11-1150-cv(L), 11-1264-cv(CON)

United States Court of Appeals

for the

Second Circuit

CHEVRON CORPORATION,

Plaintiff-Appellee,

– v. –

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS STEVEN R. DONZIGER AND THE LAW OFFICES OF STEVEN R. DONZIGER

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Defendants.

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO RULE 26.1 OF THE
FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Steven R. Donziger and the Law Offices of Steven R. Donziger, Defendants/Appellants in this action, state that they do not have a corporate parent, and that there is no publicly held corporation that owns 10 percent or more of either appellant's stock (as they could not issue, and have not issued, any stock).

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I. INTRODUCTION

On February 3, 2011, attorney Steven R. Donziger found himself in an untenable position. Donziger had devoted the last 18 years of his life to an international effort to hold the Chevron Corporation legally accountable for chemical contamination that affected a region of Ecuador roughly the size of Rhode Island and that impacted the health and culture of more than 30,000 residents, many of them indigenous people.

Now, Chevron was trying to persuade a United States District Judge that Donziger had subverted all three branches of the Ecuadorian government—the president, the legislature, and the judiciary—in order to win an anticipated multibillion-dollar judgment against Chevron in an Ecuadorian court. Although Chevron had spent nine years persuading American courts to dismiss the case and send it to Ecuador, its opinion of the Ecuadorian courts had "changed dramatically" as the case progressed, leading Chevron now to argue "somewhat ironically" that those courts were incapable of rendering fair and impartial justice. *In re Chevron Corp.*, 10-4699, 2011 WL 2023257, at *3 (3d Cir. May 25, 2011).

So Chevron was back in federal court in New York, seeking an order preliminarily enjoining the Ecuadorian plaintiffs, their attorneys, and Donziger from taking even the most basic preparatory steps to enforce the Ecuadorian court's anticipated judgment. By halting all enforcement efforts, the proposed injunction also sought to bar every other non-Ecuadorian court in the world from

deciding for itself whether a decision from a court in Ecuador warrants the respect and comity normally extended to foreign judgments.

But the specific difficulty confronting Donziger on February 3, 2011 was neither the looming possibility of a blockbuster injunction, nor the likelihood that District Judge Lewis A. Kaplan might endorse and publish Chevron's scandalous allegations against him.

The true difficulty was that the district court did not want to hear Donziger's side of the story (or the Ecuadorian plaintiffs' side, either). Although Chevron had spent thousands of hours preparing its massive filings, Judge Kaplan granted Donziger just ***eight days*** to engage counsel, read and digest Chevron's voluminous papers, and prepare an opposition setting forth his view of a lawsuit that has spanned two continents and nearly two decades.

Donziger couldn't do it. He managed to engage appropriate counsel only one day before the February 18, 2011 preliminary-injunction hearing; and through intense effort, his defense team barely managed to put together a hurried submission in just one week. But Judge Kaplan declared the record "closed" and refused to accept Donziger's filing. And although Chevron's motion (with its 589 exhibits) raised a vast number of disputed fact issues, the district court violated Circuit law by refusing to hold an evidentiary hearing.

Two weeks later, the district court displayed its handiwork to the world: a 126-page preliminary-injunction order that refers to Donziger by name 190 times,

dismantling his reputation, discrediting his life's work, and dismissing the entire government of Ecuador as corrupt and inept. For its all-important irreparable-harm finding, the district court relied on three brief and conclusory paragraphs from the declaration of a Chevron executive, submitted ***on reply*** so that no defendant had a meaningful opportunity to counter it. And although the Ecuadorian court's long-awaited judgment had by then issued and an English translation of it was available, Judge Kaplan's decision bore few signs that he had tried to read the judgment he was impugning. He simply assumed that the judgment was the product of the campaign of fraud, intimidation, and political interference allegedly orchestrated by "field marshal" Steven Donziger.

The district court's opinion makes for compelling reading because it presents a firm and unwavering point of view: Chevron's. Indeed, it reads like a Chevron brief. Although the court acknowledges that its findings are preliminary, there is no room for nuance. One would never know from reading the opinion that the Ecuadorian court viewed the expert evidence with skepticism, vowed to ignore the conclusions of ***all*** the experts and to reach its own conclusions, and relied on Chevron's own experts and admissions in holding Chevron liable. One would never know that Donziger's supposedly inculpatory oral statements, carefully culled by Chevron from the outtakes of a documentary film, look very different—and far more innocent—when viewed in context. And one would never know that the party with the most to lose from a mistaken injunction ruling is not Chevron—

which bemoans the "irreparable harm" to its business reputation if any of its shipments are disrupted—but rather, the tens of thousands of men, women, and children who are still waiting for nontoxic water to drink and unpoisoned soil in which to grow their crops.

After preliminarily enjoining Donziger, the district court blessed a series of procedural maneuvers that effectively will deny him and his counsel any opportunity to participate in the upcoming trial concerning the enforceability of the Ecuadorian judgment—a trial that inevitably will focus on Donziger's conduct.

A court that presumes to sit in judgment of another nation's judicial system ought to take special pains to provide due process in its own proceedings. Due process means that the parties who will be affected by a ruling are entitled to be heard "at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) (citations and quotations omitted). That did not occur here, and the result was an injunction of unprecedented scope—potentially embarrassing to the United States internationally[1]—premised on a nearly non-existent and untimely

[1] Care should be taken before declining to enforce a foreign judgment based on generalizations about the integrity of an entire foreign judicial system. The *New York Times* recently reported that "[t]he European Court of Human Rights has repeatedly criticized the ***French*** judiciary as lacking independence." Scott Sayare, "French System Tints View of the Strauss-Kahn Case," *N.Y. Times*, May 28, 2011, *available at* http://www.nytimes.com/2011/05/29/world/europe/29france.html (emphasis added). Yet one can hardly imagine a French judgment being treated with the lack of comity that Judge Kaplan afforded the Ecuadorian judgment in this case.

showing of irreparable harm and on numerous misconceptions about a foreign judgment that the court appears to have barely examined.

