeal to this Court from the District Court's orders denying his renewed application for elimination of monitored home confinement.

Southern District of New York serving as Referee over Mr. Donziger's disciplinary proceedings, recommended in February 2020 that interim suspension of Mr. Donziger's license to practice law, based upon Judge Kaplan's civil judgment against Mr. Donziger, be lifted. Referee Horan afforded Judge Kaplan's civil judgment "considerable," but not "decisive" weight, noting that "[t]he extent of [Mr. Donziger's] pursuit by Chevron is so extravagant, and at this point so unnecessary and punitive." Referee Horan found that Mr. Donziger, who testified in late 2019 during the pendency of the criminal case, was "candid and clear and showed no sign of dissembling or evasiveness," also concluding that none of the witnesses who attested to Mr. Donziger's honesty, integrity, and credibility "are the sort who would carelessly toss off an opinion about character or misrepresent his reputation in the world community." A57-58.

Proceedings in lower courts sometimes undermine the integrity, reputation and appearance of fair justice. No matter how strongly any particular participant may feel about a particular issue or defendant, nothing justifies injury to the process itself. Seward's approach to this prosecution, validated by the District Court, gives voice to the view that this criminal case is fueled by something other than vigorous application of the law and the facts. We have arrived at too precarious a point in our experiment in constitutional democracy to permit even the

appearance that personal or ideological agendas are interfering with the fair administration of justice. We respectfully urge this Court to act.

I RELIEF SOUGHT BY PETITIONER-APPELLANT

The prejudice to Mr. Donziger, entering his eleventh month of monitored home confinement pressed by Seward prosecutors who should not have been appointed in the first place, is irreparable. This case should be dismissed with prejudice. Alternatively, the Seward prosecutors should be summarily disqualified and the case remanded to a new randomly-assigned Judge for appointment of a truly disinterested prosecutor. Alternatively, the case should be remanded to a new randomly-assigned Judge for a hearing into Seward's refusal to answer questions about its representation of Chevron so that Seward's qualifications to prosecute this case can be properly evaluated under all the circumstances (including Seward's coverup of its attorney-client relationship with Chevron).

II ISSUES PRESENTED BY THE PETITION

1. Are private lawyers qualified to prosecute charges of criminal contempt where (a) their firm has an attorney-client relationship with the corporation for whose benefit the underlying orders were issued and on whose behalf the firm asserts attorney-client privilege and otherwise refuses to answer

questions; (b) they actively coverup and deliberately deceive the defendant about their firm's attorney-client relationship with that corporation; and/or (c) their firm's industry ties to that corporation and its industry partners demonstrate the firm's disqualifying interest in the case, even apart from the attorney-client relationship, as determined by the unrebutted opinion of an expert in prosecutorial ethics?

2. Should a case of misdemeanor contempt punishable by no more than imprisonment of six months be dismissed based on an appointed prosecutor's coverup of her firm's attorney-client relationship with the corporation for whose benefit the underlying orders were issued, while simultaneously urging unnecessary monitored home confinement entering its eleventh month and counting?

III STATEMENT OF THE FACTS

A. Seward's Coverup of the Seward-Chevron Attorney-Client Relationship

By letter dated December 19, 2019, Mr. Donziger's counsel wrote to Seward, expressing concern about two troubling issues that then appeared to counsel to be separate: (1) whether it was appropriate for Judge Kaplan to appoint lawyers from Seward to prosecute Mr. Donziger, despite Seward's industry ties to Chevron and Chevron-related entities; and (2) the extent of any contact between

Seward and Judge Kaplan. A27.

When Seward declined to answer these questions, defense counsel asked Judge Preska to conduct a hearing into the Seward-Chevron ties. A19, 23. At the time, Mr. Donziger and counsel believed from Judge Preska's role as the District Judge presiding over the criminal case that Judge Kaplan had recused himself from the criminal case, and that Mr. Donziger's application for a hearing was made only to one Judge, Judge Preska.

Seward submitted a carefully-worded letter to Judge Preska stating that Seward had conducted an internal conflicts check before accepting Judge Kaplan's appointment in July 2019 and concluded that it had no conflicting loyalties:

> With respect to the defense's claim that (a) two Seward clients receive funding from an entity whose Vice Chairman happens to be on the Chevron Board, and (b) a Seward client receives income from Chevron, even if true this creates no conflict or conflicting loyalty for the prosecution team in this criminal case. In that regard, prior to taking on this representation, Seward performed appropriate conflicts checks (as it does before taking on any representation).

A21. While Seward wrote that it had conducted a conflicts check before accepting Judge Kaplan's appointment, Seward did not disclose that the conflicts check revealed the Seward-Chevron attorney-client relationship, which was otherwise necessarily known to the Seward partnership.

Mr. Donziger's counsel in reply submitted a letter in support of his request that the Seward prosecutors be required to disclose the scope and nature of their relationship with Chevron. The letter argued that Seward's stonewalling "warrants the inference that it has business, professional and/or personal relationships that compromise both the fact and appearance of the necessary 'disinterestedness'" required of a prosecutor. A23. The letter noted that "Ms. Glavin has unlimited and unique access to the facts" and was obliged "as a Seward partner and *de facto* sovereign in this case, to disclose the full extent of Seward's relevant relationships." A24.

Defense counsel's three-page letter included a paragraph that listed three facts gleaned from publicly-available information about the Seward-Chevron relationship:

> (1) Oaktree Capital Group, LLC ("Oaktree"), whose Vice President has served on Chevron's board, significantly invested in Seward clients, according to Seward's website;
>
> (2) Multiple Seward clients, identified in the letter, derived significant income from Chevron; and
>
> (3) Seward partners appeared to have relationships with Chevron, Oaktree or both.

A24.

On January 6, 2020, at an appearance before Judge Preska, Ms. Glavin

scolded Mr. Donziger, with an adamance not adequately reflected in the transcript, for having the audacity to question whether Seward was qualified to assume the mantle of a disinterested sovereign or to ask about Seward's contact with Judge Kaplan. Ms. Glavin at one point turned and dramatically pointed at the defense table as if making an in-court identification at a trial. She orally delivered a carefully-worded response to counsel's letter of December 19, 2019, which, in retrospect and in light of Seward's subsequent disclosures, was plainly designed to hide either (1) the fact of the Seward-Chevron attorney-client relationship; (2) Judge Kaplan's appointment of Seward despite his knowledge of the Seward-Chevron attorney-client relationship to Judge Kaplan; or (3) both.

Thus, though defense counsel in his letter had asked Seward only about the extent of Seward's contacts with Judge Kaplan, not whether Seward and Judge Kaplan were coordinating prosecutorial strategy, Seward addressed only the latter unasked question:

> [W]ith respect to [defense counsel' s] claim that Judge Kaplan is any way coordinating with the prosecution team or seeking to influence the prosecution team in its decision making, in its strategy, that is false, and it is irresponsible of [counsel] to be making that claim.
>
> The prosecution team, as we prosecute this case, does not seek Judge Kaplan's input in our decisions and the steps that we take, and Judge Kaplan does not offer it or seek to provide it. Period, full stop .. . .

A31.

Seward's subsequent statements at the conference about its relationship with Chevron were carefully worded and delivered as an attack on Mr. Donziger to distract attention from the truth:

> [Defense counsel] is not entitled, nor is Mr. Donziger, to know every communication that the prosecution has with anybody in this case. What he's entitled to is the discovery that he is allowed under the Constitution, under the law, and under the rules. So let me make that very clear, because I think [defense counsel' s] claim is irresponsible and disturbing.
>
> . . .
>
> [I] understand that Mr. Donziger is unhappy that he is being prosecuted criminally in this case. That does not mean that he gets to interview the prosecutor to decide whether the defense believes that the prosecutor has conflicting loyalties, is independent, or impartial. No criminal defendant is allowed that anywhere in this country, whether it be a Rule 42 proceeding or any place else.
>
> [I]t is a pattern - we expected this would happen in this case, but it is a pattern by Mr. Donziger of attacking judges, attacking lawyers, impugning their reputations, and attacking parties, at every step of this case.
>
> [N]either myself nor [Seward attorneys] Mr. Maloney nor Ms. Armani, who are the three prosecutors appointed to represent this case, nor does my law firm, Seward & Kissel, have existing client relationships that would result in the three appointed prosecutors having conflicting loyalties or having that would cause the independence of our decision making on behalf of our client, the United States in this case, to be anything but impartial and objective.
>
> [L]et's get this case going. No more delay, no more throwing mud . . . .

A 32-33.

Mr. Donziger's counsel responded that the question was not Mr. Donziger's unhappiness about being prosecuted, but Seward's duty to disclose its ties to Chevron, and that an expert in prosecutorial ethics was prepared to opine about Seward's disinterestedness even absent the requested disclosure:

> It's not enough for Ms. Glavin to say everything's fine and to attack me, or to attack Mr. Donziger. What is required is a disclosure as to what these [Seward-Chevron] interests are.

A34.

> [I]'ve been in contact with an expert in legal ethics . . . . [T]he expert is troubled and is prepared - - - if the record stands as it is - it will be what it is - to explain to the Court that the record as it is is a problem, just based on my research of publicly available information and without knowing more about the relationship to which Seward has unique and unlimited access and won't disclose.

A35.

Defense counsel explained that legitimate concern about any contacts between Seward and Judge Kaplan was elevated by Seward's stonewalling:

> [A]nd my concern is elevated, not mitigated, by the absence of disclosures about the Seward relationship with Chevron . . . and about exactly what Judge Kaplan's role is, and I say that with due respect to the bench generally and to Judge Kaplan specifically. I'm representing a client.

A36.

When Judge Preska asked defense counsel about Ms. Glavin's representation that no contacts with Judge Kaplan were "continuing," defense

counsel responded that the absence of actual disclosures justified the inquiry:

> [M]y concern, given the history [of the case] . . . is whether or not Judge Kaplan is speaking to the prosecutors and, if so, what about. I understand there's only so much I can do to get at that issue. All I can do as an advocate, Judge Preska, is call it out and see what the response is. I don't know what more I can do to get at that particular issue. But it remains very troubling to me.

A38.

> Look, I understand that these are difficult and sensitive issues. I've tried to do my best to raise them and discuss them in a professional way with respect to all parties, including Ms. Glavin, but I did what I could. I don't l know that I could have done more. And at this point, I still think the issue with Judge Kaplan is a problem. I don't know what I can do to get at it. I don't know that I can call him as a witness to ask him questions. What I do know is with regard to the other issue [of Seward's disinterestedness], I want an opportunity to go back to my expert and make a more formal submission to your Honor.

A39.

> I renew my request to the Court to conduct a judicial inquiry to get at the facts. I understand that could raise various issues. There are ways to do it. But something needs to be done to establish whether the prosecutors are disinterested, as they must be. I renew that.

A45.

Apparently concerned that colloquy at the conference about Seward's contacts with Judge Kaplan could later be interpreted as a flat Seward lie if the truth ever emerged, Seward went back to the issue in an effort to massage the record so that it might serve to protect Seward if ever called to account for its

deceit:

> [W]ith respect to the issue on Judge Kaplan, what [counsel] was asking is that he wants to know about any and all contacts that the prosecution had with Judge Kaplan, or with chambers. I told him he's not entitled to that. He'll get what he's entitled to under the law and under discovery.
>
> [T]here is no need, in our view, to go down the road for [counsel] to talk about every conversation that I've ever had with Judge Kaplan that related to this case. Suffice it to say, as I made the representation to the Court, the prosecution does not seek Judge Kaplan's input with respect to our prosecution decisions or our strategy, and Judge Kaplan does not weigh in on our prosecution decisions or strategy.

A42-44.

At the end of the conference on January 6, 2020, Judge Preska's ruling was restricted to the three listed facts in counsel's three-page letter submitted in advance of the conference. A45. Judge Preska did not address Seward's unique and unlimited access to the relevant facts or the inference of coverup justified by Seward's stonewalling. Judge Preska did not otherwise ask Seward *anything* about the Seward-Chevron relationship. Instead, Judge Preska resolved Mr. Donziger's application solely by finding that the three facts listed in defense counsel's letter were "way too attenuated to require any additional disclosures." A45. As to whether Seward had spoken *ex parte* to Judge Kaplan, Judge Preska said, ["w]ith respect to contacts with Judge Kaplan, I am satisfied with the prosecutor's representations with respect to that." A45.

B. *Unaware of the Seward-Chevron Attorney-Client Relationship, Professor Yaroshefsky Concluded that Seward's Industry Ties to Chevron and Chevron's Partners in the Oil and Gas Industry Required Seward's Disqualification*

On February 27, 2020, in moving to disqualify Seward, Mr. Donziger proffered an opinion of Professor Yaroshefsky (A86-95) that "[e]ven based solely on the limited public record of Seward's financial interest in Chevron-related entities," much of it gleaned from Seward's own website, Seward was not disinterested and should be disqualified. A95.

Seward's industry ties to Chevron were undisputed. Chevron and a few other oil companies control the oil industry in the United States and hold an overwhelming market share. Seward is "particularly well-known" for its representation of entities related to offshore drilling and services. Seward's "Maritime Practice 2018 Year in Review, dated February 12, 2019, asks "[a]s we look forward and ponder what 2019 will hold for *us and our clients*, many of the questions we asked ourselves last year still seem salient . . . . *Will oil prices recover* enough to bring badly needed stability to the offshore drilling and services sectors." It was that very year, 2019, in which Judge Kaplan appointed Seward to prosecute alleged violations of orders issued for Chevron's benefit. A88.

Seward clients which derive significant revenue from Chevron include Euronav, reportedly the world's largest independent crude oil tanker operator,

which has described its business as including chartering "[v]essels to leading international energy companies, such as Chevron." On June 18, 2018, Seward announced that it had "[a]dvised Euronav on its merger with Gener8 Maritime," a company whose annual report cites its strong relationships with customers like Chevron. Another Seward client, Dorian LPG, a liquified petroleum gas shipping company and leading owner and operator of gas carriers, announced in October 2015 that it was in the process of clinching a five-year time-charter with Chevron. A89.

According to Chambers USA, a service whose ranking of law firms is touted on Seward's website, Seward reported to Chambers that its main areas of practice include "maritime," identifying just one representative engagement: "represent[ing] Scorpio Tankers Inc, in connection with its merger with Navig8 Product Tankers Inc . . . . creating the largest U.S.-listed owner of petroleum product tankers." According to Scorpio, the merger improved its "[c]hances to gain contracts among customers like oil majors Total and Chevron. A89.

While publicly-available information did not reveal the facts of Seward's direct intersection with Oaktree Capital Management ("Oaktree"), a fund with $120 billion of assets under management, Oaktree is significantly connected to Chevron and at least four of Seward's clients. Two of Oaktree's directors serve

or have recently served on Chevron's Board of Directors. Meanwhile, Seward's website touted Oaktree's investments in Seward clients, including Kudu Investment Management LLC, Eagle Bulk Shipping Inc, and TORM PLC. A89-90.

Thus, even unaware of the Seward-Chevron attorney-client relationship and Ms. Glavin's furious dissembling about it, Professor Yaroshefsky concluded that Seward was not qualified to assume the mantle of the Department of Justice. Professor Yaroshefsky concluded that Seward's interests were so aligned with Chevron's as to create a financial conflict of interest:

> In such a highly concentrated industry, the Seward firm's financial and business interests are dependent on the good will of Chevron and its related entities and other giants in the oil industry. Seward would not seek to act contrary to the interests of the few controlling large industry oil and gas companies and related entities.

A93. She explained that "lawyers, like all people, are subject to influences that affect their decision making:"

> Inevitably, one's perspective, bounded by their role and experience, results in rationalizations in favor of clients, even if unintentionally. Even when people set out to make impartial judgments about a course of action, however, self-interest has a way of creeping in - unconsciously - to the decision process. Somehow the information is processed in a way that makes the outcome more desirable to the decision maker.

A93-94 (citation and quotation marks omitted) (even mere "[c]ognitive biases [can be] a chronic issue is all matters, but studies point to particularized cognitive biases

for prosecutors because of the significant power they wield and their unreviewable discretion"). Professor Yaroshefsky concluded that disqualification was required whether or not the three Seward prosecutors themselves served Chevron-related entities: "The firm's financial interest is disqualifying for the entire firm." A94.

Professor Yaroshefsky concluded that "[i] is an understatement to say that there is a potential and opportunity for bias by Seward lawyers:"

> It is equally an understatement to say that Seward counsel in the special prosecutor role undermines public trust and confidence in the perception of fairness of the legal system. The facts demonstrate a disqualifying conflict of interest under any objective standard.
>
> . . . . .
>
> [T]his longstanding, highly publicized, contentious case is the subject of ongoing controversy of international dimension with wide-ranging consequences including public perception of the fairness of the system of justice in the United States.

A94.

C. *Seward's Belated Disclosure of the Seward-Chevron Attorney-Client Relationship and Bogus Assertion of Attorney-Client Privilege*

Professor Yaroshefsky's opinion, submitted in support of Seward's disqualification, addressed Seward's above-quoted letter about a conflicts check, concluding that it was inadequate and should not be the last word:

> [T]he precise inquiries in the conflicts check were not disclosed. Thus, it is not known whether the Chevron-related entities were part and parcel of that conflicts check, nor whether the role of Seward in Chevron-related entities

was part of that determination.

. . . .

> [M]s. Glavin's statement that the firm's conflict check did not determine the existence of such a conflict of interest is not dispositive of the issue. Court[s] have disqualified lawyers after determining that a conflicts check was inadequate or that the firm's analysis of no conflict was erroneous . . . .

A93-94.

Only then, on March 24, 2020, after Professor Yaroshefsky directly called into question the adequacy of the Seward internal conflicts check, did Seward disclose the Seward-Chevron attorney-client relationship. A96. Seward's belated disclosure made it undeniable that Ms. Glavin herself knew of the Seward-Chevron attorney-client relationship no later than July 2019, and that the Seward partners who had themselves represented Chevron permitted Seward to accept Judge Kaplan's appointment to prosecute Chevron's adversary in litigation.

Seward's disclosure established with certainty that Ms. Glavin was fully aware of the Seward-Chevron attorney-client relationship and covered it up on (1) January 6, 2020, when she appeared before Judge Preska and furiously opposed Mr. Donziger's request for a hearing into the Seward-Chevron relationship; and (2) February 11, 2020, when she appeared for oral argument in this Court after Mr. Donziger had expressly argued that Seward's professed concern about risk of flight was a pretext borne of disqualifying bias. *See* Second

Circuit Case No. 19-4155, Doc 16 at 8-9.

Even then, Seward's disclosure was crabbed and incomplete. A96. Rather than rebut Professor Yaroshefsky's opinion, Seward submitted a declaration of Seward partner Mark Hyland that he had overseen the conflicts check before Seward agreed to accept Judge Kaplan's appointment. Mr. Hyland determined that Seward's work for Chevron "[i]n the last ten years" consisted of "preparation of corporate forms and the issuance of related legal opinions for two of [Chevron's] foreign affiliates" in 2016 and 2018. Mr. Hyland said that his conflicts check "did not identify any conflicts that would preclude the appointment" of the Seward prosecutors. Mr. Hyland did not proffer any particular professional expertise underlying his conclusion. According to Seward's website, Mr. Hyland has worked at Seward as a commercial litigator since 1980. A96. It was in Mr. Hyland's financial interests, as well as those of his private, for-profit law firm, to obtain Judge Kaplan's appointment and deepen Seward's relationship with Chevron, Seward's industry clients, and other potential industry rainmakers.

Mr. Donziger's counsel asked Mr. Hyland in an email to disclose the identity of the foreign affiliates and the subject matter of the opinions. Mr. Hyland responded that the requested information was privileged. Defense counsel via

email posed the following additional questions to Mr. Hyland:

> 1. To clarify, is it your position that the identity of the foreign affiliates referred to in your declaration is privileged?
>
> 2. Is it your position that the "corporate forms" are themselves privileged, that is, (a) any form or template used is itself privileged; and/or (b) questions asked or information requested for which the corporate forms were prepared are themselves privileged?
>
> 3. Were the "corporate forms" filed with, submitted to, or otherwise provided to any third party or anyone outside of Chevron? If so, is it your position that the "corporate forms" as prepared are privileged?
>
> 4. You limit your declaration to the firm's work for Chevron and/or affiliates for "the last ten years." Did your firm perform any work for Chevron and/or any affiliate before "the last ten years" and, if so, what work?
>
> 5. As co-General Counsel to the firm, did the firm disclose the fact of the firm's representation of Chevron and/or foreign affiliates to Judge Kaplan in or about July 2019 at the time that attorneys from the firm were approached by and accepted Judge Kaplan's appointment to prosecute Mr. Donziger, and, if not, do you know why not?

