JUDICIAL COMPLAINT

FILED AGAINST

JUDGE LEWIS A. KAPLAN

Judicial Complaint against Judge Lewis A. Kaplan

The undersigned file this complaint[1] pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351-364 against Judge Lewis A. Kaplan of the Southern District of New York for his misconduct in the cases of *In re Chevron*, 10-mc-00002 and *Chevron v Donziger et. al*., 11-cv-0691. Complainants allege Judge Kaplan, in his capacity as the presiding judge over these cases, has violated the Canons of the Code of Conduct for United States Judges, namely Canons 2A, 3 and 3B(3).[2]

The Complainants allege the statements and actions of Judge Kaplan over the last ten years show him to have taken on the role of counsel for Chevron in these cases rather than that of a judge adjudicating a live controversy before him. By these actions, he has violated his duty of impartiality under the canons of judicial conduct.[3] A review of the record shows that throughout this litigation, Judge Kaplan's rulings have been in "lock step" with Chevron's interests and requests.

Complainants are mindful that judicial complaints are not a mechanism for challenging the correctness of the merits of substantive or procedural rulings in a case. However, where a judge's misconduct violates the Canons of the Code of Conduct, such complaints are not merits-based. In these situations there is a duty of officers of the Court, not to remain silent or to look the other way.[4]

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[1] All of the specifics of this complaint are supported in the record and are set forth in the attached Appendix and supporting exhibits.

[2] Canon 2A of the Code of Conduct for United States Judges requires federal judges to show respect for and comply with the law, and 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. 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."

[3] The requirement for judicial impartiality is a requirement worldwide.

[4] Commentary to Rule 4 of the Rules for Judicial -Conduct and Judicial-Disability Proceedings gives some examples of non-merits-based ruling. For example, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — "the merits" — of the ruling itself. An allegation that a

This complaint has been filed by lawyers and lawyers organizations worldwide, over their increasing alarm at the punitive lengths to which Judge Kaplan has gone, beyond all bounds of reason, to destroy Steven Donziger both personally and professionally. By extension, he also appears to be blocking access to the remedy for the 30,000 indigenous clients from the Ecuadorian Amazon that Mr. Donziger has represented since 1993. Complainants are very concerned that the persecution of Mr. Donziger by Judge Kaplan and Chevron will have a chilling effect on the work of other human rights lawyers, acting as a warning of the consequences they will suffer should they try to hold major corporations accountable for their human rights violations.

JUDGE KAPLAN'S IMPROPER BIAS DURING THE DISCOVERY LITIGATION AND THE CIVIL RICO ACTION

The case—and now source of this complaint—involves Judge Kaplan's role in facilitating Chevron's efforts to block the enforcement of a judgment obtained and affirmed by three levels of courts in Ecuador, which was adjudicated on a 200,000-page record developed over years of litigation. That case, *Aguinda v ChevronTexaco*, was filed in Ecuador, where both parties agreed to jurisdiction, and where the plaintiffs sought to remedy the contamination from prolonged and pervasive oil pollution by Chevron's predecessor, Texaco, in this region.[5]

Judge Kaplan began to rule over aspects of this case in 2010 in conjunction with Chevron's use of 28 U.S.C. §1782 to hunt for evidence that it could preemptively use to try to discredit the pending Ecuadorian judgment. Chevron believed the judgment would be issued against it in light of the substantial body of evidence developed and preserved in the record before the Ecuadorian court.

Chevron's initial §1782 subpoenas were directed against independent filmmaker, Joseph Berlinger. The subpoenas sought 600 hours of outtakes of the documentary he made called "Crude" which chronicled the oil pollution in the Ecuadorian Amazon by Texaco and the attempts by the people of the region to clean up their environment in the litigation against Chevron. Chevron solicited several other courts to provide other types of evidence, (primarily from expert advisors) by enforcing subpoenas in other

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judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related.

[5] In 1992, prior to the filing of the litigation in Ecuador, litigation was initiated in New York by many of the same plaintiffs. The case was known as *Aguinda et. al. v. Texaco. Aguinda* 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 acquired Texaco in 2001 prior to the time the Ecuadorian litigation began.

jurisdictions, but no judge other than Judge Kaplan agreed to try to undermine the judicial process in Ecuador, violating principles of comity. After granting Chevron *carte blanche* to all of the outtakes, Judge Kaplan granted Chevron access to all records in Mr. Donziger's possession in the underlying case, including many documents which should have been protected by attorney-client privilege.

Throughout the proceedings, Judge Kaplan's intense bias and personal hostility towards Mr. Donziger, and the case he and his Ecuadorian legal team brought against Chevron, has been palpable. Some of Judge Kaplan's most overt and biased statements in favor of Chevron's positions, not otherwise referenced in this complaint, include:

- Suggesting to Chevron that they could bring a RICO action against Mr. Donziger. Judge Kaplan thereby directly provided litigation strategy to a party in a controversy before him and Chevron subsequently filed a RICO action;
- Making disparaging remarks about the Ecuadorian judiciary and its professionalism and capacity to handle litigation involving a foreign corporation, thus endorsing Chevron's position, and violating comity instead of remaining impartial;
- Making statements suggesting that former Ecuadorian President Rafael Correa was a problem for Chevron as his government was not friendly to private oil interests, thus endorsing Chevron's position, and opining on direct political matters of a foreign country in violation of separation of powers;
- Granting every one of Chevron's invasive discovery requests, including depositions of family members and associates of Mr. Donziger aimed not at collecting the judgment against him, (see *infra)* but seeking information on Mr. Donziger's efforts to secure enforcement of the Ecuadorian judgment outside the United States;
- Appointing a former colleague, Max Gitter, to act as Special Master to oversee discovery, including depositions where Mr. Gitter took on the role of counsel for Chevron in interrogating Mr. Donziger, thus creating the appearance of favoritism and bias as Mr. Gitter effectively acted as counsel to Chevron;
- Requiring Mr. Donziger to pay 50% of the costs of the special masters over his and his clients' objections;
- Expressing open sympathy and preference for Chevron as a global economic actor and making disparaging remarks about Mr. Donziger and his clients;
- Ignoring evidence placed before the Court of Chevron's efforts to bribe a former judge as well as Chevron's fraudulent claim its own oil testing laboratories were independent labs.