For all the reasons stated below and in the Brief of the Ecuadorian Plaintiff-Appellants,[2] the district court's preliminary-injunction order should be vacated and the case reassigned to another judge on remand.

II. JURISDICTIONAL STATEMENT

Donziger joins in the Jurisdictional Statement of the Ecuadorian plaintiffs. *See* Fed. R. App. P. 28(i). Chevron's complaint asserts that the district court had jurisdiction over this matter under 28 U.S.C. §§ 1331, 1332, and 1367, and under 18 U.S.C. § 1964(c).[3]

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a) to review an interlocutory district-court order granting an injunction. *See Mastrovincenzo v. City of New York*, 435 F.3d 78, 110 n.8 (2d Cir. 2006).

Donziger timely filed his notice of appeal on April 1, 2011, less than 30 days after March 7, 2011, the date on which the district court issued the preliminary-injunction order from which the appeal is taken. *See* Fed. R. App. P. 4(a)(1).

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[2] As used here, "Brief of the Ecuadorian Plaintiff-Appellants" refers to the Brief for Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje, filed on June 2, 2011.

[3] A 93, ¶ 21. As used here, "A" refers to the Joint Appendix, and "SpA" refers to the Special Appendix.

III. STATEMENT OF THE ISSUES

1. The district court issued a preliminary injunction barring the anticipated enforcement of the Ecuadorian judgment on the ground that the judgment was procured by fraudulent conduct and pressure tactics orchestrated by appellant Steven R. Donziger. Yet the district court refused to give Donziger or the Ecuadorian plaintiffs enough time to engage counsel and to respond adequately to the scandalous and unfair allegations presented in Chevron's massive preliminary-injunction motion. Should this Court vacate the preliminary injunction?

2. Courts in this Circuit hold that irreparable-harm findings cannot be based on mere speculation. Here, the district court found irreparable harm based on its speculation that the Ecuadorian judgment may become enforceable any day now. Ten days later, this Court issued a decision stating that the prospect of an enforceable Ecuadorian judgment remains "purely hypothetical" because "[t]he Ecuadorian courts have not issued—and may never issue—a final judgment against Chevron . . . ."[4] Should this Court vacate the preliminary injunction?

3. Courts in this Circuit hold that mere business disruption does not constitute irreparable harm. The district court issued a preliminary injunction based upon an untimely and conclusory declaration alleging that enforcing the

[4] A 9397-9398 (*Republic of Ecuador v. Chevron Corp.*, No. 10-1020-cv (L) 10-1026 (Con), slip op. at 27-28 (2d Cir. March 17, 2011)) [hereinafter, "*Aguinda III*"].

Ecuadorian judgment would disrupt some of Chevron's deliveries and thereby harm its business reputation. Should this Court vacate the preliminary injunction?

4. The district court found irreparable harm based in part on the theory that Chevron could not afford to be subjected to a multiplicity of enforcement actions in different jurisdictions. But it was Chevron that expanded the present dispute beyond the New York district court to the courts of Ecuador and then back to the United States for an unprecedented nationwide campaign of discovery proceedings under 28 U.S.C. § 1782—and now this action. Few entities in the world have proved themselves more adept at waging all-out, global litigation. Should this Court reject the "multiplicity of suits" rationale and vacate the preliminary injunction?

5. When balancing the interim harms that a mistaken decision would cause to the parties, did the district court err by failing even to consider the health risks that further delay poses to Ecuadorian plaintiffs who are daily exposed to toxic water and soil?

6. The injunction's language forbidding even preparatory work on enforcement actions is overbroad and impermissibly vague. Should this Court either vacate the injunction or restrict it to cure the overbreadth and vagueness?

7. The district court has displayed a willingness to pass judgment on Donziger without granting him a meaningful opportunity to be heard, and an equal willingness to impugn the integrity of the Ecuadorian court without studying its

judgment. Whether to ensure neutrality or simply to uphold the appearance of justice, should this Court order the case reassigned to a different judge on remand?

IV. STATEMENT OF THE CASE

This is an appeal from a preliminary-injunction order entered on March 7, 2011 by Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York. Donziger joins in the Statement of the Case provided by the Ecuadorian plaintiffs. *See* Fed. R. App. P. 28(i). Additional facts about the proceedings in this action are presented at Parts V.D. and E., below.

V. STATEMENT OF FACTS AND OF PRIOR PROCEEDINGS

The facts presented below are mostly undisputed and taken directly from prior judicial opinions. Donziger also joins in the Statement of Facts provided by the Ecuadorian plaintiffs. *See* Fed. R. App. P. 28(i).

A. Texaco tries unsuccessfully to dismiss the *Aguinda* suit on forum non conveniens grounds.

In 1993, residents of the Oriente region of Ecuador—primarily members of indigenous tribes—filed an action entitled *Aguinda v. Texaco, Inc.* in the Southern District of New York. Their suit alleged that Texaco had polluted the rain forests and rivers in Ecuador during oil-exploration activities between 1964 and 1992.[5] Texaco became a wholly-owned subsidiary of Chevron in 2001.[6]

[5] *See Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

[6] *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011).

The complaint alleged that Texaco had dumped large quantities of toxic by-products of the drilling process into the local streams and rivers, contrary to the prevailing industry practice of pumping those dangerous substances back into well cavities deep underground, where they cannot imperil the environment. Texaco also used other improper means of eliminating toxic substances, such as burning them, dumping them directly into landfills, and spreading them on the local dirt roads. The complaint also alleged that the Trans-Ecuadorian pipeline built by Texaco leaked large quantities of petroleum into the environment.

The plaintiffs alleged that they and their families had sustained various physical injuries, including poisoning and the development of pre-cancerous growths. The complaint sought money damages under various theories, as well as medical monitoring and equitable relief to remedy the contamination.[7]

In November 1996, Judge Jed S. Rakoff granted Texaco's motion to dismiss the *Aguinda* case on grounds of forum non conveniens and international comity.[8] But this Court reversed Judge Rakoff's ruling, holding that it was improper to dismiss the case on those grounds in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador.[9]

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[7] *See Jota,* 157 F.3d at 155.