Mr. Hyland responded that his previously submitted declaration:

> contains the information Seward & Kissel LLP deems appropriate to provide in connection with your motion to disqualify the firm. As a clarifying point to your email, please note that Chevron - not Seward & Kissel LLP - is asserting privilege.

A120-21.

Mr. Hyland's response that Seward deemed it inappropriate to say whether it disclosed the Seward-Chevron attorney-client relationship to Judge

Kaplan before accepting the appointment to prosecute Chevron's adversary in the underlying litigation created a separate problem. It is theoretically possible that the Seward prosecutors, at the moment in July 2019 when they indisputably knew of their firm's attorney-client relationship with Chevron, decided to accept Judge Kaplan's appointment, keep the apparent conflict to themselves, and gamble that neither Judge Kaplan nor Mr. Donziger would ever find about it, all with the approval of the Seward partnership which necessarily knew of the relationship before July 2019. It is theoretically possible that Seward might have done so, but it seems unlikely. If Seward truly had not disclosed the Seward-Chevron relationship to Judge Kaplan, Seward presumably would have fallen on its sword and said so, rather than deem the question inappropriate to answer and permit the inference that Seward and Judge Kaplan were acting together to hide the fact of the Seward-Chevron attorney-client relationship from Mr. Donziger.

D. In Denying Mr. Donziger's Motion to Dismiss the Case or Disqualify Seward, the District Court (1) Did Not Address Seward's Coverup of the Seward-Chevron Attorney-Client Relationship; (2) Did Not Question Seward's Refusal to Answer Questions About the Representation; nor (3) Respond to Inferences that Seward Disclosed the Seward-Chevron Attorney-Client Relationship to the District Court Before Accepting the Appointment to Prosecute Chevron's Adversary

In a petition for a writ of mandamus argued before the Court on May 12, 2020, Mr. Donziger argued that Judge Kaplan in December 2019 had abused

his authority by issuing rulings in the civil case that affected the criminal case after arranging for Judge Preska to handle the criminal case, apparently recusing himself. *See In re Donziger*, Second Circuit Case 20-464.[4] Upon accepting the Court's invitation to respond to Mr. Donziger's petition for mandamus, Judge Kaplan told the Court that, in fact, he had never recused himself from the criminal case while nonetheless arranging for Judge Preska to preside over it. According to Judge Kaplan, he and Judge Preska shared authority over the criminal case.[5] *See* Case 464, Doc 35.

By the time of Seward's disclosure of the Seward-Chevron attorney-client relationship, Mr. Donziger had already moved, *inter alia*, for recusal of any Southern District Judge and disqualification of Seward based on Professor Yaroshefsky's opinion. Upon Seward's disclosure of the Seward-Chevron attorney-client relationship and Judge Kaplan's brief to this Court that he had not recused himself from the criminal case, Mr. Donziger moved to dismiss the case with prejudice or, alternatively, for Judge Kaplan's recusal *nunc pro tunc* as of July

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[4] By Order dated May 13, 2020 [Case 20-464, Doc 85], the Court denied the petition, finding no exceptional circumstances warranting mandamus relief.

[5] In Judge Kaplan's submission to this Court, he claimed that a Judge may retain authority over a criminal contempt case after arranging for another Judge to handle it. The cases cited by Judge Kaplan, however, establish a Judge's authority to keep a criminal contempt case, not simultaneously keep and transfer it.

2019, so that a randomly-assigned Judge could be assigned to the criminal case and appoint a truly disinterested prosecutor. A100-19.

Mr. Donziger argued in support of dismissal that the prejudice of Seward's attorney-client relationship with Chevron was irreparable on either of two grounds. *First*, the District Court did not refute the inference that Judge Kaplan knew of the Seward-Chevron attorney-client relationship before appointing Seward anyway and took any action when Seward responded to a specific request for information about Seward's relationship with Chevron by covering it up. *Second*, even if Judges Kaplan and Preska first learned of the Seward-Chevron attorney-client relationship when Seward disclosed it to Mr. Donziger, the fact of the coverup defeated any claim that the relationship was immaterial. The Seward lawyers did not momentarily forget about their firm's attorney-client relationship with Mr. Donziger's adversary in the underlying litigation or fail to appreciate its importance. To the contrary, Seward crafted carefully-worded statements deliberately designed to hide the truth and urged that the date for the scheduled trial be advanced, thereby limiting the window in which the truth might emerge.

As for disqualification, Mr. Donziger also argued that it was impossible to have confidence that Seward could faithfully honor its duties as *de facto* sovereign going forward. As one example advanced by Mr. Donziger

[A119], the degree to which Ms. Glavin actively concealed the Seward-Chevron relationship in response to a specific request renders it impossible to have confidence that she could honor her duty to disclose false or misleading information provided to her by Chevron or her former government colleagues at Gibson Dunn. Alternatively, Mr. Donziger asked that a new randomly-assigned Judge appoint a truly disinterested prosecutor or at least direct Seward to answer the questions which Mr. Hyland refused to answer so Seward's qualifications to prosecute this case could be fully evaluated. A115, 119.

By Order issued on May 7, 2020 [A122], Judge Preska denied all of Mr. Donziger's requests for relief. Judge Preska correctly noted that *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. at 787, is the key relevant authority [A134], but she glossed over its holding. The United States Supreme Court in *Vuitton*, as the Supreme Court itself described it, "establish[ed] a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment" [*id.* at 814] as a basic notion of constitutional due process and fairness. *See id.* at 808-14. Thus, "[i]t is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a *rigorously disinterested fashion* . . ." Id. at 810 (emphasis added).

If any prosecutor in any case had waited *eight months* to disclose her firm's attorney-client relationship with an interested party and the firm's continuing assertion of attorney-client privilege on that party's behalf, any Judge in this Circuit could reasonably be expected at least to express displeasure. Judge Preska's discussion of the issue was relegated to a footnote. She said that Mr. Donziger sought dismissal "because the prosecutors waited too long to disclose Seward's prior relationship with Chevron" and that he had not demonstrated any prejudice from "the timing" of the disclosure. A141 n7. Seward did not just *delay* disclosure, however, but *deliberately concealed* it – in Judge Preska's own Courtroom – in response to a specific request for disclosure. Judge Preska ignored inescapable inferences from Seward's concealment, itself disqualifying Seward as disinterested, let alone rigorously so.

Likewise, despite Seward's refusal to answer questions about its representation of Chevron, Judge Preska, in the same footnote, found that "the information Seward already provided makes clear that the prior Chevron matters create no potential conflicts for the special prosecutors. No further information is needed." A141 n.7. The only information provided by Seward, however, was that it had completed corporate forms and issued legal opinions for foreign affiliates within the last ten years. Far from making "clear" that Seward was disinterested,

Seward asserted attorney-client privilege or otherwise refused to disclose the identity of the foreign affiliates; the subject matter of the "corporate forms;" how the forms or information requested thereby could themselves be privileged; whether dissemination of completed forms to third-parties served to waive any privilege; and the nature of any Seward services for Chevron prior to the last ten years.

Just as Judge Preska failed to ask the Seward prosecutors *anything* when Mr. Donziger in December 2019 requested a hearing about the Seward-Chevron relationship, Judge Preska in denying disqualification declined to ask Seward *anything* about Seward's refusal to answer questions about its representation of Chevron. Judge Preska did not even ask Seward to reconcile its assertion of attorney-client privilege on Chevron's behalf with prosecuting Chevron's adversary for allegedly violating orders issued for Chevron's benefit.

Instead, despite the Supreme Court's self-described "categorical rule" barring "subtle calculations of judgment," and its command "that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion," Judge Preska determined that Seward's legal services for Chevron were not sufficiently significant to undermine the rigorous disinterest categorically required of prosecutors.

ARGUMENT

THE CRIMINAL CASE SHOULD BE DISMISSED OR SEWARD DISQUALIFIED AND THE CASE REMANDED TO A NEW RANDOMLY-ASSIGNED DISTRICT JUDGE

Introduction

The following facts were not refuted in District Court:

- Judge Kaplan appointed Seward with knowledge of the Seward-Chevron attorney-client relationship;

- Neither Judge Kaplan nor Judge Preska corrected Seward in January 2020 when Seward dissembled in response to Mr. Donziger's specific request that Seward disclose the scope of Seward's relationship with Chevron;

- Judge Preska did not ask Seward any questions in January 2020 when Mr. Donziger sought to probe the Seward-Chevron relationship or later when Seward refused to answer questions about its representation of Chevron and asserted attorney-client privilege;

- When Mr. Donziger appealed the conditions of his pretrial release to this Court in February 2020, Seward did not disclose the Seward-Chevron attorney-client relationship despite Mr. Donziger's express argument that Seward's professed concern about risk of flight was a pretext borne of prosecutorial bias; and

- Mr. Donziger will be subject to monitored home confinement for over a year, even if the pandemic permits his case to be tried in September 2020 as scheduled, for a misdemeanor, for which the maximum authorized sentence is imprisonment of six months, despite a record that overwhelmingly establishes no risk of flight.

The Court should dismiss the case because of irreparable prejudice from truly shocking prosecutorial misconduct and judicial bias. Alternatively, the

Court should disqualify Seward, and remand the case to a new randomly-assigned District Judge. *See, e.g., United States v. Wilson*, 920 F.3d 155 (2d Cir. 2019) (remanding to a new Judge upon vacating sentence imposed pursuant to a breached plea agreement).

A. Seward is Not Disinterested Under *Vuitton*

Judge Preska denied disqualification, noting that the appointed attorneys in *Vuitton* represented the party for whose benefit the allegedly violated order was issued in that very case. *Vuitton's* holding, however, does not turn on an attorney's ministerial act of appearing in a particular case, but on the attorney's relationship with the client. As Professor Yaroshefsky explained in her opinion, *Vuitton* is not confined to actual prosecutorial interest in a particular case, but *any* interest, direct or indirect, that may undermine the attorney's disinterestedness and the public's confidence in the integrity of the legal profession. A91-92.

Vuitton categorically prohibits appointment of an interested prosecutor. As *Vuitton* explains, "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record." *Id.* at 813 (emphasis in original). The Supreme Court barred precisely the types of "subtle calculations of judgment" [*see id.* at 814] in which Judge Preska engaged because "[i]t is a fundamental . . . that

the state wield its formidable criminal enforcement powers in a *rigorously disinterested fashion* . . . ." *Id.* at 810 (emphasis added).

The absence of rigorous disinterest is not in the margins of this case. That rigor was thrown to the wind when Seward failed to disclose the scope of its relationship with Seward when it accepted Judge Kaplan's appointment and when it later hid the ball when specifically asked about it. Seward effectively *disqualified itself* at the conference on January 6, 2020, by dissembling about the very circumstances at the heart of any attorney's disinterest: the scope of its underlying relationship. Seward's disinterest was on display in Judge Preska's own courtroom when Seward went to such great lengths to cover it up. *See, e.g., United States v. Di Stefano*, 555 F.2d 1094, 1104 (2d Cir. 1977) (adverse inferences from deception "have independent probative force"). As *Vuitton* teaches: "what is at stake is the public perception of the integrity of our criminal justice system - justice must satisfy the appearance of justice . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." *Id.* at 812.

The District Court ruled that Seward's work for Chevron "has *absolutely* nothing to do with this case" [A139], and that any connection "is *too far fetched* to merit serious attention." A140 (emphasis added). The absolutes with which the District Court expressed its view are irreconcilable with the very fact of

the Seward-Chevron relationship. As this Court instructs, because the "concept of [a disinterested prosecutor] is not altogether easy to define," "the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *Wright v. United States,* 732 F.2d 1048, 1056 (2d Cir. 1984) (citations and quotation marks omitted). It is the "myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record," which permits an inference of disqualifying bias without the District Court's "calculations" about prosecutorial judgment.

Even indulging the District Court's calculations of prosecutorial judgment, they missed the mark. The District Court saw too attenuated a connection between this case and Seward's preparation of corporate forms and legal opinions for Chevron. Even apart from Seward's inherent disinterest, Judge Preska was not faithful to the principle that "[a]n attorney's conflicts are ordinarily imputed to his firm based on the presumption that 'associated' attorneys share client confidences." *Hempstead Video, Inc. v. Incorporated Village of Valley Stream,* 409 F.3d 127, 133 (2d Cir. 2005); New York Rules of Professional Conduct 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from

doing so . . . .").

More, the attorney-client privilege protects "confidential communications between a lawyer and a client relating to legal advice sought by the client." *In re Nassau County Grand Jury Subpoena Duces Tecum*, 4 N.Y.3d 665, 678 (2001). It does not protect the identity of a client [*id.* at 679], such as the identity of the Chevron foreign affiliates that attorney Hyland claimed was privileged. "[T]he privilege . . . does not immunize the underlying factual information . . . from disclosure to an adversary." *Niesig v. Team I*, 76 N.Y.2d 363, 372 (1990). Even a privileged communication may cease to be so if it is later disclosed to a third-party. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016). Thus, attorney-client privilege does not protect the subject matter of the corporate forms prepared by Seward, the forms or requested information themselves, nor the completed forms as provided to third parties. *See People v. Adams*, 20 N.Y.3d 608, 612 (2013) ("[T]he appearance of impropriety itself is a ground for disqualification"")

Judge Preska also failed to appreciate Seward's disqualifying allegiance to Chevron's commercial interests. As Professor Yaroshefsky noted, Seward in its own marketing for 2019, the very year Seward was appointed, expressly identified Chevron's interests as its own. Seward asked clients how the

price of oil would affect "*us and our clients*" in "offshore drilling and services sectors." Multiple Seward clients derive significant revenue from Chevron and endeavor to contract with Chevron to enhance their commercial standing. Seward's relationship with Oaktree, touted on Seward's website, is plainly as significant as it is opaque. Oaktree is significantly connected to Chevron and multiple Seward clients, itself disqualifying Seward as rigorously disinterested, even absent more information about Seward's ties to Oaktree, which was among the things that Seward refused to provide. Thus, even unaware of the Seward-Chevron attorney-client relationship, Professor Yaroshefsky concluded that Seward's interests were so aligned with Chevron's as to create a financial conflict of interest: Seward's "financial and business interests are dependent on the good will of Chevron and its related entities and other giants in the oil industry."

It is possible that Seward covered up the Seward-Chevron attorney-client relationship at least in part to protect the District Court. Seward might have believed it appropriate to hold the attorney-client relationship close to the vest rather than reveal that Judge Kaplan appointed Seward aware of the Seward-Chevron attorney-client relationship. If so, Seward is no less disinterested, and this case is no less salvageable: it proves that the Seward-Chevron attorney-client relationship is diametrically at odds with the rigorous disinterest required by

Vuitton and the constitutional guarantees of due process and fundamental fairness.

B. The Extraordinary Misconduct and Bias in this Case Requires Dismissal or, Alternatively, Remand to a New, Randomly-Assigned Judge for Appointment of a Truly Disinterested Prosecutor

While the District Court sustained Seward's capacity to prosecute this case under *Vuitton*, it did not refute the inference that Judge Kaplan appointed Seward knowing of the Seward-Chevron attorney-client relationship and took no action when Seward covered it up. This inference alone contaminates the entirety of the criminal case, requires dismissal, or at least Seward's disqualification and the District Court's recusal now, without waiting for direct appeal. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981); *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 236–37 (2d Cir. 2016).

Mandamus is reserved precisely for extraordinary cases [*Kerr v. United States District Court,* 426 U.S. 394, 402 (1976); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam)] where the petitioner has demonstrated that his right to the relief is "clear and indisputable." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 18 (1983); *Allied Chem. Corp.*, 449 U.S. at 35; *In re IBM Corp.*, 618 F.2d 923, 927 (2d Cir. 1980). "[W]e have repeatedly held that mandamus is appropriate in recusal motions, believing that there are "few situations more appropriate for mandamus than a judge's clearly

wrongful refusal to disqualify himself." *Id.* at 926 (quoting *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir.1966)). *See also In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (public confidence in the courts requires that questions of disqualification must be disposed of at the earliest possible opportunity).

Mr. Donziger has previously challenged Judge Kaplan's rulings and impartiality. Mr. Donziger's appeal from Judge Kaplan's finding of civil contempt, which preceded and is the predicate for the criminal case, is the subject of pending appeals in this Court, which might moot all or part of the criminal case if sustained. Mr. Donziger argued below in conjunction with his motion to disqualify Seward and recuse the District Court that Judge Kaplan's invocation of criminal contempt was not "[t]he least possible power adequate to the end proposed." *See Vuitton*, 481 U.S. at 801. This petition raises issues of a different dimension. *See In re IBM*, 618 F.2d at 926.

CONCLUSION

The appointment of and failure to disqualify Seward threaten the integrity and reputation of this Circuit. We respectfully urge the Court to dismiss this case or, alternatively, to disqualify Seward and remand the case to a new randomly-assigned Judge for appointment of a truly disinterested prosecutor.

Respectfully submitted,

_____s/_____
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 8,696.

Dated: June 22, 2020

Respectfully submitted,

s/

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EXHIBIT 8

04UFCHEA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
IN RE APPLICATION OF CHEVRON CORPORATION for an order pursuant to 28 u.s.c. section 1782 to conduct discovery for use in foreign proceedings

IN RE APPLICATION OF RODRIGO PEREZ, PALLARES, an Ecuadorian Citizen,

and

RICARDO REIS VEIGA, an American citizen, for an Order to conduct Discovery for Use in Foreign Proceedings,
----------x

M19-111

New York, N.Y.
April 30, 2010
10:15 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

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G. CHARLES NIERLICH

Okay. Plaintiffs brought a lawsuit in this Court in 1993 and for nine years, as your Honor knows, Chevron did everything it could to escape this Court and send the case --

THE COURT: Maybe I can save you a lot of time. I'm not naive, you know. I've been at this game for a very long time now, longer than I care to admit, and I don't for a minute assume a priori that anyone's hands in this matter are clean. Anybody's.

MR. MAAZEL: Okay, fair enough.

THE COURT: Administrations changed in Ecuador. The friends of last time are now your enemies. I understand.

MR. MAAZEL: Okay. Of course, at the time they tried to transfer, successfully transfer the case to Ecuador, they said in one of their briefs that the Ecuadorian system pretty much had the same legal norms as those in many European nations. Now that they've gone to Ecuador and don't like the way the case is going, they compare it to North Korea. So I think we understand what's at play with respect to Chevron.

We had a hotly contested case in Ecuador. Over 200,000 pages of evidence, 63,000 samples, over 100 judicial field inspections, etc.

Last year Chevron made a tactical litigation choice. They decided essentially they don't like the way the trial is going in Ecuador, so instead of trying to assist the Ecuadorian court, which is what the entire purpose of 1782 is, they

MR. MAAZEL: Okay.

THE COURT: That doesn't happen always to control either.

MR. MAAZEL: I'm not suggesting it's dispositive, but I think it's highly relevant. At a minimum, if the Court is at all inclined to grant the application or to even consider it the Court should wait until the Lago Agrio Court weighs in on the issue, which is what the Microsoft case was about.

THE COURT: Believe me, if this were the High Court in London, you can be sure I'd wait.

MR. MAAZEL: And my contention, which I think was bolstered by Chevron's own attorneys for nine years is that we should also wait for what the Court says in Lago Agrio Ecuador.

What's interesting about the presentation by the petitioners is you never heard any discussion of Intel. You never heard any discussion about the four factors. Let's assume there is no privilege. I think there is a privilege, but they didn't even address this issue. There are four factors for the Court to consider, even if your Honor may order discovery, your Honor does not have to, your Honor has discretion, and those factors cut against Chevron here.