After the trial[6] in the RICO case Judge Kaplan issued a 500-page opinion in *Chevron v Donziger*, predictably finding against Mr. Donziger and the other defendants and holding that Mr. Donziger and his Ecuadorian co-counsel had bribed the issuing judge in Ecuador, Judge Zambrano. This purported bribe was to allow the Ecuadorian plaintiffs to "ghostwrite" the judgment favorable to them. Despite Mr. Donziger and the other Ecuadorian plaintiffs' vehement denials of any bribe, Judge Kaplan ruled this alleged bribe rendered the judgment invalid. This finding was nearly exclusively based on the testimony of a former disgraced judge, Judge Guerra, who at trial admitted he told multiple inconsistent versions of his story to Chevron before settling on the one he told at trial (and who later admitted to lying in the RICO trial itself). Judge Kaplan never reconsidered his views once knowing his judgment was based on perjured testimony. Further Judge Kaplan never considered any of the evidence in the record in Ecuador that was built over a many years, and never considered whether the record supported the Ecuadorian judgment.[7]

After the Second Circuit predictably did not reverse the findings of fact in Judge Kaplan's 500-page opinion as "clearly erroneous," thus affirming the decision, Judge Kaplan imposed costs of over $800,000 on Mr. Donziger. More than 90% of these costs were the allocated costs for the Special Masters he and his clients had objected to. Lacking the funds to pay such exorbitant and unnecessary costs, Judge Kaplan issued a default judgment against him. Following this judgment Chevron initiated post-judgment discovery against Mr. Donziger not just to find funds to pay the default judgment but on the theory that he was in civil contempt of Judge Kaplan's RICO Injunction because he continued to help his Ecuadorian clients secure funds needed to enforce the judgment against Chevron in other countries.[8] Although Mr. Donziger had followed what Judge Kaplan on the record allowed him to do,[9] Judge Kaplan changed his position and suddenly denied that his ruling allowed Mr. Donziger to raise funds to enforce the judgment in other countries. This change in position set Mr. Donziger up for contempt charges.

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[6] The RICO trial became a bench, rather than a jury trial after Chevron a few weeks before the start of the trial withdrew its claim for damages, seeking only equitable relief. Judge Kaplan denied Donziger a trial by jury over his objection using Chevron's withdrawal of a claim for damages as an excuse.

[7] The Ecuadorian courts found the evidence supported the verdict.

[8] By the time litigation was started in Ecuador Texaco had taken all of its assets out to Ecuador.

[9] *See* 11-cv-691 Dkt. 1901 (post-injunction decision by Judge Kaplan describing how the injunction does "not prevent Donziger from being paid, just as he has been paid Nothing in the [RICO Injunction] prevents Donziger from continuing to work on the Lago Agrio case. Period.").

JUDGE KAPLAN INITIATES CIVIL AND CRIMINAL CONTEMPT CHARGES

This change in positions by Judge Kaplan resulted in the extreme, biased and draconian decision to issue first civil and then criminal contempt charges against Mr. Donziger in 2019. Specifically, Chevron sought all of Mr. Donziger's electronic devices to seek every communication he has had, regardless of the nature of the communication or whether the communications were privileged in order to find out what Mr. Donziger was doing to raise funds. Mr. Donziger has resisted this unprecedented and disproportionate discovery, including appealing Judge Kaplan's orders to this Circuit and expressing his willingness to be bound by this ruling. However, Judge Kaplan held Mr. Donziger in civil contempt imposing onerous fines. The criminal contempt case is based on the same order for his devices which is the basis of the civil contempt charges.

In light of Judge Kaplan's criminal contempt charges against Mr. Donziger, this complaint has special urgency. August 6, 2020 was the one-year mark of Mr. Donziger's house arrest. These charges are an extension of Judge Kaplan's personal vendetta against Mr. Donziger. Indeed the instant phase of the litigation is riven with more extreme bias. Despite this being a contempt case, Judg Kaplan never recused himself. He also refuses to relinquish control of the civil case. The actions in violation of the Canons of the Code of Conduct for United States Judges are as follows:

- Invoking Rule 42 under the Federal Rules of Criminal Procedure to appoint a private prosecutor when the U.S. Attorney for the Southern District of New York declined Judge Kaplan's request to prosecute Donziger, and subsequent appointment of a private firm to prosecute Mr. Donziger; (see reference *supra*)
- Hand-picking a favored colleague, Judge Preska to adjudicate the criminal contempt case by-passing the random selection process in a criminal case required by the court's internal rules;
- Hand selecting prosecutors from the law firm Seward & Kissel who he knew or should have known had a conflict of interest due to their firm's representation as late as 2018 of the Chevron Corporation and because a significant portion of the firm's business comes from the oil and gas industry. He also failed to disqualify the firm when he was made aware.

Mr. Donziger has filed a writ of mandamus regarding the criminal contempt proceeding. The Complainants find the treatment of Mr. Donziger and his clients by Judge Kaplan deserves intense scrutiny. He should be sanctioned for his violations of the Judicial Canons of Conduct. This matter should be addressed by a special investigation committee and/or if the Judges of this Circuit believe their prior rulings on appeals would impact their consideration of the complaint, the Court should request the Chief Justice to transfer the complaint.

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