[8] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

[9] *See Jota*, 157 F.3d at 155, 159-60.

B. Texaco tries again, this time promising to submit to suit in Ecuador.

On remand, Texaco "unambiguously agreed in writing to being sued on [the plaintiff's] claims (or their Ecuadorian equivalent) in Ecuador, to accept service of process in Ecuador, and to waive for 60 days after the date of [the] dismissal any statute of limitations-based defenses that may have matured since the filing of the . . . Complaints."[10]

Texaco "also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act[, N.Y. C.P.L.R. § 5301 *et seq*.]" [hereinafter, "Foreign Judgments Act"].[11] To obtain dismissal, Texaco touted the ability of the Ecuadorian courts to "provide a fair and alternative forum" for the plaintiffs' claims.[12]

Judge Rakoff again dismissed the case, this time based on Texaco's agreement to be sued in Ecuador and the fact that "the record establish[ed]

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[10] *Aguinda v. Texaco, Inc*., 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001); *see also* A 9376 (*Aguinda III*, slip op. at 6).

[11] A 9376 (*Aguinda III*, slip op. at 6).

The Foreign Judgments Act provides that a foreign-country judgment (1) is "not conclusive" if rendered by a legal system that lacks "impartial tribunals" or "procedures compatible with . . . due process," and (2) "need not be recognized" if it was "obtained by fraud" or in violation of the parties' agreement not to resolve the dispute in "that court." N.Y. C.P.L.R. § 5304(a)(1), (b)(3) & (6).

[12] *Berlinger*, 629 F.3d at 301-02.

overwhelmingly that these cases have everything to do with Ecuador and nothing to do with the United States."[13]

This Court affirmed that dismissal on August 16, 2002. In so doing, this Court rejected the plaintiffs' contention that "Ecuadorian courts are subject to corrupt influences and are incapable of acting impartially."[14] The Court relied in part on Judge Rakoff's "detailed findings" that (1) there was no evidence that Texaco or its affiliates had corrupted any Ecuadorian legal proceedings; (2) "there [were] presently pending in Ecuador's courts numerous cases against multinational corporations without any evidence of corruption," (3) Ecuador had "recently taken significant steps to further the independence of its judiciary," (4) "the State Department's general description of Ecuador's judiciary as politicized applie[d] primarily to cases of confrontations between the police and political protestors," (5) "numerous U.S. courts ha[d] found Ecuador adequate for the resolution of civil disputes involving U.S. companies," and (6) "because these cases [would] be the subject of close public and political scrutiny . . . there [was] little chance of undue influence being applied."[15]

[13] *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).
[14] *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).
[15] *Aguinda*, 303 F.3d at 478.

C. In a decision evincing skepticism for both sides' experts, the Ecuadorian court finds Chevron liable for devastating the environment of an area the size of Rhode Island.

In 2003, after the *Aguinda* case was dismissed, the Ecuadorian plaintiffs refiled their claims against Chevron in Lago Agrio, Ecuador.[16]

Years of bitterly contested litigation ensued, culminating on February 14, 2011 in a comprehensive 188-page decision adjudicating the case and entering judgment in United States dollars against Chevron.[17] The Ecuadorian court calculated the compensatory damages at $8.646 billion. The breakdown of the damages award was as follows: $5.396 billion for soil remediation; $1.4 billion for health care costs; $800 million for deaths due to cancer; $600 million for groundwater remediation; $200 million for damage to the ecosystem; $150 million for drinking water remediation; and $100 million for damages to indigenous culture. The judgment also included a provision imposing another $8.646 billion in punitive damages, payable if Chevron did not issue a public apology within 15 days of entry of a final judgment (which it did not).[18]

Both Chevron and the Ecuadorian plaintiffs have appealed from the Ecuadorian judgment.[19] The judgment therefore is not final and enforceable, but

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[16] *See* A 9377 (*Aguinda III*, slip op. at 7); *In re Chevron Corp.*, Nos. 10-4699, 11-1099, 2011 WL 2023257, at *2 (3d Cir. May 25, 2011).

[17] Ecuador uses U.S. dollars as its own currency.

[18] *In re Chevron Corp.*, 2011 WL 2023257, at *2.

[19] A 6122-25, ¶¶ 15-17, 22, 25, 26, and 30.

rather, is stayed pending an initial appeal as of right, in which the Ecuadorian court will be called upon to conduct de novo review of an enormous factual record and of any asserted legal errors. After that appeal, the parties have another appeal as of right to the Supreme Court of Ecuador, which is limited to legal errors. During that second appeal as of right, the intermediate court may stay its judgment pending appeal, on the condition that the appellant post a bond whose amount reflects the subject matter of the judgment and the damage that might be caused by delaying enforcement.[20]

1. The Ecuadorian court views the parties' expert submissions skeptically, often relying on Chevron's own experts and admissions as a basis for imposing liability.

The Ecuadorian judgment is summarized only briefly at pages 52-54 of Judge Kaplan's preliminary-injunction order,[21] which impugns that judgment for its assumed reliance on expert reports that Chevron claims were fraudulently procured by the plaintiffs and Donziger.

But the Ecuadorian court itself addressed concerns about expert objectivity by refusing to take into consideration the submissions of plaintiff's expert, Dr. Charles Calmbacher,[22] or of Richard Cabrera, a court-appointed expert to whom Chevron had objected.[23] The Ecuadorian court also gave reduced weight to an

[20] A 6122-6123, ¶¶ 15-33; *see also In re Chevron Corp.*, 2011 WL 2023257, at *2.
[21] SpA 56-58.
[22] A 7342.
[23] A 7342-7343.

expert report on health impacts because its author disclosed that he had been hired by the Amazon Defense Front, an organization that assists the Lago Agrio plaintiffs.[24]

Judge Kaplan, unsatisfied, states that the Ecuadorian court "appear[s] to have overruled Chevron's objections" to certain allegedly fraudulent reports that purported to replace and thus "cleanse" Cabrera's report, and that the Ecuadorian court appears to have considered "at least some of those reports" in rendering the judgment.[25]

That statement does not begin to do justice to the Ecuadorian court's skeptical approach to the profusion of warring expert opinions that the parties heaped upon it. Rather, the court declared that it had "not considered the conclusions presented by [any of] the experts in their reports, because they contradict each other despite the fact that they refer to the same reality[. T]herefore the personal assessments and opinions of all the experts have been dispensed with and the technical content of their reports is what has been taken into consideration . . . such that the judge has been able to form his own assessment, in accordance with the rules of sound judgment."[26]

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[24] A 7431.