They are trying an end run around the Court's jurisdiction. They said in their reply brief they've gone to Lago Agrio to conduct an inquiry. They've gone and they failed. That's what they said in their reply brief. If that's

the Ecuadorian Court.

Another thing the Supreme Court raised is the character of the proceedings underway abroad. In the Aventis case the Southern District said that you can look at the timeliness of the application. This is a litigation that's been going on for over seven years. Crude was released in January 2009. Now, what's Chevron's response to what they've been doing all this time since Crude was released, this sort of investigation they've done with Crude that propels this application today. Their response in their footnote nine is, well, the DVD wasn't released until February 2010. Therefore, we couldn't know that the outtakes would help us, but the film was released in January 2009. Where have they been all this time?

There's no urgency here. The only urgency they have is that they have a new litigation tactic to sort of undermine the Lago Agrio Court in any way they can. It's a litigation minted philosophy here. It's not a legitimate request for information that's going to assist the Lago Agrio Court.

I just want to address for a moment this interesting presentation by the petitioners of the sort of best outtakes, I'm sorry, the best clips they can get of this film because what's interesting is how flimsy what they've come up with is.

The first thing they come up with is Dr. Beristain is someone who later became part of the Court-appointed expert

team, and appears in a film with Pablo Fajardo, plaintiffs' counsel. He was not, as the film itself demonstrates, he was not with the Court expert team at that time. That wasn't until --

THE COURT: He was just wandering through the rain forest and happened to be there.

MR. MAAZEL: He was with an NGO called Accion Ecologica, which was investigating of the effects of what Chevron did in the Amazon, and what is the impropriety of someone who later becomes a Court-appointed expert appearing for, in a meeting with the plaintiffs' counsel? What is the impropriety?

THE COURT: Maybe the impropriety comes in the fact he becomes the Court-appointed expert after having been on one side, if that's essentially where he was. I don't know.

MR. MAAZEL: They were simply in a meeting together. How many lawyers in New York City know people who later become Court-appointed experts? How many of us have gone to parties together? It's so slim, and for this to be the basis for their 600-hour foray is almost frivolous, I suggest.

You know, their next point, their next clip that plaintiffs' counsel met with the President of Ecuador, which what a horrible thing. Of course --

THE COURT: I must say I understand Ms. Wogan's concern, I really do. But in your case, this burden on the

documentary film industry argument really sounds like the lady protesting too much. What's it to you? If there's nothing on the film, what's it to you?

MR. MAAZEL: I don't really know what's on the film. I mean, I haven't seen these hundreds of outtakes because Mr. Berlinger would no sooner let us look at the outtakes than he would Chevron.

THE COURT: Mr. Donziger might have a good idea, don't you think?

MR. MAAZEL: You know he took film of many different people on all sides and many of them, although you wouldn't know it from petitioner's presentation, are not Mr. Donziger.

THE COURT: Would you be happier if I limit it to film in which anybody associated with the plaintiffs or their counsel or any Ecuadorian official appeared?

MR. MAAZEL: I would not be happy with that resolution. Obviously, anything less than 600 hours is better than 600 hours, but I don't think there's any basis for any hours of outtake.

They've come up with three things. This sort of unimportant meeting with Dr. Beristain before he's even appointed by the Court, which they misrepresent in their opening papers. They said he was appointed by the Court. Now maybe they realize he wasn't.

The second thing is there was lobbying of the

President. Well, of course, they submitted a letter in 2005 that said, quote, Texaco and Chevron representatives have always made efforts to meet with the government officials, including the President. And that's -- they have the right to do so even if the parties are engaged in litigation on one issue or another. So as your Honor said before, your Honor's obviously very experienced and knows the ways of the world. When they lobby, that's called lobbying. When a plaintiffs' lawyer lobbies that's called collusion and fraud.

I mean, Mr. Mastro sent a letter to your Honor concerning the briefing schedule here, remember this, just last week, and in which he said I called Miss Wogan to discuss the briefing schedule and he wrote in a letter to your Honor in the Southern District, a federal court, he wrote I colluded with Ms. Wogan because we discussed the briefing schedule. When they called Ms. Wogan to discuss the briefing schedule that's called discussing a briefing schedule. When we do it it's called collusion. So any time two people are in a room and there's no Chevron lawyer in the room, that's collusion and that's the kind of flimsy basis on which they're resting their application.

The very last thing they came up with, and I thought it was very interesting, this video of the proceeding before that judge in Quito. And they said look how awful this is, Mr. Donziger said, oh, it's dirty down here, we're going to go

and make this application, this ex parte application. Of course this application, this 1782 application before Judge Koeltl, that was ex parte, but I suppose that's all right. So Mr. Donziger goes and makes the application. And as you can see from the movie itself, it was contested. A Chevron lawyer appeared there. There was a bit of a shouting match back and forth.

THE COURT: The decision was made before he got his mouth open.

MR. MAAZEL: The judge made a decision --

THE COURT: You would be unhappy if I met with Mr. Mastro this morning, decided the matter, and then said come on in.

MR. MAAZEL: The interesting thing is we submitted a declaration, which is unrebutted on reply, by Juan Pablo Saenz, in which he gave context to what happened, and he said, this is under oath and they have not rebutted this, they put in 43 exhibits, but they did not rebut this. This lawyer testified in his declaration that acting ex parte Chevron attempted to obtain an order to enter the laboratories and that attempt was unusual and they bypassed the court in Lago Agrio and went to Quito. So my point is if anything, we know this is unrebutted and undisputed because what happened on film was a response to an ex parte application by Chevron's lawyers to the judge in Quito who had nothing to do with the case and that's

unrebutted. But it's now the basis for them to seek 600 hours of outtakes.

So my contention to your Honor is if you look at the Intel factors, which they ignore completely, and I think for good reason, they favor denial of the application. And if you look at the flimsy evidence that was presented here, it's just a hill of cards. It adds up to nothing.

I just want to briefly address Misters Veiga and Pallares, and point out just a couple of points. The first is this: As I said there are 12 people under investigation, not just them, but former employees of Ecuador. They don't even attempt, unlike Chevron, to point to a single scene in Crude that even suggests that outtakes could be relevant to them. They don't even attempt to do that because there's no scene in Crude that has even anything to do with them.

Then we have the undisputed declaration of Joe Berlinger and he certainly knows what's on his outtakes more than anyone, and he said, and, I quote, "The unpublished footage contains no material regarding the criminal prosecutions in general or specifically the prosecutions against Misters Pallares and Veiga." And on reply there's certainly nothing they can do with it. It's a sworn statement. Mr. Berlinger said there's nothing that has anything to do with them.

THE COURT: There's certainly an analogy to what

EXHIBIT 9

09NFCHEA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In re:

Application of Chevron Corporation 10 MC 00002 (LAK)

----------x

New York, N.Y.
September 23, 2010
11:00 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

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(Case called)

and humiliating the judges. Got to put pressure on the judges because otherwise they're not going our way. There's certainly a certain amount of evidence which if credited suggests that phony expert reports have been submitted, come back, and then depending on one's view of the business with Cabrera maybe that's true. The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it.

I believe I also saw a clip in the course of preparing for this argument in which reference is made to the criminal case and Donziger or one of his Ecuadorian colleagues makes the comment that the whole criminal problem in Ecuador could be made by the plaintiffs to go away if somehow this whole thing could be wrapped up in a nice big settlement. So the name of the game is, arguably, to put a lot of pressure on the courts to feed them a record in part false for the purpose of getting a big judgment or threatening a big judgment, which conceivably might be enforceable in the U.S. or in Britain or some other such place, in order to persuade Chevron to come up with some money.

Now, do the phrases Hobbs Act, extortion, RICO, have any bearing here?

MR. B. KAPLAN: I think not. What the conduct is that's being attacked, and with skillful editing of some quotes that should not have been made because they're too cynical --

the way, the only concession, we offered a fallback position, you could modify the subpoena to make it a little less irrational and focus on what the -- they said, oh, no we'll make a concession at a footnote on page 48 or 9 of the 50, we won't ask them about Donziger what he talked about with you, Bruce, provided it was about this matter. Thank you. Thank you very much.

The Court, I believe, can and should give limited relief to Perez and Veiga because there are criminal charges. It should quash this ridiculous subpoena, but allow them to put in one focusing solely on the criminal case without the 47 definitions and 11 instructions and conform to the Federal Rules and receive that discovery.

The final point, and then I'll sit down having said "finally" several times. Finally -- two points. Whatever the Court does Donziger should have adequate time to respond. And, two, because --

THE COURT: Well, I'm going to say to you what I said to Mr. Maazel a long time ago. Are you folks prepared to stay everything in Ecuador to let this play out or not?

MR. B. KAPLAN: There have been huge submissions and activities in Ecuador --

THE COURT: I don't care. It's not material to my question. Are you willing to join with Chevron in applying to the Ecuadorian courts to stop it and hold it status quo, no

further activity until these matters are resolved and whatever discovery I think appropriate is completed? Are you willing to do it or not?

MR. B. KAPLAN: The answer is no, we're not willing to -- Chevron has had 17 years of delaying this matter. There's no fast track in Ecuador. Counsel for Lago Agrio plaintiffs knows that better than I, but the Court as a matter of due process to my client, whatever may be the track fast or slow down there, should --

THE COURT: Look, Mr. Kaplan, Mr. Donziger made a bed here, and if he winds up having to sleep in it, the question of the duration of the snooze is in some degree in his hands.

MR. B. KAPLAN: It's more in your hands, Your Honor.

THE COURT: Well, it's certainly in my hands, but I'm telling you right now, I will look at the question of time very differently if the activity stops in Ecuador than otherwise. And you know that's my view from the last case. You know it's the Court of Appeals' view from the last case. Don't tell me about how long Mr. Donziger needs. I know the game here.

MR. B. KAPLAN: Final point. Chevron, because of the oppressive nature of what it's done and refusal to even modify a whit its overwhelmingly burdensome demands should pay his fees and costs. Your Honor has that power under Federal Rule 45(c)(1) and if anything is ordered in favor of the two individuals, they should foot that bill. He's only a person.

EXHIBIT 10

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
IN RE: APPLICATION OF CHEVRON CORPORATION

10 MC 2 (LAK)

----------x
New York, N.Y.
November 22, 2010
2:00 p.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

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(Case called, in open court)

THE COURT: All right. We'll deal with the motion on behalf of -- or the motions on behalf of Chevron and individuals, Pérez and Reis, if I have got that right. Then we'll deal with the -- or at least address the question of the motion by Ecuador, and then Mr. Mastro's letter of today.

Mr. Mastro.

MR. MASTRO: Thank you, your Honor. Your Honor, before I begin, if I may hand up to the Court, the demonstratives I'll be using here today. And I'm handing them to my adversaries, as well.

THE COURT: Proceed.

MR. MASTRO: Your Honor, thank you for seeing us so quickly today. Your Honor, we appreciate the constructive role the special master has played in trying to advance this case. Unfortunately, what we do not appreciate, is the way Mr. Danziger is conducting himself in response to court orders.

Your Honor, here is his privilege log. It is a thicker stack than what he produced as responsive documents after his counsel told you that he had hundreds of thousands of documents, and it would take months and months and months.

Here we are today --

THE COURT: Let's deal with the motion you made.

MR. MASTRO: Certainly, your Honor.

THE COURT: Here we are today on a very discrete but

important question, which is whether Mr. Danziger and his counsel made choices, took gambles, ignored court orders, played procedural games which has led to a waiver of privilege that -- that the genie is out of the bottle and can't be put back.

Now, your Honor, you were very clear in your October 20th order. You told the parties, you told Mr. Danziger, produce forthwith. You have already waived. You made a clear finding on page 7 of your October 20 order that he already waived. But you gave him the potential for a safe harbor. You gave him the potential that he should produce a privilege log by the 29th for your consideration.

Instead of doing that after, in essence, misleading everyone involved here that he was going to do that, and that his counsel were going to do that, not only the Court, the parties, but the special master he, instead, made a motion for reconsideration to you on only one issue, whether he waived privilege. Because he didn't produce a privilege log. It was the only issue we moved on. So he obviously recognized, and his counsel, recognized that you had in fact expressly made that finding. And then he rushed up to the Second Circuit.

THE COURT: It doesn't actually matter, does it, whether I made such a finding, though I did, because what we are concerned with is not whatever I said and the rationale, we're concerned with the decretal paragraph which said, they

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and I'll quote what your Honor said. This was your interpretation of your order.

The Court denied the motions to quash and required compliance, quote, saving to Danziger the ability to make specific claims of privilege for later adjudication by the Court --

THE COURT: Well, let me tell you a few things that are wrong with your argument. Just a handful, apart from what I regard as an essential lack of candor.

The first problem is that the October 20th order said he was to produce, he was to comply with the subpoenas forthwith, everything. Absolutely everything. The subpoenas called for the universe. And I said give them the universe now. No lack of clarity there.

That's the first problem.

There is of course absolutely nothing inconsistent with that in the November 5th opinion. That follows for a great many reasons.

First of all, I said nothing inconsistent with it.

Second of all, it was perfectly obvious from the beginning, given that I said that Danziger, if he filed a privilege log by October 29th, might, underscore the word "might," be relieved of the waiver. But I never said that if he did I would relieve him of the waiver. And he didn't file it by October 29. So there was never any conditional character

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to any order; the October 20th order or the subsequent order.

Now, it is true that the October 20th order preserved two ways in which privileged matters, in some cases, would and in some case is might be, adjudicated later. The October 20th order made no finding of waiver with respect to objections that might be interposed to questions in a deposition.

I appointed a special master to preside at the deposition and to rule, at least in the first instance on any such privilege questions. That is at least one way in which the October 20th order, unmistakenly, contemplated that it would be necessary to resolve privilege questions, in this case related to the deposition, later on.

The second possibility was that Danziger would comply. That was a way in which it was preserved to him. The possibility of saving the privilege claim with respect to the documents, notwithstanding the failure to produce the privilege log when he was required to do so. He elected not to do so. That went away. Had he done so, I might have relieved him of the waiver. And if I had, he then would have had the opportunity to litigate the merits of the privilege objections.

Now, so the November 4th or 5th order, whichever it is, opinion, in no way is inconsistent, in the slightest degree, with the October 20th. He was then, and he is today, under a long defaulted obligation, forthwith, to produce every

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shred of paper, regardless of whatever privilege claims he might have made.

And Mr. Maazel, even if you were right that the November 5th opinion altered that, let me tell you that you lose anyway on this point. You're hoist by your own petard. Because it is your argument here that the November 5th opinion could not alter the obligations of the October 20 order, because you had filed a notice of appeal and I was divested of jurisdiction to alter it.

You're still making that argument on the basis of the pendency of the notice of appeals. So if you're saying all of that with a straight face, then this argument can't be advanced honestly.

MR. MAAZEL: I hear what your Honor said --

THE COURT: I'm glad. I tried not to leave you in doubt.

MR. MAAZEL: And I heard when your Honor referred to the November 5th and I think you were referring to November 10.

Just a couple of points on that. I think in your original order in the footnote 17, your Honor mentioned that you would entertain a privilege log from Mr. Danziger.

THE COURT: No. I don't think I said I would entertain, that's not exactly what I said. I said if he submitted it, I might.

MR. MAAZEL: And my first point is that even

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entertaining, even if you might consider a privilege log by October 29th, there would be no purpose in doing so if all of the privilege documents were ordered to be produced immediately. And so mentioning in the footnote that there was a possibility of a privilege log would seem to make no sense, if Mr. Danziger was required, immediately, to produce privilege documents, otherwise why entertain a privilege log. The documents would have been produced.

The Second Circuit, whether Chevron opposed the stay motion to the panel, Mr. Mastro stated to the panel -- and this is a direct quote on page 24 --

THE COURT: Mr. Maazel, did you, or your colleagues, or did you not on November 15th, tell the Court of Appeals that if you didn't get a stay, on November 15th your clients would lose their privilege in its entirety because Danziger otherwise was obligated to produce all of the allegedly privileged documents. Did you say that?

MR. MAAZEL: I don't think I did, actually. But if you -- this is a letter that I send to the Court, your Honor?

THE COURT: I was not referring to the letter, I was referring to the transcript of the oral argument.

MR. MAAZEL: Okay. I did not attend the oral argument.

THE COURT: Well, maybe you ought to read what the other counsel representing your client said. Because they made

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it was reduced and reduced dramatically.

I have been disturbed by the level of personal attack in this case. I won't go into all of it. I mentioned one of them before. For all intents and purposes, I don't want to overstate it, but to put not too fine a point on it, Ms. Neuman was put on a most wanted poster with the charge that she had been sanctioned. My associate saw that picture. The picture was false, as we know, because we got an order from the magistrate judge on a motion for clarification referring to the misleading press release that led to this poster being put on the web.

That's an example of the kind -- and I should say that to my chagrin, your office were counsel of record in the Colorado action and participated in the underlying proceedings and therefore knew that it was false to say that Ms. Neuman had been sanctioned.

And now you are saying that

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problem. But you all know what I want from the other side of the table at this point. And I will insist on it.

Go ahead, Counsel.

Q. Mr. Donziger, isn't it correct --

THE SPECIAL MASTER: Put it another way, Mr. Donziger, is it fair to say that when you used the words "they," or he used the words "they wanted it to go away," he most likely was referring to Chevron? Yes or no.

THE WITNESS: I don't know. I do not know, sir.

THE SPECIAL MASTER: Let's go back. Let me do it. Do you want to do it or shall I do it? Let's just finish this whole thing up. Go back a little bit.

MR. VINEGRAD: I would like to do it.

THE SPECIAL MASTER: Go ahead, do it yourself.

Q. Mr. Donziger, you understood it at the time, right?

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the question are you not shown on film repeatedly saying to the effect that he just said.

MR. KAPLAN: May we have the question back.

THE SPECIAL MASTER: Yes, you may.

(The record was read.)

THE SPECIAL MASTER: The question asks isn't that true, that is all it is.

A. Is it true that I said that on film?

Q. Yes.

A. I do not know.

THE SPECIAL MASTER: Excuse me, you have no idea -- excuse me, in preparation for your testimony, did you review outtakes from the film?

THE WITNESS: I reviewed dozens of outtakes. I don't recollect which one I might have said that on.

THE SPECIAL MASTER: Did you say it on film? The question is, did you

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say it on film?

THE WITNESS: I don't remember, sir.

THE SPECIAL MASTER: When did you review the outtakes that you saw in preparation for this deposition?

THE WITNESS: On different occasions starting many weeks ago. There is a lot of outtakes.

THE SPECIAL MASTER: I know, because I saw a lot of outtakes.

Are you unable to answer the question? And the question is, is it true, are you unable to answer that question? The question is -- you know, it makes a declarative statement, you are on film on numerous occasions saying in effect you are out to get in this lawsuit as much money as you can; isn't that true?

The entirety of the question is, isn't that true, and are you telling us you cannot answer that question? Is that what you are telling us?

THE WITNESS: That's what I'm

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saying right now.

THE SPECIAL MASTER: That's what you are saying right now. You have your answer, Counsel.

Q. Do you remember being at a meeting in the Selva Viva office in Ecuador in March of 2007 with a number of plaintiffs' experts and others in which you said "we could jack this thing up to $30 billion in one day"? Do you remember doing that? Yes or no.

A. I remember reading about it in one of your -- one of Chevron's briefs.

Q. That's not my question. Do you remember making that statement at that meeting? Yes or no.

MR. KAPLAN: May we have an instruction, that Mr. Vinegrad, as passionate as he might be, not pound the table.

THE SPECIAL MASTER: I think he went a little overboard, Mr. Vinegrad, as have you, Mr. Kaplan, in your day, and as have I in my day and every other lawyer in

hydrocarbons, BTEX, chromium VI.

Q. Is that all?

A. There is others, I'm sure, but I don't have them -- I don't know them offhand.

Q. And is it your testimony that you have scientific evidence that those constituents are found in harmful levels in the Oriente and that you have linked them to TexPet's operations?

A. Yes.

MS. NEUMAN: I can break for the day, Mr. Gitter.

THE SPECIAL MASTER: Is it also your testimony that those constituents are not found in the -- as a consequence of the production by PetroEcuador? Yes or no, please.

MR. KAPLAN: Objection to the Special Master's substantive participation in --

THE WITNESS: That's not what the case is about.

MR. KAPLAN: -- in the

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questioning of the witness.

THE SPECIAL MASTER: Can you answer the question, please? Whether it is or not.

THE WITNESS: It is a complicated question that doesn't lend itself to a yes or no answer. Because there is a lot of mixed sites that Texaco built and operated and handed over to PetroEcuador for continued operation using the same methods. Whether or not those are attributable to PetroEcuador or Texaco is one of the disputed issues in the trial.

So I can't answer that yes or no.

THE SPECIAL MASTER: Okay, thank you.

Ms. Neuman, are you done for the evening? Can you continue tomorrow?

MS. NEUMAN: Yes.

THE SPECIAL MASTER: We are not going off the record. I want to ask the witness something. I want to go back to

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Q. Can you tell us where during that clip you saw the man who was spraying the bug spray spray it under the shirt of the court secretary?

A. It didn't happen in that clip.

Q. It happened in some other clip?

A. I don't know whether it happened or if I'm mistaken here. What bothered me was exactly that scene. It bothered me. I have a right to my opinion. I expressed it. It bothered me.

THE SPECIAL MASTER: Excuse me, I want to ask some questions now. Are you finished with this clip?

MR. VINEGRAD: Go ahead, Mr. Gitter.

THE SPECIAL MASTER: Are you finished with this clip?

MR. VINEGRAD: Not quite.

THE SPECIAL MASTER: You finish first.

MR. VINEGRAD: Please, you are the Special Master. You ask the questions.

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THE SPECIAL MASTER: That is okay. I want you to finish first.

Q. You just said "I have a right to my opinion and it bothered me," that's what you said just a minute ago?

A. Yes.

Q. And in your opinion, am I correct that in your opinion that kind of stuff, right, a Texaco person spraying bug spray on a court secretary, often matters more than legal argument; is that your opinion? Yes or no.

A. That combined with a pattern of activity in the court with the secretary that we had noticed over a long period of time bothered me, and I felt at that time that it might matter more than legal argument. I think there was a certain amount of hyperbole in the statement to the filmmaker.

Q. Did you see Mr. Veiga do or say anything to the court secretary on that clip?

A. No.

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MR. VINEGRAD: I have no other questions on this clip.

MR. KAPLAN: I'll object to the Special Master conducting substantive cross-examination of my client.

MR. ABADY: I join in the objection.

THE SPECIAL MASTER: Excuse me, I'm going to clarify the record, as I think it needs to be clarified.

Mr. Donziger, did you say to Mr. Berlinger in this e-mail, which is 771, "Eddie took video of the court secretary flirting with the Texaco people and getting lotion rubbed on her body by the Texaco people"? Did you say that? Yes or no.

THE WITNESS: Yes.

THE SPECIAL MASTER: You did?

THE WITNESS: Yes.

THE SPECIAL MASTER: Now, you have just seen the clip, correct?

THE WITNESS: Yes.

THE SPECIAL MASTER: And that

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the Lago Agrio civil case?

MR. KAPLAN: I'll object to this.

THE SPECIAL MASTER: Excuse me, you believe -- you can object to it all you want, but I know what's going to happen here, we are going to be at this for the next hour unless it is honed down in this way.

Mr. Donziger -- and if you want to object, you do what you want. I believe the question can be put a different way.

Do you deny the statement that you, Mr. Donziger, believe that public pressure would bring about the result that you wanted in the Lago Agrio civil case?

MR. KAPLAN: I object to the Special Master participating in cross-examination of the witness.

THE SPECIAL MASTER: I'm trying to move this along, and you are going to keep me at lunch to try to close the examination.

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A. I don't know exactly. They certainly wanted a well-known law firm to commit to the case before they would invest. And they also were supportive of Patton Boggs being that law firm.

Q. Am I also correct that Patton Boggs shares office space on the same floor in New York City with the Burford Group?

A. Yes.

Q. And that they share a common mail room?

A. I don't know.

Q. And that Mr. Tyrrell used to be a law partner of one of the principals of the Burford Group?

A. I believe that's the case.

Q. Is that Selvyn Seidel?

A. Yes.

Q. Let me go farther down the list here. But one more question.

When was it, as you recall, that the Burford Group agreed to make a financial commitment to this lawsuit?

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A. I would say July of 2010.

Q. So that was definitely after Mr. Tyrrell and his law firm, Patton Boggs, were on board, correct?

A. Yes.

Q. Now, going farther down the page here --

MR. KAPLAN: Mr. Gitter, could we --

THE SPECIAL MASTER: You know what, you have just anticipated something I was going to do. I assume that Mr. Mastro will not make an offer of proof except on an ex parte basis as we had once before.

Will you consent to my asking him outside the room ex parte what his offer of proof is going to this kind of detail in this document?

MR. KAPLAN: Yes.

THE SPECIAL MASTER: Mr. Abady?

MR. ABADY: Yes.

(The Special Master and Mr. Mastro depart the room.)

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THE SPECIAL MASTER: This subject is going to go a lot faster right now.

BY MR. MASTRO:

Q. Am I also correct that the Patton Boggs firm is doing the case on contingency?

A. Is that a question?

Q. Yes.

A. Partial.

Q. They are also being paid some amount for the case while they also get a contingency component, correct?

A. Yes.

Q. And the Burford Group in investing in the case is on a contingency arrangement?

A. I think that's accurate.

Q. Now, Patton Boggs on this list is responsible for, it says here, identifying Chevron asset locations, correct?

A. Where are you looking?

Q. Towards the bottom of the page,

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"Chevron asset locations, Patton/Eric."

Do you see that?

A. Yes.

Q. That's Patton Boggs' responsibility, correct?

A. Yes.

Q. Has Patton Boggs done that?

MR. KAPLAN: Objection.

THE SPECIAL MASTER: It's in the Invictus report. The answer to that question is already in evidence in the Invictus report.

Q. Besides Invictus, are there any other documents that you have received from the Patton Boggs firm relating to Chevron asset locations?

A. No.

Q. Besides Invictus, is there any other documentation you received from the Patton Boggs firm of information on principal target jurisdictions?

A. Documents?

Q. Yes.

A. No.

DONZIGER

Q. So the document that Patton Boggs produced on Chevron asset locations and principal target jurisdictions for the plaintiffs' team was the Invictus document, correct?

A. I think the Invictus reflected some of their work product. I'm not privy to all the specifics.

Q. Are there other documents that were produced following on Patton Boggs' Invictus memo about enforcement and collection of assets from Chevron?

A. Not that I'm aware of.

Q. Besides Patton Boggs' Invictus memo, did you receive any other documents from Patton Boggs of drafts of procedures to go after assets? That's at the top of page 3.

A. Top of page 3?

Q. Yes. Did you receive any other documents from Patton Boggs concerning procedures to go after assets besides Invictus?

A. No.

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Q. Besides Invictus, did you receive any other documents from Patton Boggs about the most effective defendants for going after an enforcement proceeding?

A. Most effective defendants? I don't understand the question.

Q. Look on page 3, down about a third of the way down the page, you see on the left side "input from PB about the best method and most effective defendants in an enforcement proceeding." Do you see that?

A. Yes.

Q. It says "Patton/Eric," correct?

A. Yes.

Q. So that was being prepared by Patton Boggs, and specifically Eric Westenberger of Patton Boggs, correct?

A. I don't know if that was the case.

Q. Besides the Invictus memo, are you aware of any other documents that you received from Patton Boggs relating to the most effective defendants in an

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enforcement proceeding?

A. No.

Q. Going a little farther down the page, "draft of procedures to go after assets." Again, "Patton/Eric."

Besides Invictus, are you aware of any other documents produced by Patton Boggs to you relating to procedures to go after assets?

A. No.

Q. You see a little further down the page, "analysis of the doctrine that courts do not punish clients when their representatives have committed misdeeds and clients are innocent." Do you see that, sir?

A. Yes.

Q. That's also a document that was being prepared by Patton Boggs and Eric Westenberger, correct?

The reference there to the clients' representatives committing misdeeds, that's a concern about your conduct, correct?

DONZIGER

A. I believe so, yes.

Q. And did Patton Boggs produce that analysis, sir?

A. I don't know.

Q. Did you ever see any such analysis from Patton Boggs?

A. No.

Q. Is that something you would have been interested in seeing?

MR. KAPLAN: Objection.

THE SPECIAL MASTER: Excuse me, sir. Mr. Donziger, who were the clients in this reference here to an analysis of the doctrine that courts do not punish clients when their representatives have committed misdeeds and clients are innocent?

THE WITNESS: What's the question?

THE SPECIAL MASTER: Who are the clients referred to here?

THE WITNESS: People who live in the Amazon in Ecuador.

THE SPECIAL MASTER: Any people

who live in the Amazon in Ecuador?

THE WITNESS: It depends on how you would define clients. It would be the named plaintiffs plus anyone in our mind who would benefit from a remedy, which would be many, many people.

Q. Do you actually have a signed retention agreement with any of the named individual plaintiffs listed on the Lago Agrio complaint?

A. No.

Q. When was the last time you ever spoke to any of the individuals named in the caption of the Lago Agrio complaint as a plaintiff?

A. I don't remernber.

Q. Many years?

A. No.

Q. Give me your best estimate of the last time you ever spoke to them.

A. I would say 2010 or 2009.

Q. Do you see -- so it is your testimony that you have never seen any such analysis of the doctrine that the

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courts do not punish clients when their representatives have committed misdeeds?

A. That's correct.

Q. Even though it says here that that was to have been completed by the last week of July by Patton Boggs, correct?

A. Yes.

Q. Do you see the next category down, "identify possible Latin-born, U.S.-based university professor to consult with us"?

A. Yes.

Q. That's also for Patton Boggs?

A. Yes.

Q. Was that task completed?

A. I believe so.

Q. Did you receive any documents on that subject from Patton Boggs?

A. Not from Patton Boggs.

Q. Who did you receive documents from on that subject?

A. I believe an attorney at Motley Rice.

DONZIGER

Q. Who is the Latin-born, U.S.-based university professor that was identified to you?

A. Alejandro Garro.

Q. And is Professor Garro working with you now?

A. He I think worked with us in the past, and I don't know whether he is active or not.

Q. Please explain what it is that Professor Garro has been retained to consult with you on.

THE SPECIAL MASTER: I think that's been gone into.

MR. MASTRO: Okay. I was not aware of it. But I will skip it. I will skip it.

THE SPECIAL MASTER: I have a question, Mr. Donziger, or maybe counsel.

I see at the bottom of page 2, and several other places at the middle and top of page 4 and then again -- no, that's it -- you see the word "privileged" in those places on the left side?

DONZIGER

MR. KAPLAN: If you are asking me, I see it.

THE SPECIAL MASTER: I'm not asking you. I'm asking the witness first.

THE WITNESS: Yes.

THE SPECIAL MASTER: Does this mean that the document has been redacted in those places on the ground of privilege?

THE WITNESS: I don't believe so. I think this is just the nature of this printout.

THE SPECIAL MASTER: Well, I think the nature of the printout as I see it is it should have been printed out in landscape form and then we would see the word "privileged" next to certain categories.

I wouldn't understand why the word "privileged" -- the reason I'm asking the question, I wouldn't understand why the word "privileged" would be next to some of these categories except as an indication that something has been

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redacted.

For example, if I do the equivalent of a landscape printout, the first reference to the word -- the first use of the word "privileged" appears to be -- well, it is either "draft settlement plan and program," in which case it might make sense, or it's "call from Eric, Steven," etc.

Anyway, is it your -- what's the purpose of this word "privileged" in these places?

THE WITNESS: I don't know. I didn't prepare this document. But I suspect that if it were to be printed out or seen electronically, it might be more clear, the use of that word.

THE SPECIAL MASTER: Well, I'm looking at it now. Let's go to the next -- in fact, this one is very clear.

Go to page 4, at the very top, and if you just do what I have just done, which is to rip the document apart, or you don't have to rip it apart, but you will

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see that the reference to "privileged" at the top of page 4 follows on to the heading "Draft of procedures to go after assets."

Now, what is privileged about that as opposed to many of the other categories here? Do you understand, Mr. Donziger?

THE WITNESS: I don't know.

THE SPECIAL MASTER: Then let me put the question to Mr. Kaplan. My expanded role here.

Does the word "privileged" here indicate that a matter has been redacted from the document?

MR. KAPLAN: I'll adopt my client's answer.

THE SPECIAL MASTER: I'm sorry?

MR. KAPLAN: I don't know.

THE SPECIAL MASTER: Would you please investigate that.

MR. KAPLAN: Yes.

THE SPECIAL MASTER: Thank you.

All right, Mr. Mastro, move on,

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please.

BY MR. MASTRO:

Q. Mr. Donziger, you previously testified you received the Invictus memo that was prepared by Patton Boggs, correct?

A. Yes.

Q. Did you receive any other documents from Patton Boggs about issues relating to enforcement of a judgment in the Lago Agrio case once one is issued in Ecuador?

A. I don't believe so.

Q. I would like to refer you back to the Invictus document.

THE WITNESS: Can we take a short break?

THE SPECIAL MASTER: Sure. That is fine.

THE VIDEOGRAPHER: Off the record, 4:03 p.m. This is the end of disk four, Volume XI, deposition of Steven Donziger.

(Recess taken.)

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THE VIDEOGRAPHER: Back on the record, 4:15 p.m. This is the beginning of disk five, Volume XI, deposition of Steven Donziger.

THE SPECIAL MASTER: Let me just say two things quickly.

One, we are going to continue without pause or break from now until about 5:30, when I have to leave for an engagement, and therefore we are breaking at about 5:30 today. That's number one.

Number two is I didn't want to create a misleading impression when I came back on the record after talking to Mr. Mastro before. I did not intend to say -- I didn't say, but I did not want it interpreted as having been said -- that his line of questioning was not relevant. I was satisfied that what he was doing was relevant. However, I thought I could, and I did, make it go much faster than it otherwise might have.

MR. MASTRO: Yes, you did.

MR. KAPLAN: I think the level

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of detail on this document at this time in the deposition is simply too great an expenditure of time. I appreciate very much the Special Master's expediting it, but it has been a long time of questioning on this particular document.

THE SPECIAL MASTER: Actually, as I believe you will find out in the not that distant future, there was real relevance to this. Go on.

MR. KAPLAN: One other thing I should note. I told the Special Master we, our firm, did not make any redactions whatever on this Exhibit 1615. Mr. Haggerty is checking whether the document had been redacted before Mr. Donziger received it, if that can be determined.

THE SPECIAL MASTER: Mr. Mastro, please proceed.

BY MR. MASTRO:

Q. Mr. Donziger, I believe you testified that you were among a group from the plaintiffs' team that met with Burford

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to 4 o'clock.

Mr. Kaplan, you wanted to say something further about depositions?

MR. KAPLAN: Two brief points, sir. I noted yesterday that on a number of occasions when Mr. Mastro gave the witness a document, the witness was reading it, seeking to have an adequate time, and I would just like him to be allowed to have adequate time without the question coming up too soon, "Are you finished yet?" He is not stalling. But if it is a two or three page e-mail trail and if it is of importance enough that Mr. Mastro wants to question on it, I mean, there were a number of times I remember when you said "You aren't finished reading the document as yet?" That's point one.

Point two is unless it is necessary on a core, relevant matter, I would respectfully ask that the questioner not get into personal details of Mr. Donziger's life, such as whether his

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good friend of many years, Mr. Abady, who he recommended for a matter, attended his wedding. So what?

THE SPECIAL MASTER: Mr. Kaplan, on that point, on that last point, let me deal with that first, I said to you at the close yesterday that I was satisfied with the relevance of the line of questioning that Mr. Mastro was making and I think you will find -- I could be surprised -- but my hunch is you are going to see some filing about the subject of the relevance -- wait a second, hear me out, Mr. Kaplan -- there will be a filing in my judgment at some point that will show you the relevance that I was satisfied about. And I believe, I could be wrong, but I believe the questioning which you think was about a personal matter is actually related to that subject.

Mr. Mastro, am I correct about that?

MR. MASTRO: You are absolutely correct. But it won't come as a surprise

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to Mr. Kaplan or Mr. Maazel that I'm not going to discuss it with them today.

MR. KAPLAN: I must say, I don't dispute the relevance of the line. I think you correctly observed that matter. But once you say I've been his friend for decades and I recommended him for the assignment, does it matter whether he went to a wedding or a bar mitzvah or a christening? And questions about Mr. Donziger's wife, unless directly relevant, I would respectfully ask that the family matters be not touched upon.

THE SPECIAL MASTER: A smallish matter. I'm sure Mr. Mastro has now been sensitized to it by dint of your mentioning it, to the extent he hadn't been before. I don't think we need to go further.

Your first point was adequate time to read. Of course every witness is entitled to adequate time to read. I must say that at least on one of the occasions that Mr. Mastro asked him "are you done

2007, according to the Crude log.

(Exhibit 385 marked for identification.)

(A portion of Exhibit 385 was played at this time.)

Q. Did you hear that, Mr. Donziger?

A. I heard the clip, but which part are you talking about?

Q. The whole clip. You just heard it played, right?

A. Yes.

Q. This is the same meeting with Mr. Kohn that we listened to just a few minutes ago, just a different part of it?

A. I don't know. I will take your word for it if it is.

Q. When you said "We did the work for them because they," referring to the Attorney General, "don't even know how to put out a press release much less write a report," was that the truth, was that what you believed at the time?

A. Yes. I don't believe it today.

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Q. But you believed it then?

THE SPECIAL MASTER: You know, that was a volunteered statement. The question was -- and I'm going to strike it -- the question was simple, did you believe it then? He didn't ask you whether you believed it today. That was simply a volunteered statement. It is stricken.

MR. VINEGRAD: This is a good time to break, Mr. Gitter.

THE SPECIAL MASTER: Folks, the witness can go to lunch and the lawyers are going to stay here and we are going to do it on the record, Mr. Kaplan.

(Witness departs the room.)

THE SPECIAL MASTER: I want to go back to the testimony relating to the draft letter given to Amazon Watch and the objections to the question asking for the discussions that Mr. Donziger or the members of the team had with Amazon Watch about the draft letter to the United States government asking for a criminal

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please.

A. No. It was in a larger context.

Q. Mr. Donziger, is it true or not true that what you meant by that statement was that because there was a new Prosecutor General in Ecuador and because there is never finality in Ecuador, that there was a chance that the criminal investigation that had been closed could be reopened; is that what you meant?

MR. KAPLAN: Form objection.

MR. ABADY: Objection.

THE SPECIAL MASTER: Answer it, please.

A. Based on a suspicion that it had been closed for improper reasons, yes, we felt there was an opportunity to again present the publicly available information of fraud that was being generated in the Lago Agrio trial.

THE SPECIAL MASTER: I'm going to strike everything before the word "yes, we felt it was an opportunity to again

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present the publicly available information of fraud that was being generated in the Lago Agrio trial." The words that precede it are volunteered, self-serving and unresponsive.

MR. ABADY: Please note my objection for the record.

THE SPECIAL MASTER: You may. Excuse me, it is noted.

Q. And is it fair to say that in the months that followed that conversation with Mr. Kohn on January 31st, 2007 that you and the other plaintiffs' lawyers undertook efforts to push and persuade the Prosecutor General to criminally investigate and prosecute Mr. Veiga and Mr. Pallares?

MR. KAPLAN: Objection to form.

MR. ABADY: Form objection.

THE SPECIAL MASTER: It is compound. Would you make it a simpler question, please. The words "push" -- what makes it compound are the words "push and persuade."

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Was one of the ways -- did you believe that one of the ways to bring about the criminal prosecution of Mr. Veiga and Mr. Pallares was to put public pressure on the prosecutor? Yes or no.

A. Based on the evidence in the Lago Agrio case, yes.

THE SPECIAL MASTER: No, no, that's unresponsive and I strike it. Please answer that question. It is really capable of a yes or no answer.

THE WITNESS: I can't answer it yes or no, sir.