[25] SpA 87.

[26] A 7387; *see also* A 7412 ("[I]t is reiterated that only those results of the analyses of the samples taken in the field by the different experts that were analyzed in the laboratory and whose results are recorded in the proceedings should be borne in mind, but not . . . the conclusions of any of the experts, for this Presidency does not

The court noted that "there are more than 100 expert reports in the case file, which constitute a important documented source of evidence, provided by experts nominated by both parties and also provided by experts of the Court not nominated by either party, such that as a whole their information is reliable and allows the Judge to come to the conclusion that there are different levels of contaminant elements that are from the hydrocarbons industry in the area of the Concession."[27]

The court compensated for the experts' perceived lack of objectivity by relying repeatedly on test results by ***Chevron's*** experts, and on admissions by Chevron or Texaco, to support the conclusion that Texaco had contaminated the environment. For example:

1. The court noted that "at the Aguarico field, sample RB-EAG-A1-SE4 ***taken by the defendant's expert, Fernando Morales,*** shows the presence of Chromium VI in levels hazardous to human health (1.11 mg/kg)."[28]

2. With respect to barium compounds, the court noted that levels over 751 mg/kg. are "dangerous" to human health even if not proven to be carcinogenic, and then stated that the barium levels found in "samples J1-SSF-25-PIT2-SDI-(0.0M), SSF-SUR-J1-SB5, SSF-SUR-J1-SB3 and JI-GTA06-PIT1-SD2 . . . exceed 5000 mg/kg and ***all of them [were] taken by defendant's experts*** (first by Jorge

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share [their] criteria and is capable of reaching its own conclusions based on the results and sound judgment.").

[27] A 7388-7389.

[28] A 7404 (emphasis added).

Salcedo, second and third samples by John Connor and fourth by Gino Bianchi) in different judicial inspections (Shushufindi 26 for the first sample, Shushufindi Sur for second and third, and Guanta 6 for the fourth)."[29]

3. The court further noted that "[w]e have found samples with barium content in samples SA-6-JI-SB6-1.6M, ***taken by the [defense] expert John Connor*** in the judicial inspection at the Sacha 6 well, . . . which shows results of 1110 mg/kg of barium, and in the judicial inspection at the Sacha 57 well . . . which has been exclusively operated by the defendant where sample SA-57-JI-NEA-TW, ***taken by the defendant's expert Gino Bianchi,*** shows results of 1290 mg/kg of barium." [30]

4. The court noted a wide disparity in the experts' test results for Chromium IV and total petroleum hydrocarbons ("TPHs") in water, and concluded that, regardless of those discrepancies, it was undeniable that ***a Texaco legal representative had admitted*** in a letter to an Ecuadorian official that, "in Ecuador, 15,834 billion . . . gallons [of formation waters] were dumped between 1972 and 1990 during the whole period of operation of the Consortium by Texaco."[31] The court reasoned that, "[c]onsidering that formation waters have hydrocarbon

[29] A 7404-7405 (emphasis added).

[30] A 7405 (emphasis added).

[31] A 7406 (quoting letter from Rodrigo Perez Pallarez to Xavier Alvarado Roca, President of Revista Vistazo, *reprinted in* El Comercio, March 16, 2007, p. 6, section 1).

solvents, such as BTex (benzene, toluene, ethyl benzene and xylene); PAHs (polycyclic hydrocarbons) and TPHs (total petroleum hydrocarbons) which we have already mentioned above because of the hazard they pose to human health, the harm and risk become apparent."[32]

5. Chevron argued that the "production waters" that Texaco dumped into the environment posed no environmental risk. In response, the Ecuadorian court cited contrary sample results by ***Chevron's own expert, John Connor***,[33] and a statement by ***Chevron*** experts that "'even if production waters do not contain significant concentration of toxic compounds, [they] might represent a potential harm to receptive bodies and vegetation, given [their] elevated concentrations of salt . . . .'"[34] The court concluded that it was "appropriate" to regard formation water as "industrial waste, inevitably produced when oil is extracted, and that, considering its danger, . . . should be treated with extreme diligence, which did not happen in the operation [conducted] by TexPet."[35] The court also noted that Texaco had applied for a patent in 1972 (granted in 1974) disclosing a method for treating oil-industry effluent streams to avoid soil contamination, but that Texaco had not implemented that method in Ecuador for reasons of economy.[36]

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[32] A 7406.
[33] A 7406-07.
[34] A 7407-7409.
[35] A 7408.
[36] A 7455-7459.

6. The court also addressed Chevron's contention that the clay soils lining its remediated "decanting pits"[37] were too impermeable for an unsafe level of hydrocarbons to migrate into neighboring groundwater. Based on their assumption that migration was impossible, some of Chevron's experts had simply "avoided the trouble of taking samples."[38] Not only did this assumption leave Chevron without a response to reports of migration by plaintiff's experts, but it also was contradicted by the testimony of ***Chevron's expert, Ernesto Baca***, who stated that petroleum had indeed migrated through clay samples examined by him, imparting a distinctive odor to distant clay.[39] Given the "differences of opinion among the various parties' experts" on this subject, the Ecuadorian court "ascrib[ed] full evidentiary weight" to a memorandum ***sent by an engineer to a Texaco Petroleum manager*** stating that, on October 7, 1976, "'seepages of crude occurred at the pits of the Lago Agrio 15 well, as a consequence of which a nearby stream was contaminated where a watershed originates, whose waters were contaminated in their course as far as the Aguarico, and causing damage at a farm

[37] "'Decanting pits were used at the production stations in order to remove solids and oil from production water before its discharge into the environment.'" A 7542 (quoting report of Chevron expert John Connor).

[38] A 7452.

[39] A 7409.

belonging to a settler.'"[40] To the Ecuadorian court, this "indicat[ed] that at least at that time seepages occurred which caught the notice of the authorities."[41]

2. The Ecuadorian court rejects Chevron's tactic of using carefully edited documentary outtakes to impugn Donziger's conduct.

The Ecuadorian court also addressed Chevron's charges of misconduct by Donziger, which Chevron tried to document by presenting carefully edited outtakes from *Crude: The Real Price of Oil*, a documentary film about the Lago Agrio lawsuit.

The Ecuadorian court held that it would be unfair to penalize the plaintiffs for the alleged misconduct of a lawyer who did not formally represent them. The court went on to condemn Donziger's insulting statements about the Ecuadorian judiciary ***and*** Chevron's attempts to besmirch Donziger by quoting the *Crude* outtakes out of context:

> [I]nsofar as concerns the merits of [Donziger's] statements, they are rejected—especially the unwarranted statements regarding the Ecuadorian Judiciary—and the Court does not recognize anything that Mr. Donziger might say or do when he is in front of the cameras or in any other act. No pressure has effectively been exerted on this Court. In addition, the Court notes that [even if it had] the power to judge Mr. Donziger due to his disrespectful statements, it could not do so based on such limited portions, chosen and edited from hours of taping, and without giving the accused the right to defend himself or explain the context of those statements . . . .[42]

[40] A 7411 (quoting memo at page 101106 of Ecuadorian record).

[41] A 7411.

[42] A 7344-7345.

The court also criticized some of Chevron's litigation conduct, noting that Chevron's attorney had misled the court by submitting a putatively official "military intelligence report" that did not in fact have the military's backing.[43] The court further held that Chevron's attempt to prove that the plaintiffs had submitted documents bearing forged signatures had been rebutted by the signatories themselves, and that Chevron's pursuit of that argument was "extremely reckless and evidence of bad faith."[44]

D. In this action, Judge Kaplan refuses to hear Donziger before besmirching his character and reputation and enjoining him from a broad range of enforcement activities.

On February 1, 2011—almost two weeks before the Ecuadorian judgment issued—Chevron filed this action in the Southern District of New York, attacking the anticipated judgment as procured by fraud, and alleging a RICO conspiracy between the Ecuadorian plaintiffs, their counsel, and Donziger.

1. Chevron spends "thousands of hours" on its injunction papers and then arranges for the case to come before Judge Kaplan.

Chevron spent months researching and writing its blunderbuss filings, which included a 148-page, 397-paragraph Complaint; applications for a temporary restraining order and a preliminary injunction; 71 pages of briefing; 589 exhibits; and a putative expert report on the Ecuadorian judiciary.[45] Indeed, Chevron's

[43] A 7348.

[44] A 7349.

[45] A 67-221; A 222-227; A 228-242.

complaint trumpeted the fact that it was the product of "many thousands of hours of work by Chevron, its attorneys, and its investigators[.]"[46]

Instead of asking that the case go back to Judge Rakoff, Chevron maneuvered it[47] to Judge Lewis A. Kaplan, who was then presiding over two proceedings in which Chevron successfully sought discovery under 28 U.S.C. § 1782,[48] ostensibly for use in connection with proceedings in and against Ecuador.[49] Chevron evidently did not wish to present its assault on the Ecuadorian judiciary to the same judge who had dismissed the case in reliance upon Texaco's representations that Ecuador could render fair and impartial justice. Chevron's about-face might have seemed "somewhat ironi[c]," to quote a recent Third Circuit decision. *In re Chevron Corp.*, 2011 WL 2023257, at *3.

2. Judge Kaplan effectively shuts Donziger out of the preliminary-injunction proceedings.

Two days after Chevron filed this action, Judge Kaplan ordered Donziger, the Ecuadorian plaintiffs, and the other defendants to appear five days later to

[46] Southern District of New York Docket No. ("Dkt.") 283, Complaint ¶ 338.

[47] Donziger challenged that maneuver without success.

[48] Section 1782 is the statute that authorizes U.S. courts to order discovery for use in foreign and international proceedings. *See Berlinger*, 629 F.3d at 310. During the Lago Agrio litigation, Chevron filed at least twenty-five § 1782 discovery applications in federal courts across the United States, a campaign that the Third Circuit has described as "unique in the annals of American judicial history." *In re Chevron Corp.*, 2011 WL 2023257, at n.7.

[49] *Chevron Corp. v. Donziger*, No. 11 CIV 0691 LAK, 2011 WL 1747046, at *1 (S.D.N.Y. May 9, 2011); *In re Chevron Corp.*, 2011 WL 2023257, at *3.

oppose Chevron's application for a TRO enjoining any effort to enforce the Ecuadorian judgment pending a preliminary-injunction decision.[50]

On the morning of February 8, before the TRO hearing, Donziger hand-delivered a letter to the court advising it that he had returned from a trip to Ecuador only the day before, and asking it to (1) briefly continue the hearing because he had been unable to retain counsel on such short notice and (2) randomly assign the case to a different district judge.[51] That morning, the Ecuadorian plaintiffs' counsel submitted papers opposing injunctive relief.[52]

Although Donziger appeared at the TRO hearing, he was unrepresented by counsel and did not argue.[53] At the hearing, the court denied Donziger's requests but represented that Donziger would have "whatever time he wishes to pursue counsel before any preliminary injunction is heard."[54] The court granted Chevron a TRO, operative until midnight on February 22, barring "[d]efendants, their . . . attorneys and all other persons in active concert or participation with [them]" from taking any action to enforce, and from receiving any benefit from, any judgment entered in Ecuador.[55]

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[50] A 222-227. *See* Part V.F., below, discussing Chevron's BIT arbitration against Ecuador.