Q. Did you believe, Mr. Donziger, that putting pressure on the prosecutor was more important in bringing about the criminal prosecution of Mr. Veiga or Mr. Pallares than the facts or the law?

MR. KAPLAN: Objection.

A. No.

Q. Did you believe that public pressure would bring about the result that you wanted in the Lago Agrio civil case?

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take it what you meant by that was ask for his criminal prosecution; is that a fair statement?

A. What I meant by that was to, again, call attention to the need for there to be an investigation based on facts and what actually happened during the so-called remediation.

Q. When you said "it is time to ask for the head of Perez Pallares," was the action that you ultimately wanted to seek his criminal prosecution? Yes or no.

MR. KAPLAN: I object to the form.

THE SPECIAL MASTER: You may answer. You should answer.

A. Yes, based on facts.

THE SPECIAL MASTER: I strike everything after the word "yes."

MR. VINEGRAD: Thank you.

THE SPECIAL MASTER: That's a volunteered statement.

Q. And when you said "given what the President said," were you referring to

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So in this particular instance, to try to hold people accountable that we felt committed crimes, we wanted to present the publicly available information about what we believe was a fraudulent remediation to an independent prosecutor's office that could make an independent determination whether or not to prosecute people.

MR. VINEGRAD: I move to strike that, too.

THE SPECIAL MASTER: That one I will grant. Because the entire question, although not brilliantly put, really asked you couldn't have been talking about beauty here --

THE WITNESS: It was facetious.

THE SPECIAL MASTER: Counsel, please. I will strike it. Please ask the question in a beautiful way so that he cannot give you the kind of, you know, open-ended, self-serving, and I mean that in the kindest way.

MR. ABADY: I respectfully

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object to the strike.

THE SPECIAL MASTER: That's okay.

Go ahead and ask your question in a more beautiful way.

Q. Isn't it a fact, Mr. Donziger, when you were talking about "the beauty of Ecuador is that there is never finality," in this particular instance, that you were talking about --

THE SPECIAL MASTER: The more beautiful way is to break it up into two or three questions so that you get -- go ahead, please, do it, otherwise you are going to get the same problem and then I'm not going to strike it. Go ahead.

Q. The context of this conversation with Mr. Kohn was the criminal investigation by the Prosecutor General in Ecuador; is that correct? That's what you were talking to him about in the clip that we just saw, correct?

MR. KAPLAN: Objection, compound.

EXHIBIT 11(a)

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withdrawn.

THE SPECIAL MASTER: You may answer.

A. "They" being attorneys for the government?

Q. Correct.

A. There came a point in time when there was a general discussion about the basis for making a claim in court, either an offensive or defensive posture related to evidence that a fraud had been committed in the remediation.

Q. And by "court," are you referring to the Judge Sand case?

A. Yes.

Q. And so tell me what they told you specifically, "they" meaning the Republic's lawyers, what did they tell you specifically about that?

MR. KAPLAN: Objection.

THE SPECIAL MASTER: Same grounds as before?

MR. KAPLAN: I think this is perhaps getting into what you described

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earlier, sir, as core work product.

MR. VINEGRAD: May I ask a foundational question or two, Mr. Gitter?

THE SPECIAL MASTER: Go ahead.

BY MR. VINEGRAD:

Q. At some point the Republic added as an affirmative defense in the Judge Sand case the claim that the remediation was fraudulent, correct?

A. Yes.

Q. And would you accept my -- well, do you remember when that happened?

A. Yes.

Q. When?

A. I don't remember the date, but I believe it was filed in court. So I think it is ascertainable. Probably in -- was it -- I don't remember, 2005 or 2006.

Q. Does August of 2006 sound right to you?

A. About right.

Q. Do you have any reason to question that?

A. No.

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Q. And the meeting that you are describing with the Winston & Strawn lawyers, approximately, approximately, how much before August of 2006 was it?

A. I believe it was about two to three months before.

Q. So in or about May or June; is that fair?

A. Yes.

MR. VINEGRAD: I've asked my foundation questions. I have a proffer.

THE SPECIAL MASTER: No, no, now put the question again to the witness and then we will hear the objections.

(The record was read as follows:

"Question: And so tell me what they told you specifically, "they" meaning the Republic's lawyers, what did they tell you specifically about that?")

THE SPECIAL MASTER: Mr. Kaplan?

MR. KAPLAN: And the "that" is the filing of an amended pleading?

MR. VINEGRAD: No.

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THE SPECIAL MASTER: I think the "that" refers to what we had the break about, correct?

MR. VINEGRAD: Correct.

THE SPECIAL MASTER: The prior break about.

MR. VINEGRAD: Right. I will rephrase it just to get the record --

THE SPECIAL MASTER: No, if this is what you want. I thought they had withdrawn their objection. But if now they are not withdrawing the objection, we are going to have to do what we have to do.

MR. KAPLAN: No objection.

MR. BRINCKERHOFF: The question is, I'm just reading it back -- the answer from the witness was "There came a point in time when there was a general discussion about the basis for making a claim in court, either an offensive or defensive posture related to evidence that a fraud had been committed in remediation.

"Question: And by 'court,' are

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division of the judgment or any settlement among investors, is that relevant, particularly in light of my prior ruling that the total amount of the investment is at best marginally relevant and I did not allow questioning about that.
I did not find the case law that you got me on Monday particularly helpful on that. I think partly because this whole subject of investments in litigations is so new that it has not generated significant amount of judicial rulings.
However, I am advised by Mr. Ormand, who did quick research for me in light of the fact that I didn't find all that helpful what was given to me on Monday, and he found a Delaware federal case yesterday in which the federal judge affirmed the ruling of the magistrate to make some kind of disclosures, or permitting some kind of questioning or disclosures with respect to investors in litigation. The opinion of the judge is

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extremely brief and uninformative. But the opinion of the magistrate apparently would be much more so and maybe the briefs as well.
So I'm asking counsel to get for me -- Mr. Ormand will give you at the break or otherwise the name of the case and the citation or whatever. So will counsel please get to me as soon as they can the opinion of the magistrate. And if that doesn't suffice, also the briefs either to the magistrate or to the federal judge so I can see what the ruling really is likely to have been on an issue that is far closer to what we have at hand than anything I have been given so far.
Those are my rulings, folks. Let's call the witness back.
MR. KAPLAN: Can I make a couple of comments?
THE SPECIAL MASTER: No. I made my ruling. If you want to ask me to reconsider, you do that later on, okay?
MR. KAPLAN: No. I wanted to

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ask a clarifying question about what interrogation you are permitting.
THE SPECIAL MASTER: Yes.
MR. KAPLAN: As I understood what you've ruled, that the questioner --
THE SPECIAL MASTER: Mr. Kaplan, let me interrupt you. I'm sorry to do this.
Wouldn't it be better just finding out, you know, making an objection to any particular question that comes up as opposed to asking in the abstract?
MR. KAPLAN: I will put it in the abstract.
You haven't ruled on category three, and therefore it would be my position and ask you to rule that the questioner can't go by the back door. He can ask what does this mean or what does that mean --
THE SPECIAL MASTER: I don't know what the back door is. I think I was clear the only thing you can do with the document right now, apart from

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Mr. Donziger -- and he has complete freedom to do what he wants with respect to Mr. Donziger's share and apportionment either in the document or outside the document. As to the investors, the only thing he can do is ask for clarification, if it is needed, as to what this document says.
MR. KAPLAN: Understood.
THE SPECIAL MASTER: That's the ruling.
MR. KAPLAN: Could we get the reference now so we can start looking at it?
MR. ORMAND: The caption is Leader Technologies against Facebook. It is from this year, District of Delaware.
THE SPECIAL MASTER: Anybody have it handy? Don't tell me you were counsel.
MS. NEUMAN: No. We tried to get that magistrate's opinion because we saw that case and that was relevant and that is sealed in some way, and we weren't

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able to get it.

THE SPECIAL MASTER: How about the briefs?

MS. NEUMAN: Let me check. I know we tried to get the opinion and that was not possible.

THE SPECIAL MASTER: Did anybody call the counsel in the case?

MS. NEUMAN: I don't believe so.

THE SPECIAL MASTER: Just call and see if we could get it unsealed or something.

MS. NEUMAN: We will check with counsel. Then we would like to submit additional documents on the waiver issue.

THE SPECIAL MASTER: On this document?

MS. NEUMAN: No, on the part three of your ruling that you haven't gotten to yet. We would like to submit additional documents that show waiver.

THE SPECIAL MASTER: Fine. Do it, later today, tomorrow, whatever you

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want.

MS. NEUMAN: Thank you.

THE SPECIAL MASTER: I have not ruled on part three yet, folks. If you have something more to tell me beyond this Leader case, the Facebook case in Delaware, I would be happy to take it. But I want it to be something quite direct, more directly on point than anything I have seen so far. Thank you.

Okay, let's bring in the witness.

One last thing. You have 48 hours to deal with this ruling to Judge Kaplan, as you know.

MR. KAPLAN: I know the opinion. We sing it sometimes. When we want to feel depressed, we sing the opinion. I understand.

(Witness returns to the room.)

THE VIDEOGRAPHER: We are going back on the record at 11:10 a.m. This is the beginning of disk two, volume III, in the deposition of Steven Donziger.

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BY MR. VINEGRAD:

Q. Mr. Donziger, you are aware that about a week after Prosecutor General Pesantez dismissed the Controller General's criminal complaint, this is March of 2007, that members of the plaintiffs' team met with President Correa?

MR. KAPLAN: Objection.

A. I'm not aware of that.

THE SPECIAL MASTER: I was going to sustain the objection, but nevertheless, for a reason that you probably didn't think of.

Q. Specifically was there a meeting between members of the plaintiffs' team and President Correa and others on March 20th of 2007?

A. I remember two meetings with the President that I personally attended. I don't know what the dates were.

Q. Is it fair to say that in addition to those two meetings, that you were aware at the time that other members

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of the plaintiffs' team also met with President Correa without you being present?

A. I think I remember one other meeting. But beyond that I don't have any specific recollection.

Q. Let me show you Exhibit 425 and ask you to review that.

(Exhibit 425 marked for identification.)

THE SPECIAL MASTER: This was previously marked. It was marked in the Berlinger deposition. If you are trying to run the exhibits consecutively, I'm just bringing that to your attention.

MR. VINEGRAD: I'm sorry. I thought we had navigated around that. There aren't going to be many of these.

THE SPECIAL MASTER: That's fine. What is the number of this one?

MR. VINEGRAD: 425.

Q. Have you read it?

A. Yes.

Q. You see the reference there in

EXHIBIT 11(b)

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wash. They had found a lot of contamination at the site and there was a lot of sort of irrelevant comments and stuff in about a hundred-page report, if I remember correctly.

Q. By abandoning the judicial inspections, did plaintiffs prevent any other settling expert reports from being issued?

A. I don't think the two issues were connected.

Q. What's your understanding of why Sacha 53 is the only site for which a settling expert report was issued?

A. It is the way the process ended up working out. We strongly felt that the settling expert reports were not required under Ecuadorian law and that they were being used by Chevron to delay the trial.

Q. Did the court ever find that the settling expert reports weren't required under Ecuadorian law?

A. Well, we made that argument based on our understanding of the law and

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what was being generated during the inspections. We didn't feel like there was a factual dispute between the parties as to the scientific results being produced.

So therefore we felt there was no need for the settling expert report and that they were really usurping the power of the judge to ultimately decide the case. But I don't know if there was an actual ruling.

THE SPECIAL MASTER: I strike everything before the words "But I don't know if there was an actual ruling." The question was did the court ever find, i.e., rule, that the settling experts reports weren't required under Ecuadorian law. That question did not call for your views. It asked simply whether the court so found.

I strike everything -- excuse me, Mr. Abady, I'm going to finish -- I strike everything before the words "But I don't know if there was an actual ruling."

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MR. ABADY: Objection. Can we be heard on this?

THE SPECIAL MASTER: Yes.

MR. ABADY: Outside the presence of the witness?

THE SPECIAL MASTER: Of course.

(Witness departs the room.)

MR. ABADY: I continue to think that there is improper curtailment of this witness' answers. I think that the striking of this testimony with respect to this question and answer is similar to the previous answer that was stricken in part.

My reading of this answer is that it is responsive to the question that Ms. Neuman was asking. She asked what the court ruled, and I don't think this witness was in a position to state definitively whether the court had ruled or not. He articulated legal arguments that were made and then alluded to the fact that he didn't know what decisions were made or were not based on litigation that took place in Ecuador.

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That is a responsive and fair answer to that question. It is proper context in my view.

THE SPECIAL MASTER: Stop, enough. It is not. We disagree. Okay? And you don't need to go through all that speech any more. You have done it at least three times. You probably have done it five times. You don't need to make that speech. I don't know at this point whether or not you are making that speech for our hearing, for the reader's hearing, or for some other purpose.

MR. ABADY: I'm making it, Mr. Gitter, with all due respect, I believe I'm making my comments in a discriminating manner, and I'm making what I think is a fair and proper record.

THE SPECIAL MASTER: You have made your record more times than is required. Now, I reiterate my ruling. The question called for whether there was a finding; instead we got a speech before the answer was given. "I don't know if

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read the rest of the e-mail.
MR. VINEGRAD: Move to strike
THE SPECIAL MASTER: That is stricken. Let me just say it is stricken and the examiner has said to you straight out that he is going on to the rest of that paragraph and yet you continue to fight with him. Stop the fighting. Answer the questions.
And stop these objections, gentlemen, right now. They are uncalled for. We are counting every one of them. And they are doing two things, and I will talk about it after the witness leaves. Let's go. It is now 5 of 5. Let Mr. Vinegrad finish.
Q. Did you ever disclose Mr. Beltman's findings, the ones I just read, to any member of the Attorney General's office of Ecuador? Yes or no.
A. What was disclosed, as I understand it, by our local team to -- you are talking about the Prosecutor General's office?

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Q. No, now I'm talking about the Attorney General's office, the Procurador.
A. Well, whatever was disclosed to government officials by our local team that I know of about this whole issue accurately reflected the facts as we understood them and as I believe Mr. Beltman understood them if you look at the totality of his position.
MR. VINEGRAD: Move to strike.
THE SPECIAL MASTER: Stricken.
MR. VINEGRAD: I will try it again.
Q. The findings that I just read from this e-mail, Mr. Beltman's findings, did you, Steven Donziger, ever disclose those findings to any member of the Attorney General's office of Ecuador? Yes or no.
A. I don't know.
Q. Did you ever ask or request any member of the plaintiffs' team to disclose those findings that I just read to you from Mr. Beltman to any member of the

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Attorney General's office of Ecuador? Yes or no.
A. What you just read to me is inaccurate. So no, I did not ask them to disclose that.
MR. VINEGRAD: Move to strike the first part of the answer.
THE SPECIAL MASTER: Stricken. I'm going to obviate all this. I'm going to read the entirety of the paragraph. Okay?
MR. VINEGRAD: I really -- you know, Mr. Gitter, respectfully, I don't think the contumacious conduct of this witness should impede my ability to question him as I see fit.
THE SPECIAL MASTER: I agree with you. Go.
MR. ABADY: I would like to be heard at the appropriate time on this.
Q. The findings of Mr. Beltman that I just read to you, did you ever disclose those findings to President Correa or any member of his staff? Yes or

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no.
A. I don't have any recollection, as I've testified, of discussing your client's case with President Correa. So the answer would be no.
MR. VINEGRAD: I move to strike everything other than the last sentence. The answer would be "no."
THE SPECIAL MASTER: No, that one I will let. That one I will allow.
MR. VINEGRAD: I don't really care, but let's keep going.
Q. Did you ever ask or request any member of the plaintiffs' team to disclose Mr. Beltman's findings, the ones I just read to you, to President Correa or any member of his staff? Yes or no.
A. I have no recollection of that.
Q. The next sentence reads, and I quote, "The very large exception, of course, is that sampling during the judicial inspections and by Cabrera showed that the 'cleaned' pits are in fact still contaminated. However, the sampling done

EXHIBIT 11(c)

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opportunity of investing in the Lago Agrio litigation?
MR. KAPLAN: Objection.
THE SPECIAL MASTER: I understand there is an assumption that it was Mr. Economou that made the contact. But it is all right. It will be corrected if it's not correct. It is not an objection worth making or responding to.
Go ahead, answer the question, if you can.
A. Can you repeat it, please? I'm sorry.
Q. I'll rephrase it.
You said that it was Mr. Economou who introduced Burford to the opportunity to invest in the case. Do you know how it came about that Mr. Economou introduced Burford to the opportunity?
A. Yes.
Q. How?
A. He set up a meeting with an individual in Burford.
Q. Who was it on plaintiffs' team

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who knew Mr. Economou?
A. I'm sorry?
Q. Who was it on plaintiffs' team who knew Mr. Economou?
A. Who knew Mr. Economou?
Q. Yeah.
A. I did.
Q. Was Mr. Tyrrell already working on the case at this point when plaintiffs' team had its first meeting with Burford or was he not yet on board?
MR. KAPLAN: I object to the form.
THE SPECIAL MASTER: Answer the question. Hand further away from the buzzer, please, Mr. Kaplan.
MR. KAPLAN: Yes, sir.
A. I don't know. But to the best of my recollection, I don't think he was -- Patton Boggs was involved at that point.
Q. Am I correct that Burford didn't agree to invest in the case until Patton Boggs came aboard?

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A. I don't know exactly. They certainly wanted a well-known law firm to commit to the case before they would invest. And they also were supportive of Patton Boggs being that law firm.
Q. Am I also correct that Patton Boggs shares office space on the same floor in New York City with the Burford Group?
A. Yes.
Q. And that they share a common mail room?
A. I don't know.
Q. And that Mr. Tyrrell used to be a law partner of one of the principals of the Burford Group?
A. I believe that's the case.
Q. Is that Selvyn Seidel?
A. Yes.
Q. Let me go farther down the list here. But one more question.
When was it, as you recall, that the Burford Group agreed to make a financial commitment to this lawsuit?

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A. I would say July of 2010.
Q. So that was definitely after Mr. Tyrrell and his law firm, Patton Boggs, were on board, correct?
A. Yes.
Q. Now, going farther down the page here --
MR. KAPLAN: Mr. Gitter, could we --
THE SPECIAL MASTER: You know what, you have just anticipated something I was going to do. I assume that Mr. Mastro will not make an offer of proof except on an ex parte basis as we had once before.
Will you consent to my asking him outside the room ex parte what his offer of proof is going to this kind of detail in this document?
MR. KAPLAN: Yes.
THE SPECIAL MASTER: Mr. Abady?
MR. ABADY: Yes.
(The Special Master and Mr. Mastro depart the room.)

EXHIBIT 11(d)

DONZIGER

correct?

A. Yes. But that's not accurate.

Q. And, sir, I want to ask you a further question in this regard.

THE SPECIAL MASTER: Wait a second. Once again, the witness is claiming that this is incomplete. Why don't we just read the whole thing into the record.

MR. MASTRO: We will. I will read it right now, your Honor.

THE SPECIAL MASTER: I will read it right now. Let the witness complain that I'm reading it wrong.

"He also said the fraud argument turned out well for us because, A, it got traction without us having to back it up; B, it was reinforced by the intervenors, who trashed Texaco, which helped us, yet by Winston opposing the intervenors, it made the gov look mature and put distance between the gov and the plaintiffs, and cured some of the Bonifaz damage; C, it allows them better chance to

DONZIGER

get rid of all evidence in motion in limine about what a great job they did in the remediation. I love Eric."

Did you write that, Mr. Donziger?

THE WITNESS: Yes.

THE SPECIAL MASTER: Now I put it in complete context for you. Did you believe all of it?

THE WITNESS: No, it is not in complete context. I disagree with you, sir.

THE SPECIAL MASTER: All right. I will read the rest of the context.

"I love Eric. I knew the day that I met him that he would be a key linchpin in our strategy on this front. The entire Winston team did an incredible job. The bottom line is they put quicksand under Chevron. There is now no clear exit. It is one more door shut."

Now that I have read the entirety of it, do you believe what you wrote?

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THE WITNESS: I wrote that, but it is not the entire context in my opinion.

THE SPECIAL MASTER: Did you believe the portions I've just read?

THE WITNESS: I wrote it, but I do not believe it accurately represents the context, sir.

THE SPECIAL MASTER: Tell me what more I should read under Eric Bloom to represent the context, or do I need to read into the record the entirety of Exhibit 777 in your view?

THE WITNESS: I think you should.

THE SPECIAL MASTER: Well, I'm not going to do that, Mr. Donziger.

Would you please answer my question. What else under Eric Bloom do I need to read --

THE WITNESS: Nothing. The context I'm talking about is not written under that section.

MR. KAPLAN: Could we have a

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brief recess?

THE SPECIAL MASTER: You better have a break right now with that witness.

THE VIDEOGRAPHER: Off the record, 2:46 p.m.

(Recess taken.)

THE VIDEOGRAPHER: Back on the record, 2:50 p.m.

THE SPECIAL MASTER: Mr. Kaplan, I assume you asked for the recess in order to once again caution the witness about not arguing with the questioner, not arguing with me, answering questions directly, is that correct?

MR. KAPLAN: That is correct.

(Witness returns to the room.)

THE SPECIAL MASTER: Mr. Donziger, whether you know it or not, I'm going to instruct you that an examiner is entitled to read from a section. It is not necessary in order to provide context to a question or a piece of a document to read the entirety of the document, particularly when it is book length, and I

EXHIBIT 12

heavily in favor of Chevron.

There is almost nothing to be said on the other side. The absolute worst case in the sense of the worst scenario that could possibly be developed as a result of issuing a TRO, mistakenly or wrongly, would be that a judgment is rendered in Ecuador as we speak, it turns out that it is a perfectly bona fide judgment that in the fullness of time proves to be entitled to recognition and enforcement, and what will have happened. A TRO can't last more than 28 days, absent consent. So the worst that can happen is that the plaintiffs can be delayed in enforcing that judgment for 28 days. When I balance that possibility against the potential harm to Chevron, it's not a contest. It's not even close.

Public interest warrants some consideration also, I think. I don't denigrate the interests asserted on behalf of the Ecuadorian plaintiffs, if indeed what they claim happened occurred, if they have a right to relief in Ecuador. They are entitled to it in the fullness of time, by which I mean not indefinite delay but prompt proceedings to examine the bona fides of any judgment.

On the other hand, we are dealing here with a company of considerable importance to our economy that employs thousands all over the world, that supplies a group of commodities, gasoline, heating oil, other fuels and lubricants on which every one of us depends every single day. I don't

think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and finds that there isn't any gas there because these folks have attached it in Singapore or wherever else.

Obviously, if and when in the last analysis there is a judgment to be paid, so be it. But helter-skelter disruption for the sake of disruption to attempt to alter the negotiating balance over a possible settlement is not in the public interests. This is too important.

So I am going to grant the temporary restraining order and we are going to move promptly to a determination of the preliminary injunction motion.

As of this moment, the defendants and their officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with any of them, be it they hereby are retrained to and including 11:59 p.m. on February 21, 2011, from funding, commencing, prosecuting, advancing in any way, or receiving benefit from, directly or indirectly, any action or proceeding for recognition or enforcement of any judgment entered against Chevron in Maria Aguinda y Otros v. Chevron Corporation, No. 002-2003, currently pending in the Provincial Court of Justice of Sucumbios in Ecuador, or for prejudgment seizure or attachment of assets based on any such judgment.

I also want to make clear that I am very well aware of

the fact that to issue this kind of relief in advance of the entry of a judgment in Ecuador is certainly unusual. I thought long and hard about it. I think the short answer to that concern is this.

We have plaintiffs with an announced strategy to move promptly upon the entry of any such judgment to cause as much disruption as possible to the purpose of securing a settlement. We know the judgment can come at any moment. The judge in Ecuador has politely but firmly refused to indicate when a judgment will be rendered, although requested to do so by the International Arbitral Tribunal. There are certainly reasons to which allusion has been made before to believe that there is a very substantial likelihood the judgment will be adverse to Chevron. The long and short of it is that I am persuaded that the likelihood of irreparable injury is quite high. It is not a certainty, but it is quite high.

That said, let's talk about the schedule.

Papers in opposition to the plaintiffs' motion for a preliminary injunction are to be served and filed no later than February 11 at 5:00 p.m. Reply papers in support of that motion are to be filed and served no later than February 15 at 5:00 p.m. Unless otherwise ordered, I will hear argument on the motion for a preliminary injunction on February 17 at 9:30 a.m. The parties ought to hold the period beginning February 22 available against the possibility that I will schedule an

evidentiary hearing on the 22nd or thereafter, if I conclude that there is sufficient reason to do so.

The question of a bond has been raised. A bond in these circumstances serves one purpose alone. It is to provide a fund against which a party who was wrongly enjoined may recover any damages that it may sustain as a result of the wrongful injunction during the period of injunctive restraint. At the moment, the period of injunctive restraint is two weeks.

Frankly, for reasons to which I alluded in my colloquy with Mr. Elsen, I can't imagine any economic harm to the Lago Agrio plaintiffs as a result of their being enjoined from seeking to enforce the judgment in that period if indeed there is a judgment during that period, none at all. In any case, they have certainly offered no evidence of any potential economic harm.

In consequence, simply as a matter of form, the TRO is conditioned on Chevron posting a bond no later than Friday at noon in the amount of $10,000.

Anything else this afternoon.

MR. ELSEN: A couple things, your Honor. I am going to be out of the country with the federal bar council trip to Los Cabos.

THE COURT: I congratulate you on your wisdom.

MR. ELSEN: Are you going to there.

THE COURT: Not this year.

EXHIBIT 13

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. STEVEN DONZIGER, et al., Defendants.	Case No. 11-CV-0691 (LAK)

MEMORANDUM OF LAW IN SUPPORT OF KEKER & VAN NEST LLP'S MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANTS STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER AND DONZIGER & ASSOCIATES, PLLC

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Pursuant to Southern District of New York Local Civil Rule 1.4, Keker & Van Nest LLP ("Keker & Van Nest") submits this memorandum of law in support of its Motion to Withdraw as Counsel for Defendants Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC (collectively, "Donziger"), on the grounds of non-payment of fees.

I. INTRODUCTION

It is with regret that undersigned counsel is forced to make this motion to withdraw. This is an extraordinary case, which has degenerated into a Dickensian farce. Through scorched-earth litigation, executed by its army of hundreds of lawyers, Chevron is using its limitless resources to crush defendants and win this case through might rather than merit. There is no sign that Chevron wants a trial on the merits. Instead, it will continue its endless drumbeat of motions—for summary judgment,[1] for attachment,[2] to reinstate long-dismissed claims,[3] for penetration of the attorney client privilege,[4] for contempt and case-ending sanctions,[5] to compel discovery already denied or deemed moot,[6] etc., etc.—to have the case resolved in its favor without a trial. Encouraged by this Court's implacable hostility to Donziger, Chevron will file any motion, however meritless, in the hope that the Court will use it to hurt Donziger. Donziger does not have the resources to defend against Chevron's motion strategy, and his counsel should not be made to work for free to resist it.

In the fourteen months since the stay was lifted in February 2012, this case has been litigated at a feverish pace, which has increased at an exponential rate. The docket sheet shows

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[1] *See, e.g.*, Dkt. Nos. 396, 483, 583, 744.
[2] *See, e.g.*, Dkt. Nos. 353, 404.
[3] *See* Dkt. No. 782.
[4] *See, e.g.*, Dkt. Nos. 475, 562, 656, 850, 1031.
[5] *See* Dkt. No. 893
[6] *See, e.g.*, Dkt. Nos. 1018, 1074.

81 entries for the first quarter of 2012; 43 entries for the second quarter of 2012; 81 entries for the third quarter of 2012; 114 entries for the fourth quarter of 2012; and 261 entries for the first quarter of 2013. April has yielded another 130 docket entries, plus a three day evidentiary hearing. Letters, emails, discovery responses, meet and confer calls, and other non-docketed materials have all followed the same trajectory of relentless increase. Chevron served over 210 document requests to Donziger, many with subparts, as well as dozens of pages of interrogatories, and 1,228 requests for admissions, many with multiple subparts. Donziger's counsel has spent thousands of hours in recent months dealing with Chevron's seemingly limitless discovery demands. Now, with the addition of two special masters and their associate and assistants, there is the additional burden of responding to their various letters, orders and emails. Keker Decl. ¶¶ 5 & 6.[7]

Defense counsel has sought the Court's intervention to control and manage what has become unmanageable. *See* Keker Decl., Ex. A (March 1, 2013 letter to Judge Kaplan). The Court did not respond to this letter and indeed, in the weeks since March 1, has made matters worse by consistently and cumulatively increasing the litigation burden on defendants: allowing dozens of fact depositions to occur from Park Avenue to Peru;[8] ordering over objection the appointment of two very expensive special masters with burdensome procedural requirements;[9] ordering a three-day evidentiary hearing in New York on a Chevron motion seeking sanctions because an Ecuadorian went to court in Ecuador to clarify his Ecuadorian attorneys' responsibilities under Ecuadorian law;[10] threatening defense counsel that they were to "proceed

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[7] "Keker Decl." refers to the Declaration of John W. Keker, filed concurrently herewith.
[8] Dkt. Nos, 882, 910, 941.
[9] Dkt. No. 942.
[10] Dkt. No. 997.

at their own risk" and "at their peril" when they wrote to the court and special masters that Donziger could not pay his lawyers, much less the exorbitant fees of the special masters;[11] forcing Donziger's counsel to spend hundreds of thousands of dollars on attorney time responding to a motion for summary judgment, which counsel begged to be put off until after discovery closed,[12] only to rule on the motion by announcing that it was denied without prejudice until after discovery closed, and could be reinstated later;[13] and ordering not one seven-hour day, but three days of depositions (on top of 16 previous days of deposition) of Donziger.[14]

This Court's hostility towards Donziger, already the subject of a motion to recuse and currently the subject of a pending mandamus proceeding, has in recent weeks become even more pronounced. When Chevron complains about defense counsel's possible role in an Ecuadorian lawyer seeking an order from an Ecuadorian court, the Court responded by ordering a three-day evidentiary hearing in New York, but when defense counsel complained about Chevron making blatantly false statements, the Court responded by accusing defense counsel of "bickering" and "venting of [counsel's] spleen."[15] During the recent evidentiary hearing, and in its order demanding Donziger's presence at a deposition for three days, the Court has made plain that its mind is made up, and its hostility toward Donziger is implacable.

Chevron's litigation tactics, which this Court has endorsed and encouraged throughout these proceedings, notwithstanding the dictates of Federal Rule of Civil Procedure 1, have made the costs of this litigation unsustainable to Donziger. Simply put, Donziger cannot afford to pay

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[11] Dkt. No. 999, 1055.
[12] Dkt. No. 780.
[13] Dkt. No. 1063.
[14] Dkt. No. 1060.
[15] *See* Dkt. No. 1055.

what is required to litigate effectively against a hostile wealthy corporation in a hostile court. As set forth in the accompanying Declaration of John W. Keker, Donziger has since September 2012 fallen into significant payment arrears such that Keker & Van Nest is now owed more than $1.4 million in unpaid fees and costs, including for work presently being conducted. Keker Decl. ¶ 9. More significantly, to even stay alive in this case, without appearing at depositions or other frills, through discovery and trial will cost another six to ten million dollars in attorney time and costs—an amount about equal to what we estimate Chevron is paying its lawyers each month. *See id.* ¶ 10. There is no reasonable prospect of payment of the current receivable, nor of payment of the future fees and costs anticipated to be incurred through trial. *See id.* ¶ 11.

Keker & Van Nest therefore seeks to withdraw as counsel. Mr. Donziger will represent himself and his law firms for the remainder of the pretrial phase of this case. If he is able to hire (or re-hire) outside counsel for trial, he will do so. But for now, his counsel is unwilling to continue on a *pro bono* basis under the current conditions, and should not be made a slave to this impossible situation.

II. DONZIGER IS NOT ABLE TO PAY HIS COUNSEL

Keker & Van Nest's retainer agreement with Donziger imposes a straight hourly rate billing structure. There is no contingency or bonus feature. Keker Decl. ¶ 8. During the course of Keker & Van Nest's representation of Donziger in this litigation, Keker & Van Nest has performed a substantial amount of work in connection with the pleading and discovery phases of this action. Donziger kept largely current with paying Keker & Van Nest's billed fees and costs for the first year and a half of Keker & Van Nest's representation of him. However, by September 2012, Donziger was no longer able to keep current. *See id.* ¶ 9.

Since September 2012, Donziger has owed Keker & Van Nest for fees and costs. Keker Decl. ¶ 9. Notwithstanding some partial payments made during the last six months, Keker &

Van Nest's receivable has grown steadily since last Fall, and now exceeds $1.4 million dollars, including for work being performed currently. *Id.* This is so despite a contractual fee agreement calling for payment of all invoices within 15 days of receipt, and despite repeated requests by Keker & Van Nest to Donziger for payment of its fees and costs. *Id.*

There is no reasonable prospect of Keker & Van Nest's recovery of its current outstanding receivable of over one million dollars, nor of receiving substantial payment for future fees and costs that would be incurred if Keker & Van Nest were to continue on as counsel. Keker Decl. ¶ 11.

As the Court is aware, written discovery has been completed, but few depositions have yet been taken in this case. Keker Decl. ¶ 12. Depositions are in the process of beginning now. *Id.* Discovery currently is set to close on May 31, 2013. Dkt. No. 494. Trial is set for October 15, 2013. Dkt. No. 606

III. ARGUMENT

Under Local Civil Rule 1.4 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York:

> An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar.

Accordingly, "[w]hen considering whether to grant a motion to dismiss, district courts must thus analyze two factors: the reasons for withdrawal and the impact of the withdrawal on the timing of the proceeding." *Blue Angel Films, Ltd. v. First Look Studios, Inc.*, No. 08 Civ. 6469 (DAB)(JCF), 2011 WL 672245, at *1 (S.D.N.Y. Feb. 17, 2011).

A. Donziger's failure to pay Keker & Van Nest's fees and costs justifies granting leave to withdraw.

Donziger's failure to pay legal fees in accordance with contractual arrangements warrants an order from this Court granting Keker & Van Nest leave to withdraw as counsel. *See* Local Civil Rule 1.4; *Police Officers for a Proper Promotional Process v. Port Auth. of New York and New Jersey*, No. 11 Civ. 7478 (LTS)(JCF), 2012 WL 4841849, at *1 (S.D.N.Y. Oct. 10, 2012) (citation omitted) ("it is well-settled in the Eastern and Southern Districts of New York that non-payment of legal fees is a valid basis for granting a motion to withdraw pursuant to Local Civil Rule 1.4."); *Centrifugal Force, Inc. v. SoftNet Commc'n, Inc.*, No. 08 Civ. 5463(CM)(GWG), 2009 WL 969925, at *2 (S.D.N.Y. Apr. 6, 2009) ("Attorneys are not required to represent clients without remuneration, and the failure to pay invoices over an extended period is widely recognized as grounds for leave to withdraw."). "It is well-settled in the Eastern and Southern Districts of New York that non-payment of legal fees is a valid basis for granting a motion to withdraw pursuant to Local Civil Rule 1.4." *Melnick v. Press*, No. 06-cv-6686 (JFB)(ARL), 2009 WL 2824586, at *3 (E.D.N.Y. Aug. 28, 2009); *Team Obsolete Ltd. V. A.H.R.M.A. Ltd.*, 464 F.Supp.2d 164, 166 (E.D.N.Y. 2006) ("Courts have long recognized that a client's continued refusal to pay legal fees constitutes a 'satisfactory reason' for withdrawal under Local Rule 1.4"); *D.E.A.R. Cinestudi S.P.A. v. Int'l Media Films, Inc.*, No. 03 Civ. 3038 (RMB), 2006 WL 1676485, at *1 (S.D.N.Y. Jun. 16, 2006) ("It is well-settled that nonpayment of fees is a valid basis for the Court to grant counsel's motion to withdraw." (citation omitted)).

More specifically, applying Second Circuit law, courts in the Southern and Eastern districts have reiterated that non-payment of fees constitutes a "satisfactory reason" under Local Civil Rule 1.4 supporting an order granting withdrawal. According to these courts, "[a]lthough there is no clear standard for what may be considered a 'satisfactory reason' for allowing a

withdrawal, it seems evident that the non-payment of legal fees constitutes such a reason." *Blue Angel Films*, 2011 WL 672245, at *1 (citation omitted); *Diarama Trading Co. In. v. J. Walter Thompson U.S.A. Inc.*, No 01 Civ. 2950 (DAB), 2005 WL 1963945 at *1 (S.D.N.Y. Aug 15, 2005) ("'Satisfactory reasons' include failure to pay legal fees."); *Cower v. Albany Law Sch. Of Union Univ.*, No. 04 Civ. 0643 (DAB), 2005 WL 1606057, at *5 (S.D.N.Y. Jul. 8, 2005) ("It is well settled that nonpayment of fees is a legitimate ground for granting counsel's motion to withdraw"). Accordingly, these courts conclude that "[c]ourts have uniformly granted motions to withdraw when attorneys allege non-payment of fees by their clients." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, No 95 Civ. 2144 (JGK), 1997 WL 109511, at *2 (S.D.N.Y Mar. 11, 1997), *reversed on other grounds by* 140 F.3d 442 (2d Cir. 1998).

In addition, courts in this district repeatedly have held that counsel should not be compelled to represent a client *pro bono*. *See, e.g., Cower*, 2005 WL 1606057, at *5 ("The Court cannot force Plaintiff's counsel to proceed *pro bono*."); *HCC, Inc. v. RH & M Mach. Co.*, No. 96 Civ. 4920 (PKL), 1998 WL 411313, at *1 (S.D.N.Y. Jul. 20, 1998) (granting withdrawal and stating that it would not "impose on counsel an obligation to continue representing [corporate] defendants pro bono").

Donziger currently owes over $1.4 million dollars in fees and costs to Keker & Van Nest for work performed in this case. Keker Decl. ¶ 9. Although Donziger has made minimal partial payments during the last six months, they are far below the amount billed for fees and costs, causing Keker & Van Nest's account receivable to balloon. *Id.* Despite extensive efforts to work with Donziger to resolve this situation, there is no workable plan to pay Keker & Van Nest the fees that Donziger already owes, or fees that will be incurred in the future. *Id.* ¶11. And given the recent pace of this litigation, Keker & Van Nest anticipates that it will cost millions of

dollars to finish discovery, to prepare the case for trial, and to defend Donziger at trial. *Id.* ¶ 10.

Regarding discovery, deposition costs alone will be substantial, if Donziger could afford to have his attorneys participate. Pursuant to this Court's March 15, 2013 Rule 16 Order, the parties can depose up to 42 fact witnesses, and these depositions will take place all over the United States and abroad, including in New York, San Francisco, Denver, Houston, Washington, DC, and Lima, Peru. Keker Decl. ¶ 13; Dkt. No. 910. We expect extensive motion practice regarding these depositions, including briefing concerning unresolved privilege issues and to preclude Defendants from deposing certain of Chevron's employees and agents. Keker Decl. ¶13; Ex. E at 2; *see also, e.g.*, Dkt. Nos. 1065, 1067, 1069. Furthermore, the parties have the right to appeal any rulings made by the Special Master at the deposition to the Court within forty-eight hours after the deposition, which will likely result in substantial additional motion practice. Dkt. No. 942, at 2-3. Expert discovery and depositions will impose grievous additional costs, especially given that Chevron has disclosed more than three dozen experts, and the Court so far has declined to require Chevron to reduce the number of experts . Dkt. No. 1052.