[51] A 6654-6657.

[52] *See* A 4298-5181.

[53] A 5200, 19:19-23.

[54] A 5183, 2:10-12.

[55] A 5238-5240.

The court also ordered the defendants to submit all of their briefs in opposition to Chevron's preliminary-injunction motion by 5 p.m. on February 11, thereby giving Donziger and the Ecuadorian plaintiffs only ***three more days*** to respond to Chevron's motion. The court set the preliminary-injunction hearing for February 18.[56]

Donziger could not retain appropriate counsel that quickly.[57] Nor could the Ecuadorian plaintiffs adequately prepare. The Ecuadorians' new counsel asked the court to adjourn the hearing; but the court denied the request on the ground that an adjournment would not leave the court with enough time to "reflect on the argument and the record" and "render a considered decision" before the TRO expired.[58] The court then thought better of the matter and *sua sponte* granted itself—but not the defendants—additional time by extending the TRO to March 8, 2011 to "facilitate careful consideration" of Chevron's preliminary-injunction motion.[59]

On February 15, 2011, Chevron submitted reply papers that included over 100 additional exhibits[60] and 12 additional declarations.[61] One of those reply

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[56] A 5238-5240.

[57] Donziger was represented at that time only by a criminal-defense lawyer with a very small office. A 7613-7615.

[58] A 5262.

[59] A 5261.

[60] A 5263-6033.

[61] A 5310-5384.

declarations—that of Chevron Deputy Comptroller Rex J. Mitchell—contained all of the evidence on which Judge Kaplan eventually based his irreparable-harm findings.

Donziger retained Keker & Van Nest LLP on February 17, the day before the preliminary-injunction hearing. Counsel immediately asked the court to adjourn the hearing. The court refused.[62] The next day, at the hearing, Judge Kaplan "closed" the record, declaring that he would not entertain any further opposition papers.[63] The court noted that it had entered the TRO ten days earlier and that, "[i]f for whatever reason Mr. Donziger just elected or failed to submit papers, well, that's what happens."[64] The court also announced that it would not hold an evidentiary hearing. Donziger and the Ecuadorian plaintiffs therefore had no opportunity to cross-examine the witnesses who had submitted declarations with Chevron's reply—including Chevron's ***entire*** factual showing on the critical issue of irreparable harm.

A week later—with two weeks still to go before Judge Kaplan issued his decision—Donziger submitted a brief and an offer of proof in opposition to Chevron's preliminary-injunction motion.[65] But the district court refused to accept

[62] A 6036, 2:20-3:8.
[63] A 6114, 80:4-5.
[64] A 6114, 80:15-16.
[65] A 7534-7612.

the submission on the ground that Donziger had filed his requests for an extension of time after the deadline had passed for filing opposition papers.[66]

At roughly the same time, the Ecuadorian plaintiffs submitted additional evidence of Chevron's unclean hands, facts that should have been critical to the court's preliminary-injunction analysis. Judge Kaplan rejected that submission as untimely as well.[67]

Donziger also offered to stipulate to a 60-day extension of the district court's TRO to permit Donziger to submit, and the court to consider, a substantive opposition; but the district court dismissed that offer on the ground that it would not protect Chevron from irreparable harm unless the Ecuadorian plaintiffs also so stipulated.[68]

The court thus deprived Donziger of any opportunity to respond in writing to Chevron's sweeping and unprecedented motion.

3. The district court's preliminary-injunction order focuses on Chevron's allegation that Donziger subverted the Ecuadorian court, while largely ignoring that court's decision.

The district court issued its order on March 7, 2011,[69] preliminarily enjoining all efforts to enforce the Ecuadorian judgment. The injunction was based solely on Claim Nine of Chevron's complaint, which seeks a declaratory judgment

[66] SpA 125.
[67] Dkt. 172; Dkt. 183.
[68] SpA 127-128.
[69] SpA 1-131.

that holding that the Ecuadorian judgment is not enforceable because Ecuador does not provide impartial tribunals and procedures compatible with due process of law.[70] The district court found that Chevron had established irreparable harm[71] and a likelihood of success (or at least the existence of serious questions raising a fair ground for litigation) on Claim Nine.[72] The district court also found that the balance of hardships tipped decidedly toward Chevron.[73]

The preliminary injunction swept broadly, barring Donziger, the Ecuadorian plaintiffs, and their attorneys from "directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the [Ecuadorian judgment], or any other judgment that hereafter may be rendered in the *Lago Agrio* Case by that court or by any other court in Ecuador in or by reason of the *Lago Agrio* Case . . . , or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon [such] a Judgment."[74] This language barred the Ecuadorian plaintiffs and Donziger not only from filing and prosecuting

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[70] *See* SpA 69 ("The irreparable injury requirement is satisfied if there is a 'substantial chance' that Chevron, in the absence of a preliminary injunction, would suffer injury that could not be undone if Chevron prevails on its declaratory judgment claim."); SpA 88-91 (exercising jurisdiction over declaratory-judgment claim and holding that it is unnecessary to evaluate Chevron's likelihood of success on its other claims).

[71] *See* SpA 69-70.

[72] SpA 77, 88.

[73] SpA 77-79.

[74] SpA 129.

enforcement actions, but also from taking the most basic steps to begin planning or preparing for such actions.

a. The district court's irreparable-harm finding was founded on minimal evidence that Chevron submitted on reply—too late for the defendants to respond to it.

The district court's crucial irreparable-harm finding was premised on three conclusory paragraphs from the declaration of Rex Mitchell stating that Chevron's "business reputation" and "valuable customer goodwill" would be irreparably harmed in a manner "not . . . remediable by money damages" if the plaintiffs carried out their plan to attach oil tankers, wells, pipelines, or other links in Chevron's "supply chain," thereby causing Chevron to miss product deliveries.[75]

Chevron submitted the Mitchell Declaration only on reply, thereby preventing Donziger and the Ecuadorian plaintiffs from testing its assertions.

b. After refusing to hear Donziger, the district court authored an opinion placing him at the center of an alleged plot to subvert justice in Ecuador.

On March 7, 2011, after effectively shutting Steven Donziger out of the preliminary-injunction proceedings, Judge Kaplan issued a preliminary-injunction order that refers to Donziger by name 190 times and locates him at the very center of an alleged conspiracy to subvert the Ecuadorian justice system and deny justice to Chevron. Among Judge Kaplan's many references to Donziger were these:

[75] A 5341-5344, ¶¶ 7, 8, 10.

1. Judge Kaplan observed that, "for years [the Ecuadorian plaintiffs] used Donziger and his New York office to mount public relations, political and fund raising efforts in support of their Ecuadorian efforts."[76]

2. Judge Kaplan "infer[red]" that the national legislation under which Chevron ultimately was held liable—Ecuador's Environmental Management Act of 1999 ("EMA")—was "substantially drafted and its enactment procured by Bonifaz, Donziger and other American attorneys for the *Aguinda* plaintiffs" because they feared "being remitted to Ecuador, which had no class actions and thus no vehicle for the sort of giant toxic tort and other litigations" that occur in U.S. courts.[77]

3. Under the heading "*Donziger's Role*," Judge Kaplan opined that, when the case was refiled in Ecuador, Donziger not only "remained very much involved" but played an "enormous" role, becoming "the fulcrum of the entire effort to use the Lago Agrio litigation to obtain a very large payment from Chevron."[78] Judge Kaplan noted that "[t]he evidence establishes" that Donziger and various Ecuadorian parties "have worked closely together at all relevant times."[79]

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[76] SpA 9.
[77] SpA 16.
[78] SpA 18.
[79] SpA 20.

4. Judge Kaplan called Donziger "the field general" in a political battle that was played out through a legal case, and opined that Donziger and others had "orchestrated a campaign to intimidate the Ecuadorian judiciary."[80]

5. Judge Kaplan wrote that Donziger's assessments of his own importance to the Lago Agrio suit were "understatements" because Donziger had "'attempted to (1) intimidate the Ecuadorian judges, (2) obtain political support for the Ecuadorian lawsuit, (3) persuade the Government of Ecuador to promote the interests of the Lago Agrio plaintiffs, (4) obtain favorable media coverage, (5) solicit the support of celebrities . . . and environmental groups, (6) procure and package [fraudulent] 'expert' testimony for use in Ecuador, (7) pressure Chevron to pay a large settlement, and (8) obtain a book deal.'"[81]

6. Judge Kaplan added that Donziger was "intimately involved in obtaining and formulating expert reports for submission in the Lago Agrio case; seeking political support of the president of Ecuador, among others; procuring favorable media coverage in the United States and elsewhere; and promoting critical attention to Chevron by U.S. and New York State public officials, all for the purpose of pressuring Chevron to pay a settlement."[82]

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[80] SpA 39.

[81] SpA 19 (footnote, citation, and internal brackets omitted).

[82] SpA 19.

7. Judge Kaplan also stated that Donziger and others had (1) urged the Ecuadorian government to prosecute TexPet's[83] lawyers for committing fraud in connection with a settlement and release of Ecuador's claims against Texaco;[84] (2) applauded the fact that the President of Ecuador supported that prosecution;[85] and (3) devised a global judgment-enforcement strategy to pressure Chevron to settle.[86]

Ironically, having denied Donziger any effective voice in the proceedings, Judge Kaplan then took him to task for failing to oppose Chevron's submissions adequately. For example:

- Judge Kaplan criticized Donziger's failure to explain "under oath" critical statements that he had made about the quality of the Ecuadorian judicial system.[87]

- Judge Kaplan criticized Donziger's failure to submit "sworn proof" to counter the testimony of an expert, Dr. Charles Calmbacher, who claimed that he had not authorized some of the opinions that the Ecuadorian plaintiffs had submitted in his name.[88]

[83] SpA 10. "TexPet" refers to Texaco Petroleum Company.
[84] SpA 21.
[85] SpA 25-26.
[86] SpA 61-62.
[87] SpA 7.
[88] SpA 28.

- Judge Kaplan criticized Donziger's failure to submit evidence to rebut charges that the Ecuadorian court was pressured into appointing Richard Cabrera Vega as its independent expert, and that Cabrera was offered a job if the plaintiffs won the case.[89]

- Judge Kaplan also professed reluctance to condemn "the fairness of the judicial system of another country . . . on a record less complete than it would have on a motion for summary judgment or at trial."[90] Then he proceeded to do exactly that, while preventing Donziger or his legal experts from being heard on the subject.

c. The district court's opinion deals only cursorily with the substance of the Ecuadorian court's ruling, and assumes unfairly that it must have been the product of fraud.

Judge Kaplan's order focuses intently on Chevron's fraud allegations, distilling them into a narrative that derives much of its force from the fact that it is so thoroughly one-sided. In his rush to adopt Chevron's viewpoint, Judge Kaplan did not even consider whether the Ecuadorian judgment appeared on its face to be the product of normal judicial reasoning. Rather, he assumed that the judgment ***must*** be the product of the campaign of fraud, corruption, and intimidation alleged by Chevron. Judge Kaplan's decision therefore omitted any discussion of the

[89] SpA 30.
[90] SpA 81.

Ecuadorian court's many thoughtful observations, statements, and rulings. Notably, Judge Kaplan made no mention of the Ecuadorian court's skeptical statements about the parties' expert submissions, its refusal to accept ***any*** expert's conclusions, or its reliance on Chevron's own expert reports and admissions to support liability. Judge Kaplan might have avoided these oversights had he granted Donziger's counsel the time necessary to put together and present a thorough opposition.

d. The district court uncritically accepts Chevron's misleading quotations from the *Crude* outtakes as evidence of Donziger's wrongdoing.