There is no reason to think that Chevron's fusillade of motions, correspondence, and various other demands will diminish as the case approaches trial; Chevron made clear years ago that it intends to "fight until hell freezes over" and then "fight it out on ice[.]"[16] Its CEO John Watson said in February 2013, when asked when the litigation will end, "the short answer is it will end when the … lawyers give up."[17] Before depositions even began, Chevron already filed three separate partial summary judgment motions, two motions for attachment, and a motion for terminating sanctions, and innumerable discovery and procedural motions. Keker & Van Nest

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[16] January 9, 2012, Reversal of Fortune, *New Yorker*, available at: http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe

[17] Chevron's Expensive Problems, *Forbes Magazine*, March 4, 2013 issue, http://www.forbes.com/sites/christopherhelman/2013/02/13/chevrons-expensive-problems/.

estimates that it will cost between six and ten million dollars to litigate this case through trial. This estimate is probably conservative given the litigation tactics that Chevron (and its counsel Gibson Dunn) has employed to date. Keker Decl. ¶ 10.

With revenues in the billions of dollars,[18] Chevron can afford to litigate this case "until hell freezes over." But Donziger can't, and his counsel cannot continue to defend him going forward with no realistic prospect of payment for its efforts. "The Court cannot force [Keker & Van Nest] to proceed *pro bono*." *Cower*, 2005 WL 1606057, at *5.

B. Withdrawing at this stage of the litigation would not unduly disrupt the existing case schedule.

Where discovery has not yet closed and a case is not "on the verge of trial readiness," withdrawal of counsel is unlikely to cause either prejudice to the client or such substantial disruption to the proceedings as to warrant a denial of leave to withdraw. *Winkfield v. Kirschenbaum & Phillips, P.C.*, No. 12 Civ. 7424 (JMF), 2013 WL 371673, at *1 (S.D.N.Y. Jan. 29, 2013) (quoting *Blue Angel Films*, 2011 WL 672245, at *2); *accord Karimian v. Time Equities, Inc.*, No. 10 Civ. 3773 (AKH) (JCF), 2011 WL 1900092, at *3 (S.D.N.Y. May 11, 2011).

Indeed, courts frequently grant motions to withdraw as counsel at equivalent, or even later, stages of litigation. *See, e.g., D.E.A.R. Cinestudi*, 2006 WL 1676485, at *1-2 (granting counsel's motion to withdraw due to lack of payment of fees where discovery was complete and trial was months away); *Spadola v. New York City Trans. Auth.*, No. 00 CIV 3262, 2002 WL 59423, at *1 (S.D.N.Y. Jan. 16, 2002) (allowing counsel to withdraw where discovery had been completed and client had not paid outstanding legal fees because client "would not be unduly

[18] Chevron's profits for 2012 exceeded $26 billion, and they ended the year with $21.9 billion cash on hand. Keker Decl. ¶ 15; Ex. F.

prejudiced by his counsel's withdrawal at this stage of litigation."); *Promotica of America, Inc. v. Johnson Grossfield, Inc.*, No. 98 CIV. 7414, 2000 WL 424184, at *1-2 (S.D.N.Y. Apr. 18, 2000) (granting motion to withdraw where discovery was closed and case was ready for trial); *Cf. Furlow v. City of New York*, No. 90 Civ. 3956 (PKL), 1993 WL 88260, at *2 (S.D.N.Y. Mar. 22, 1993) (where document discovery was complete but depositions had not been taken, withdrawal permissible because "this action is not trial ready and resolution of this matter will not be delayed substantially by counsel's withdrawal at this juncture").

C. Donziger is prepared to represent himself and his law firms in this matter.

At the present time, Donziger does not have substitute outside counsel. And, given his inability to fund his current counsel, he is not likely to be successful in finding substitute outside counsel. Accordingly, Donziger intends to represent himself and his law firms during the remainder of the pretrial stage of this case, with hopes of either securing new counsel, or re-engaging his present counsel, for the trial.

As courts have recognized, "[a] litigant's unrepresented status is often 'not the product of choice,' but 'the result of necessity and economic reality'." Cynthia Gray, *Judicial Ethics and Self Represented Litigants*, American Judicature Society (2005), at p. 11 (quoting *Jacobsen v. Filler*, 790 F.2d. 1362, 1367-68 (9th Cir. 1985) (Reinhardt, dissenting)). The right of self-representation is as old as the Judiciary Act of 1789, is codified in the United States Code at 28 U.S.C. § 1654, and has been affirmed by the Supreme Court, *Faretta v. California*, 422 U.S. 806, 812-13 (1975). For Donziger, it is not only a right but a necessity.

If Donziger is able to secure outside counsel to represent him at trial he will do so, whether by re-engaging Keker & Van Nest, or by hiring other trial counsel. But for now, he is not paying his current counsel, his contractual obligations to counsel are being disregarded, and his counsel Keker & Van Nest is no longer willing or able to represent him under these

circumstances.

IV. CONCLUSION

For all the foregoing reasons, Keker & Van Nest respectfully requests that the Court enter an order permitting Keker & Van Nest to withdraw from its representation of Donziger in this action, and allowing him represent himself and his law firms in this action.

Respectfully submitted,

KEKER & VAN NEST LLP

Dated: May 6, 2013

By: */s/ John W. Keker*

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EXHIBIT 14

KEKER - DIRECT (by Friedman)

Justice Earl Warren at the Supreme Court.

MR. FRIEDMAN: How long did you do that?

THE WITNESS: I did that for about two-thirds of the year. Then I worked for a brief time at the (indiscernible) National Resources Defense Council in Washington while I was waiting to start my public defender job in federal court in San Francisco, which I did in July or June of 1971.

MR. FRIEDMAN: And how long were you with the public defender's office?

THE WITNESS: Two years.

MR. FRIEDMAN: What did you do after that?

THE WITNESS: I started the firm with two others. Then my law school classmate and I broke that firm up in 1985 and started this firm later, what was called Keker & Brockett.

MR. FRIEDMAN: What has been the nature of your practice since then?

THE WITNESS: I do litigation, both civil and criminal. Done everything from intellectual property to major criminal cases to alimony cases on Court TV and so on. I do a lot. Just all kinds of litigation except

KEKER - DIRECT (by Friedman)

matrimonial and family law.

MR. FRIEDMAN: What's the size of your firm now?

THE WITNESS: We're about 100 lawyers.

MR. FRIEDMAN: At some point in time, did you represent Mr. Steven Donziger?

THE WITNESS: Starting in February 2011 me and others at my firm represented Mr. Donziger. We met him on February 17, 2011.

MR. FRIEDMAN: What were the circumstances under which you were contacted?

THE WITNESS: Jerry Laur (phonetic) had recommended that he get in touch with us. He came out in February 17th and told his story to all. We agreed to represent him and the next day I was in New York for Judge Kaplan.

MR. FRIEDMAN: At that point, had the RICO case been filed? Do you remember?

THE WITNESS: RICO, yes. The RICO case had been filed. The first was around the 1st of February and the temporary restraining order had been entered. Judge Kaplan was planning a hearing on the 18th. On the preliminary injunction, it had been set the next week. So

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I had to have an entry here, on the preliminary injunction, if necessary. That's when we showed up.

MR. FRIEDMAN: All right. I wonder for how long a period of time were you representing Mr. Donziger?

THE WITNESS: We were representing him until we drew a motion to withdraw and Judge Kaplan granted it. That was I think in May of 2013.

MR. FRIEDMAN: Had the trial taken place at that point?

THE WITNESS: No. The RICO case, the RICO trial happened after that.

MR. FRIEDMAN: All right. What was the reason for your withdrawal?

THE WITNESS: The handwriting was on the wall that this was a (indiscernible) by Chevron. Judge Kaplan had made it clear that he was determined to see Mr. Donziger, I think, convicted of the charges Chevron was making. Chevron was through scorched earth tactics, running up huge bills. They had a 160 lawyers working on the case from Gibson Dunn. They had

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60 law firms working on the case that filed for summary judgment motions. It was simply economically impossible for us to keep up. And, as I say, the handwritings on the wall was it was not going to end up well. So we asked to withdraw and we did withdraw. I filed a motion in which I stated why we were withdrawing. The best evidence of why we withdraw was in that motion. I think one of the things I did was refer to the legal proceedings as transient farce. And I was referring to (indiscernible).

MR. FRIEDMAN: So during the time that -- wait, have you stayed in touch with Mr. Donziger since your withdrawal?

THE WITNESS: Some, yeah. Not a lot. Some.

MR. FRIEDMAN: During the time you were representing him, did you have regular contact with him?

THE WITNESS: Yes.

MR. FRIEDMAN: And did you have occasion to explore the allegations against him?

THE WITNESS: Of course, yes.

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MR. FRIEDMAN: And were you able to form an opinion as to his character for truth and veracity?

THE WITNESS: With me, Steven was straightforward and truthful.

MR. FRIEDMAN: Do you believe that he received a full and fair opportunity to litigate the issues while you were representing him?

MR. DAVIDSON: Objection.

THE WITNESS: He did not while I was representing him.

MR. DAVIDSON: Move to strike.

THE REFEREE: I'll reserve on that. Go ahead.

MR. FRIEDMAN: You used some strong language in that brief that you referred to. I don't want to go through the brief, but you mentioned some of the language. Have you ever written such direct critical language about federal judge in a pleading before?

THE WITNESS: I probably have since I had two cases before the Honorable Richard Owen in Southern District New York. We wrote some

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fairly harsh language about the way he treated us in those criminal cases.

MR. FRIEDMAN: Just give me a minute here, Mr. Keker. We've got some ground rules I'm trying to adhere to. Hold on just a minute.

Oh, yes. Could you tell us how it came to pass that Mr. Dohniger's attorney-client and work product privileges were taken away?

THE WITNESS: That was before. That was part of the package that we got when we first met Steven. He had been subject to 1782 proceedings in which we did not represent him. That started in 2010. During these proceedings we came to understand, because we had to look into the background, he had been deposed for 14 days.

The most important thing that had happened was that he had filed a motion to quash with respect to subpoenas to him for his records. He had timely filed a motion to quash, but he did not accompany it with a log, the attorney-client privilege log. Judge Kaplan had determined that that amounted to a waiver of attorney-client privilege. That was all of his

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records going back for I think 10 years that were subject to discovery by Chevron and he had no privilege left. That was the situation he was in when we got him.

MR. FRIEDMAN: Was that the reality of the litigation during the time you were representing him?

THE WITNESS: Well, we fought about it and fussed about it but that never changed. That was the way it was. It was then everything -- an awful a lot of the rulings amounted to waiver. Everything that happened that Judge Kaplan could call a waiver, he called a waiver. So he didn't have an attorney-client privilege to speak of.

MR. FRIEDMAN: The point I was driving at is, as a practical matter then, Chevron got all of his emails, all of his electronic communications and various other things. Is that correct?

THE WITNESS: I believe that's the truth but I don't -- yeah, I think that's fair.

MR. FRIEDMAN: I don't have any other questions, Mr. Keker, but the Committee may. I

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mean I'll change seats with them since they have to seat over here and talk to you.

THE REFEREE: Okay, Mr. Davidson. And you have to move to the screen there.

CROSS-EXAMINATION

BY MR. DAVIDSON:

MR. DAVIDSON: Good morning, Mr. Keker.

THE WITNESS: Good morning, sir. I don't know who you are.

MR. DAVIDSON: I'm George Davidson, a pro bono counsel to the Disciplinary Committee.

THE WITNESS: Okay. Nice to meet you.

MR. DAVIDSON: There's an awful lot at stake in the RICO case in terms of the money in issue. Isn't that right?

THE WITNESS: Well, in terms of reputational issues, there's a lot at stake too but I don't --

MR. DAVIDSON: From Chevron's point of view, I mean it's a very --

(interposing)

THE WITNESS: I think Chevron cared about it a lot. They have all kinds of statements about how the earth will freeze or something

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teaching as a member of the visiting faculty at Harvard Law School, and I've previously taught at Georgetown and American Universities.

MR. FRIEDMAN: I don't have it in front of me, but I think I remember seeing on your résumé you're also a member of the ALI?

THE WITNESS: The American Law Institute, yes.

MR. FRIEDMAN: What does that involve?

THE WITNESS: That is a body of lawyers, judges, and law professors who work together to develop the restatements and other products that reflect the profession's best understanding of what the law is.

MR. FRIEDMAN: How did you first hear about this case? I'm sorry. Let me ask a better question. How did you first hear about Steven Donziger?

THE WITNESS: Well, I think I may have been aware of press coverage of the case in general, but I was first contacted by Steven's friend, Jason Adkins, who I think at the time was the president of Public Citizen's board of directors. And this was while the trial was

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going on and sort of unusual. Usually, people wait to see if they've won or lost before they decide that they have an appeal. But I think Steven and his team was assuming that the judge would rule against them, and they wanted to identify appellate counsel.

So I tried to learn as much as I could about the case to consider whether to take it on, not just reading the press accounts but eventually coming up to visit the trial and observe the proceedings myself, and also to learn what I could about the record.

You know, I was aware that there were some fairly serious allegations being bandied about. It's not my practice to take on cases simply because people want to hire us. The nature of my practice is that I only want to take on cases where I believe I'm on the right side. That means that I'm representing clients in causes that I believe in and principles that I believe in.

So it was a daunting task, to be honest, given the years and years of litigation. But I guess the first thing I did is I came up and I

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observed the trial. And it is not my habit to say --

MR. FRIEDMAN: Let me just ask you this. Would it be fair to characterize yourself as a fairly careful and cautious person?

THE WITNESS: I like to think so. I hope so.

MR. FRIEDMAN: Not everybody thinks that's a good thing but you're --

THE WITNESS: In my line of work that's kind of the coin of the realm.

MR. FRIEDMAN: All right. So what was your purpose in watching the trial?

THE WITNESS: I wanted to understand what the dynamics of the trial were. Sometimes, a lot of the times, I'm brought into a case, I'm just looking at the cold hard record. But I'm really glad I was able to see the trial because there was a lot that I observed that I don't think would have come through in the paper record.

One thing that was immediately obvious was I don't -- I have never -- had never -- at that time I haven't since seen a proceeding with as

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much of an imbalance in terms of resources, in terms of procedural opportunities. And also I want to say this delicately because it's not my habit to say anything adverse about -- I have the greatest respect for the federal bench. I clerked for a federal judge. I practiced before the federal courts. I have never seen a judge whose disdain for one side of the case was as palpable on the bench in ways that I think may not have always come through in the paper record. But it was fairly obvious that Judge Kaplan had great personal animosity for Steven Donziger. And I was very concerned that it wouldn't be a fair proceeding. Obviously, it wasn't already a fair proceeding. And actually that just made me more inclined to take on the appeal because I felt like a great injustice was being done.

MR. FRIEDMAN: As you got oriented to -- well, we all know how the judgment came out, and then you agreed to represent Mr. Donziger on appeal, is that right?

THE WITNESS: I did.

MR. FRIEDMAN: And as I recall -- well,

EXHIBIT 15

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September 11, 2017

VIA ECF

Honorable Lewis A. Kaplan
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

RE: *Chevron v. Donziger*, Case No. 11 Civ. 691 (LAK)

Dear Judge Kaplan:

Chevron's response in opposition (Dkt. 1934) to my August 7, 2017 letter motion (Dkt. 1927) serves largely to reinforce the validity of argument that a grant of fees in this matter is barred by clear judicial precedent and equity.[1] Chevron puts forth no credible argument that overcomes the established holding and bedrock principle of *Aetna Casualty & Surety Co. v. Liebowitz*, 730 F.2d 905 (2d Cir. 1984), that legal fees cannot be awarded without a claim for money damages. The company utterly ignores the profound Constitutional implications—First Amendment SLAPP issues, Fifth Amendment due process problems, the Seventh Amendment jury trial right issues—that bar this brazen attempt by the nation's second-largest fossil fuel company, with total revenues during the six-year period of the RICO litigation of over $1 trillion, to bankrupt a solo practitioner and human rights lawyer.

Even putting aside the outrageousness of this attack by a powerful corporation on adversary counsel, Chevron is attempting to wipe out my assets based on false evidence. Despite various attempts at spin that, as described below, end up only in a bewildering series of dead ends, Chevron falls completely flat in its now desperate attempts to salvage the false Guerra testimony that forms the core of this court's RICO findings and makes the RICO judgment utterly unreliable as any basis to impose legal fees or costs or to defend enforcement actions in other jurisdictions. Incontrovertible facts adduced after the close of the RICO trial record clearly demonstrate the company and its counsel at Gibson Dunn bribed a witness to put forth fraudulent and untruthful testimony that, again, formed the basis for the core findings in this case. Chevron now seeks to

[1] The undersigned, acting *pro se*, is currently traveling overseas and for logistical reasons was unable to file this Reply by the deadline of September 11, 2017 even though it was completed. Leave is requested to ensure this Reply receives full consideration despite its filing shortly after the deadline.

parlay that fraud into a SLAPP-style erasure of my assets to try to thwart ongoing litigation against the company to collect the Ecuadorian judgment in other jurisdictions.

Chevron's opposition reveals many problems. First, it does not dispute voluminous scientific and testimonial evidence that it created a humanitarian catastrophe in Ecuador that continues to kill people and decimate indigenous groups, rendering any claim for fees on the back of this underlying human rights violation unethical, inappropriate, and barred under the equitable doctrine of unclean hands. Second, the company distorts facts about the false Guerra testimony to further cover-up its Guerra fraud; in the process, it makes the preposterous claim that Guerra's admission before the arbitration panel of lying to this court somehow "supports" the very prior testimony he now acknowledges was untrue.[2] Third, Chevron's lawyers evince fear at the prospect of being held to account for their gross misconduct via a renewed discovery process that would be absolutely essential to protecting the due process rights of the undersigned. Given that the Chevron lawyers at the Gibson Dunn firm who signed the opposition are themselves potential witnesses or co-conspirators to a fraud involving the discredited and avowedly corrupt witness Guerra, it is little wonder that they resist a process that could well produce even more evidence on their unethical and illegal behavior in this matter -- even apart from the baseline ethical issues involved in Gibson Dunn essentially promising Chevron it would find or produce "fraud" so as to "rescue" its deep-pocketed client from the consequences of a horrendous humanitarian catastrophe and multi-billion dollar liability of its own making.

My specific responses to Chevron's opposition follows.

Clear Judicial Precedent Bars Chevron's Fee Award

As explained in my August 7 letter motion and earlier pleadings, *Aetna* clearly forecloses the possibility of attorneys fees under § 1964(c) for "a plaintiff [like Chevron] who only obtained injunctive relief," or where "there has been less than a final recovery of damages." *Aetna* at 907. Chevron's defense that the case doesn't apply because it claims to have proven an "injury" ***is precisely the argument made by Aetna*** in *Aetna*, and rejected by the district court and the Second

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[2] For a more comprehensive account of the numerous respects in which Guerra acknowledged or was confronted with falsehoods in his RICO testimony, I reference my Motion for Judicial Notice dated Nov. 5, 2014, 2d Cir. No. 14-826, Dkt. 461-1, at 6-8 (noting, as just one example, how Guerra acknowledged that a key part of his testimony regarding his alleged involvement in the alleged bribery scheme—indeed, the part relating to his promised compensation, which also supplies the basic motive for his involvement—"wasn't true"). The Second Circuit chose to ignore this evidence on technical grounds, without review or comment, leaving its own decision essentially incomplete and obsolete on issuance. This is another reason why foreign courts now reviewing the merits of the Ecuadorians' judgment enforcement application, and Chevron's defenses thereto including its trumped-up claims of fraud and bribery, will necessarily conduct their own plenary reviews and come to their own conclusions, rather than obsequiously apply the false findings and conclusions of U.S. courts, as Chevron hopes. This forthcoming additional scrutiny, which in light of the new evidence will likely arrive at vastly different conclusions that those reached by this Court, presents an additional prudential reason for this court to decline to further advance this matter in any respect, as it would only exacerbate the impending difficulties

Circuit in that case. Chevron's real claim is once again that the established law of this Circuit should be rewritten to suit its own objectives.

Chevron claims *Aetna* is distinguishable because it involved a settlement, or alternatively that the broader holding of *Aetna* applicable here was dicta because the case turned on the fact of settlement. This ignores the fact that the fee-seeker in that case (Aetna) specifically claimed, like Chevron here, that it had established "injury" as part of earning its injunction, that it did so after an evidentiary hearing resulting in full factual findings subject to only abuse-of-discretion review, and indeed that it was legally "successful on its RICO claims" by way of the court's adoption of the terms of the consent judgment part of the settlement (which, notably, did provide for substantial six-figure damages). *Aetna Casualty & Surety Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983) (trial court decision). Neither the trial court nor the Second Circuit disagreed with these points by Aetna. *See, e.g.*, 570 F. Supp. at 911 ("Aetna is without doubt the prevailing party in this litigation"). But they nonetheless found against it. Both courts recognized both the easier issue of the non-availability of attorneys fees for a settlement with no adjudication of liability, and also the somewhat harder issue where the fee-seeker was a "prevailing party" with a proven injury, sufficient for recovery under any number of fee-shifting statutes—including the Clayton Act, after the 1976 amendments.

The Second Circuit, seeing no embrace of the "prevailing party" approach anywhere in the RICO statute, categorically rejected the notion that anything short of a full recovery of damages would allow for fees, and expressly rejected the notion that proven injury alone would suffice:

> [§ 1964(c)] appears on its face to require a civil RICO plaintiff, in order to qualify for an attorney's fee, first to prove that he has suffered injury to his business or property as a result of the RICO violation ***and to recover the damages sustained and the cost of the suit***, of which the attorney's fee would be deemed part. . . .
>
> Turning to the legislative history of § 1964(c), we find nothing indicating a Congressional intent to authorize an award of attorney's fees when there has been less than a final recovery of damages and costs.

730 F.2d at 907 (emphasis added). Chevron's "injury"-only theory is foreclosed by the clear holding in *Aetna* that not just ("first") injury but also ("and") "recover[y] [of] damages sustained" is a necessary predicate to an award of fees. *Id.* This holding was not dicta because it was necessary to meet Aetna's unchallenged claim that it had proven injury. *U.S. Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), does not detract from this holding, not only because it is a Clayton Act case rather than a RICO case, but more fundamentally because damages there ***were*** established, trebled, and awarded in that case, in accord with the stricter requirements of *Aetna*. *U.S. Football League* simply declined to make an exception in a case of nominal damages. Even *Sciambra v. Graham News*, 892 F.2d 411 (5th Cir. 1990), which in any event could not relieve this Court of the obligation to follow Second Circuit precedent, is not in tension, not only because it, too, is a Clayton Act case, but because the relevance of proof of injury (or "fact of

damage") in *Sciambra* was only to establish that the fee-seeker was indeed a "prevailing party"—at which point the different analysis in the Clayton Act context took over.

While Clayton Act cases are generally useful in interpreting comparable RICO statutory language given that "the antitrust laws provided a major influence on the statutory scheme embodied in RICO," *Aetna*, 570 F. Supp. at 911, where the Clayton Act has specifically followed a different path or reflects a different legislative intent, any reliance on Clayton Act cases must be limited as appropriate to reflect that difference. Such is the case on the question of whether a standard lesser than "final recovery of damages," such as a "prevailing party" or injury-only standard, should be read into RICO's allowance of attorneys fees. The fact that Congress amended the Clayton Act to expressly include a "prevailing party" standard reflects a different path and different legislative intent, even though the language was added to the tandem section on injunctive relief at 15 U.S.C. § 26 rather than the core civil recovery section at 15 U.S.C. § 15. Borrowing intent from one inter-linked section of a statute for another is quite different than borrowing from a whole different statute addressing an entirely different subject area of the law. *Aetna* was attuned to this. 730 F.2d at 909 (noting the "non-existence in RICO of a provision comparable to § 16 of the Clayton Act"); 570 F. Supp. at 912 ("It follows that if Congress had intended for fees to be awarded to a prevailing party or a substantially prevailing party in a suit brought under § 1964, it would have used language similar to that found in these statutes."). In response, Chevron does not offer an alternative interpretation of the significance of the fact that the Clayton Act has an articulate prevailing party provision; it simply announces: "There is no reason to adopt a different reading of 28 U.S.C. § 1964(c) [from 15 U.S.C. §15], given the language of the two statutes remains the same." Ipse dixit and arrogance, not law.

Civil RICO has conspicuously **not** been amended to move it in the direction of other fee-shifting statutes. *Aetna* has gone unchallenged for over 30 years and its holding is clear. "Final recovery of damages" remains the standard. As set out in my August 7 letter motion, Chevron knowingly, and for strategic advantage, forfeited its right to pursue, much less achieve, such a recovery in order to deny me my right to a jury trial in this case. It is precisely that right that is wisely protected by the *Aetna* rule requiring actual recovery of damages before authorizing a monetary award of fees that in most cases will be far above the mere $20 USD required to trigger the civil jury right (even if no party has ever had the audacity to demand the outrageous amount Chevron demands with its fee application). Allowing a party to strategically drop damages to eliminate the jury trial right but pursue a massive, jury-less monetary claim against its adversary by way of the attorneys fees provision would open up a huge loophole in the protections of the Seventh Amendment that is clearly not constitutionally permissible.

Chevron's Argument Against Discovery Is Unavailing

Chevron claims that the issue of its Guerra-related fraud should be off-limits because a motion for fees "is not the right place" to litigate issues "unrelated" to the "reasonableness" of the claimed fees. Opp. at 18 (quoting *Samms v. Abrams*, 198 F. Supp. 3d 311, 320 (S.D.N.Y. 2016)). Chevron obviously wants to act like its request for $32 million in fees is a "routine" matter—as if the

undersigned was simply another commercial litigant and the RICO findings were not infected by fraud. Neither is true. The fee issue implicates core Constitutional concerns regarding my ability to speak out about a public matter of grave importance to our society, namely, a U.S. corporation devastating the lives of thousands of people and in the process accelerating climate change and the destruction of the planet. It also implicates my continued right to earn a livelihood in support of myself and those that depend on me, including a minor child. And, as elaborated on below, the RICO findings were infected by fraud and Chevron as the moving party is demonstrably responsible for that fraud, thereby nullifying (under the doctrine of unclean hands) any possibility of a fee recovery in this matter even if the Court does not deny the motion based on the holding in *Aetna* that already has been extensively briefed.

To the contrary, nothing could be *more related* to the reasonableness of a fee motion and to due process requirements than the fact that the fee sought is the result of attorney efforts to present false testimony to a federal court to frame various individuals with quasi-criminal findings in a civil trial absent a jury. Made worse is that the false testimony was part of a SLAPP-style attempt to thwart the role of adversary counsel in an ongoing litigation as that litigation continues in other jurisdictions, backed by unanimous Supreme Court decisions of two sovereign nations (Ecuador, Canada) that disagree with Your Honor's findings. The Gibson Dunn lawyers who signed Chevron's opposition (among them Randy Mastro, Andrea Neumann, and William Thomson) protest that allowing depositions to ascertain facts surrounding their own roles (and those of colleagues Brodsky, Weitzman, and others) in creating the Guerra fraud would be an attempt to "harass" opposing counsel. Let's put aside for a moment that the undersigned was forced by these same lawyers (with the active encouragement of this Court) to sit for an unheard-of 19 days of depositions in the RICO and related matters, for which the company now tries to impose almost $1 million in "costs" for the "services" of two Special Masters to oversee the bloated proceedings[3]. To the contrary, discovery in this matter would be critically necessary to further establish the facts and circumstances needed for any neutral arbiter (of which this court is decidedly not, hence the need for transfer to another court) to determine the equitable issues involved that are essential to conducting any fair analysis on the merits should the court decide to proceed past the *Aetna* barrier.

The deciding court must have a record of all the relevant facts and circumstances so that it does not run the risk that Chevron will illegally earn a financial reward for attorney misconduct or outright illegality. Chevron's attorneys may not like it, but they and/or their colleagues are deeply implicated in the fraud and their opposition to further discovery on these issues should be given no weight. If these attorneys did nothing wrong, they would not be so adamant about opposing discovery into their own roles in the creation of the now-recanted Guerra testimony. By initiating

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[3] It is undisputed that this court during the underlying proceedings allowed Chevron and two of its executives to depose the undersigned for a historic record length of time; the Court also denied my effort to bring counterclaims. Certainly the same Court at a minimum should now try to correct a discovery playing field radically tilted in favor of Chevron by allowing me and my Ecuadorian clients a small fraction of that same time to depose each of the Gibson Dunn lawyers and others involved in the 53-day coaching of Guerra before he lied repeatedly to this court in exchange for exorbitant payments.

a motion to recoup fees on a record with clear evidence of fraud for which they are responsible, Chevron's lawyers at Gibson Dunn have only themselves to blame for the peril in which they and their client now find themselves by greedily pursuing a recoupment of fees and costs that has a clearly punitive and unconstitutional purpose.

The Core "Bribery" Evidence in the RICO Trial Has Been Eviscerated

Chevron's claim that the Guerra testimony in the arbitration proceeding "corroborates" his trial testimony (Dkt. 1934 at 10) in this matter is false. Unassailable evidence has emerged in the international arbitration proceeding that absolutely eviscerate the Guerra testimony relied on by this court for its core RICO findings, as follows:

- Guerra testified under oath before this court that the plaintiffs "delivered" to Ecuador trial judge Nicolas Zambrano the "ghostwritten" decision against Chevron after eight years of proceedings in late January or early February 2011, just days before the Ecuador trial judgment issued. PX 4800 (Guerra Direct) at 18-19, 21. Your Honor relied heavily on this exact testimony and placed it at the center of his finding that the undersigned and others had been involved in a "bribe" of Zambrano in exchange for an agreement to "ghostwrite" the judgment. Dkt. 1874 at 245 ("About two weeks before the Judgment was issued in February 2011, Guerra went to Zambrano's apartment where he said he met with Fajardo and Zambrano. 'Zambrano gave [Guerra] a draft of the judgment so that [Guerra] could revise it.' He told Guerra that the LAPs' attorneys had written the judgment and delivered it to him."). I testified under oath that this assertion by Guerra is categorically false. There is no direct evidence in support other than Guerra's testimony.

- The results of a forensic examination—conducted under the auspices of the BIT arbitration that Chevron initiated against the Republic of Ecuador (ROE)—of the hard drives from Judge Zambrano's courthouse computers categorically and forensically prove that this core of Guerra's testimony is false. It is now undisputed that a file containing substantial parts of the Ecuador judgment in draft form was on Zambrano's courthouse computers at least by October 11, 2010. The results also show that on those same computers, the Word file that became the judgment gradually developed as text was added incrementally and the file was saved hundreds of times. Despite having years to respond to this devastating evidence, Chevron has come up with nothing to contradict it.

- Guerra's story was always suspect given his admitted history of corruption and dishonesty, Chevron's exorbitant and illegal payments to him, and the fact that the details of his story shifted repeatedly to match evolving facts. *See* Dkt. 1640 (motion to strike Guerra's testimony). Indeed, the false story which Guerra told at trial and which the Court relied on in its final decision appeared only after an earlier and strikingly different version of the story was disproven by new facts. Guerra tries to gloss over this in his witness statement, stating that "[i]n trying to recall these events initially, I assumed I had received the

> document on a flash drive given to me by Mr. Zambrano in the Quito airport, as Mr. Zambrano often provided me flash drives along with the court files. But later on, I specifically recalled that I worked on that document in Mr. Zambrano's residence in Lago Agrio using Mr. Fajardo's computer." PX 4800 at 18-19. In fact, the earlier story was not merely an assumption, but a detailed explanation by Guerra of being given the draft judgment on a flash drive and then working on it for several days over the course of a specific weekend at his house in Quito. That is what Guerra initially told Chevron's investigators. Chevron "disappeared" this version after its forensic team could not find a trace of the judgment on Guerra's computer. To maintain the flow of payments from Chevron, Guerra then had to shift to a story that left no digital trace, and the story of being given the judgment on Pablo Fajardo's laptop was it. Now that story, too, has been proven false by the forensic examination.

This new evidence directly and frontally destroys the core findings of the RICO judgment and nothing in Chevron's opposition—despite its varied attempts at misdirection and spin—changes that fundamental fact. The RICO judgment is unreliable and under equitable principles must be given no weight as a basis for any award of fees, even if the Court mistakenly extends its analysis past the clear holding of the *Aetna* decision barring an award of fees under RICO absent a final recovery of damages.

Chevron's Denials of the Significance of the New Evidence Are Outrageous

While Chevron's experts have strained mightily to find inconsistencies between the results of the forensic examination and various minor and largely irrelevant details of Judge Zambrano's RICO testimony, the basic and indisputable fact that the draft judgment was found on Zambrano's courthouse computers as early as October 2010 utterly destroys the possibility that Guerra's story is true.[4] Chevron literally has had years to provide a cogent explanation as to how Guerra's

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[4] Guerra clearly testified under oath in this court that he was closely involved with Judge Zambrano and the alleged corrupt arrangement to "ghostwrite" the judgment throughout the Fall of 2010:

> From [the time Zambrano allegedly struck a corrupt deal with the plaintiffs] forward, our modus operandi regarding my role as ghostwriter in the Chevron case changed. Mr. Zambrano advised me that we had to be more careful because the attorneys for Chevron would be very attentive to any irregularities. Because of that, there were times when I traveled to Lago Agrio to work on the court rulings for the Chevron case. I would regularly travel to Lago Agrio by bus, and less frequently by plane on TAME. True and accurate copies, certified by TAME, of TAME's records reflecting my travel between Quito and Lago Agrio from 2009 through 2010 are marked as PX 1722 through PX 1726. Those records reflect, for example, that I traveled via TAME from Quito to Lago Agrio on August 4, 2010, returning to Quito on August 6, 2010; and that I again traveled from Quito to Lago Agrio on August 11, 2010, returning to Quito on August 12, 2010.

Id. at 17. The Court relied heavily on this exact testimony and placed it at the center of its central finding that the undersigned and others had been involved in a corrupt arrangement or "bribe" with the Ecuador trial judge. Pushing past Guerra's massive credibility issues and all his changing story details, the Court found that Guerra "never wavered" from certain core aspects of his account, including that the corrupt arrangement was for the

testimony can be reconciled with this fact. Its response has been to bury its head in the sand, offering no explanation in the hundreds of pages of briefing and dozens of hours of trial time in the BIT arbitration. It certainly offered no explanation in its opposition to my August 7 letter motion.

Chevron's theory of unfiled work product

The miscellaneous distractions offered in Chevron's opposition are stale or meaningless. Chevron tries to argue that materials not found in the record but in the possession of the plaintiffs were used verbatim in the 188-page judgment, as if this proves "ghostwriting" despite the collapse of the Guerra testimony. In the BIT arbitration, the U.S. legal team for the ROE categorically demonstrated that both parties (Chevron and the Fajardo legal team) occasionally provided the court with materials that were never logged in the official record, either because of logistical problems or other challenges. The ROE went as far as to cite to videotape of both parties handing materials to the judge that were never logged to prove the point that this was an occasional practice engaged with full knowledge of the parties and the court, and was not in the least bit nefarious. [5] Perhaps Chevron one day may make the less bombastic and more grounded allegation that such informal practices in Ecuador amount to a cognizable due process claim; regardless, the proof that *both parties* engaged in such practices and that they were common in Ecuador destroys the argument that the judgment's reliance on allegedly "unfiled" documents proves the bogus "ghostwriting" allegation.[6]

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plaintiffs' team to "bring the judgment" so that Zambrano and Guerra could "dress it up" and "issue it." Dkt. 1874 at 280. Again, we now know this not to be true.

[5] When the defense dedicated some of its limited resources to bringing a distinguished lawyer familiar with the Ecuador judicial inspection process (Mr. Alejandro Ponce) to New York to testify about how it was typical to provide materials to the judge that were not necessarily placed in the record, the Court disregarded his testimony in two sentences in its final decision on the rationale that Mr. Ponce, in his written direct testimony, "failed to identify a single occasion when that actually had happened" (even though he testified clearly that it ***did*** happen, *see* Dkt. 1700-4 at 4, and Chevron did not raise any challenge to the lack of specificity on cross) and "had left the [plaintiffs'] team before most of the LAP internal work product documents that appear in the Judgment even were created" (simply ignoring the fact that Mr. Ponce was testifying to a practice). Significant parts of the evidence assembled by the ROE on this point was also available, *see* DX 902 at 88-93, and, along with countless other persuasive rebuttals to various Chevron "fraud" theories, was simply ignored by this Court in its final decision.

[6] Chevron recites a number of other unconvincing or already rebutted claims regarding the judgment. For example, it references the citations to French law, a "language[] neither Zambrano nor his typist speaks, reads, or writes," ignoring the established fact that those citations were taken from a large portion of an Ecuadorian Supreme Court judgment that Zambrano appropriately incorporated wholesale. Dkt. 1874 at 189 n.779. The Court dismissed this fact by pretending it was relevant that Zambrano, three years later, "was unable to recall its name, the names of the parties, or what it was about." *Id.* The record portion cited by the Court not only utterly disproves this claim, but shows how the Court itself went out of its way to assist Chevron's gamesmanship to hide the truth throughout the RICO trial.

> Q. Do you know the name, can you tell us the name of this case or will tell us the name of this case, I should say?
> ZAMBRANO. Well, this was a complaint brought by the communities of Esmeraldas Province against Petroecuador.

The issue of the "old" versus the "new" computer

Chevron also attempts to salvage the collapsed Guerra testimony by raising the same bogus arguments related to his two computers. Chevron in its opposition puts huge emphasis on the fact that while Judge Zambrano said he typed the judgment into what he called the "new" computer, it initially appeared it had been typed into the so-called "old" computer in his office. This apparent inconsistency, which could easily be explained by inexact memory by an individual who clearly had little technological savvy, was also a key part of the findings by this Court. Dkt. 1874 at 194-95. In its opposition, Chevron slyly persists on this point, noting that "only Zambrano's 'old' computer contained versions of the document in question," but failing to mention that the forensic results in the BIT arbitration revealed that ***the old and new computers were networked together*** such that Zambrano was able to edit a document that was "on" the old computer while sitting at his new computer. Again, the evidence shows that Zambrano opened and saved the Word document that became the judgment hundreds of times.

The weakness of Chevron's rebuttal by Spencer Lynch

The fact that the draft judgment was *found* on the courthouse computers by itself fatally undermines Guerra's claim that the judgment was "ghostwritten" by the plaintiffs. But, as indicated, the forensic evidence is even stronger than that. It shows a clear picture of the judgment being developed over time on those computers starting in October 2010, or months before Guerra claims it was delivered to the trial judge. The only rebuttal Chevron's expert, Spencer Lynch, is able to offer to these facts is the observation that various USB drives were attached to the courthouse computers from time to time. Lynch then posits that it would be impossible to "rule out" that the judgment was not copied—piece by piece—from files on USB drives during late 2010 and early 2011. There is no way this far-fetched speculation is sufficient to support the claim that the judgment was ghostwritten. It will indeed never be possible to "rule out" every new and far-fetched conspiracy theory Chevron can conjure up, especially when the theory simply changes like a chameleon every time new evidence appears. Lynch's new USB conspiracy theory also happens to contradict Guerra's story of the judgment being "delivered" by the plaintiffs in late January 2011—a discrepancy Chevron doesn't even try to address, because it cannot do so credibly.

MR. BOOTH: Your Honor.
MR. MASTRO: Objection, move to strike. Nonresponsive.
THE COURT: The answer is stricken. It is nonresponsive.
MR. BOOTH: Let me ask it a different way. Dr. Zambrano, will you tell the Court how this case is referred to in Ecuador?
THE COURT: If indeed it is a case.
A. This case is so unique because it was one of the first ones dealing with environmental pollution and this is definitely where one observes that the burden of proof is inverted.
MR. MASTRO: Objection, your Honor. Move to strike.
THE COURT: Granted.

Tr. at 1885.

Conclusion

Once again, I respectfully request that Your Honor recuse himself for the reasons stated in the letter motion. Absent that, I request that the Court reserve any litigation on the reasonableness of Chevron's claimed fees until it has decided on the availability of *any* fees absent a recovery of damages. If the court decides to reject the *Aetna* holding, I request that it certify its disagreement directly to the Second Circuit. If litigation regarding reasonableness is required, I request a substantial period of discovery to inquire into the nature of Chevron's and Gibson Dunn's conduct regarding Guerra's false testimony and its billing practices generally.

Sincerely,

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Steven R. Donziger