A full-blown opposition by Donziger also would have alerted Judge Kaplan to Chevron's attempts to misrepresent the oral statements that Donziger made in the *Crude* outtakes. The outtakes consisted of about 600 hours of recordings made in the preparation of the final film that were not used in the documentary.[91]

Judge Kaplan's finding that Donziger likely had intimidated or defrauded the Ecuadorian court was premised in large part upon Chevron's selective editing of those outtakes. The Ecuadorian court had criticized Chevron's edited submissions as being misleading and procedurally unfair; but Judge Kaplan took a different approach, uncritically adopting Chevron's snippets and making them the centerpiece of his assault on Donziger's character and conduct.

[91] *See In re Chevron Corp.*, 10-4699, 2011 WL 2023257, at *5.

When Chevron's snippets are compared with lengthier transcripts of the outtakes (which Chevron also submitted below),[92] many of Donziger's remarks turn out to be reflections on how to counter ***Texaco's*** attempts to undermine the judicial process. For example:

1. Judge Kaplan devotes an entire section of his order to Donziger's "*Plan to Pressure the Court With an 'Army'*."[93] But the transcript of that outtake shows that Donziger was toying with the idea of creating a team of 20 citizens, compensated for their time, to go to court each day and prevent Texaco from corrupting the proceedings.[94]

2. Judge Kaplan also hints darkly at plans to foment revolutionary violence against the judiciary, writing: "The conversation about raising an army to pressure the court then continued, with Yanza waving the camera away as he told Donziger that the 'army' could be supplied with weapons."[95] But the transcript reveals the facetious nature of Yanza's comment, and also depicts Donziger's effort to bring a silly conversation back to earth:

> YANZA: [The citizen monitors] would have to receive minimal training… things like that—details, so they do a good job for us. That's it. And then, if it goes well, and we need, uh, if we need weapons, we can provide weapons.

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[92] A 674-1128.

[93] SpA 41.

[94] A 1058.

[95] SpA 42.

DONZIGER: [laughter]

YANZA: From Iran! We can bring…

DONZIGER: [laughter]

KOENIG: Oh man.

SOLTANI: I'm going to lose my [Iranian] citizenship here.[96]

DONZIGER: So we really need—we really need some—some long-term support. Get some people mobilized.

YANZA: [laughter]

SOLTANI: I understand. What kind of long-term support? [pause] Steven?

DONZIGER: What's that?

SOLTANI: What type of support?

DONZIGER: Money. It's basically a project that requires us to pay to find the people and pay them for their time.[97]

3. Under the heading "*Intimidation of Ecuadorian Judges*,"[98] Judge Kaplan describes an outtake in which Donziger describes a plan to "intimidate," "pressure," and "humiliate" the judge during an ex parte meeting.[99] But in the transcript of the outtake, Donziger explains that he plans to "confront the judge who we believe is paid by Texaco . . . with our suspicions about his corruption,"

[96] Soltani was an Iranian citizen and U.S. permanent resident.

[97] A 1097-1098.

[98] SpA 39.

[99] SpA 40.

and serve notice on him that "I'm not lettin' 'em get away with this stuff."[100] Donziger also lamented the fact that "we have to, occasionally use . . . pressure tactics to neutralize [Texaco's] corruption."[101]

e. The district court furnishes no adequate justification for rushing to judgment without Donziger's input.

Judge Kaplan devoted more than eight pages of his order to a heavily researched discussion—citing 11 published decisions and containing 28 footnotes—entitled "*Donziger Was Afforded an Adequate Opportunity to Respond*."[102]

Judge Kaplan justified rushing ahead without Donziger's input by citing the irreparable harm that Chevron claimed it would suffer if the Ecuadorian plaintiffs made good on their "stated determination to move promptly to seek to enforce [the Ecuadorian] judgment in multiple jurisdictions around the world 'without,' in Donziger's words, 'waiting for the appeals process.'"[103] As previously discussed, however, Chevron's irreparable-harm showing consisted of a reply declaration containing a few conclusory statements about loss of business reputation and goodwill if Chevron missed some product deliveries. Donziger and the Ecuadorian plaintiffs had no opportunity to respond to that showing, minimal as it was. Thus,

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[100] A 688-692.
[101] A 689.
[102] SpA 110.
[103] SpA 115.

Judge Kaplan piled one due-process violation on top of another when he cited irreparable harm as the ground for effectively barring Donziger from participating in the preliminary-injunction proceeding.

E. Judge Kaplan continues to push Chevron's suit forward, while blessing procedural maneuvers that will exclude Donziger and his counsel from participating in the most critical aspect of the suit.

Since granting the injunction, Judge Kaplan has seized every opportunity to place the case on the fastest possible track, while curtailing Donziger's ability to defend his conduct and reputation, and the integrity of the Ecuadorian judgment.

For example, all parties stipulated to extend the time for the Ecuadorian plaintiffs to respond to the Complaint until 14 days after the court ruled on Chevron's motion to bifurcate the case.[104] Yet the district court gratuitously denied the extension, once again citing its own convenience and ignoring any prejudice to the defendants.[105]

The district court also denied the Ecuadorian plaintiffs' requests that it trim back the overbroad aspects of the preliminary injunction to allow for preparation, but not actual filing, of future proceedings to enforce the Ecuadorian judgment.[106]

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[104] Dkt. 236.

[105] *See* Dkt. 236 (stating that it "may prove helpful to the Court" to have defendants' answers in hand when ruling on bifurcation, while "defendants would not be prejudiced by filing answers shortly.").

[106] *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 1560926 (S.D.N.Y. Apr. 18, 2011).

This Court granted temporary relief on May 12, 2011 by staying the overbroad aspects of the injunction.[107]

Most significantly, the district court helped Chevron cut Donziger and his counsel out of the most critical part of the case—the part concerning the enforceability of the Ecuadorian judgment—by severing that part of the case and then all-but-denying Donziger the right to intervene in it.

This maneuver involved several steps.

First, the district court granted Chevron's motion to bifurcate its declaratory-judgment claim from the rest of the case and try that claim first. That claim (Claim Nine) asks the court to declare the Ecuadorian judgment unenforceable on the ground that (among other things) it was procured by the fraud that Donziger allegedly orchestrated.

In his order granting bifurcation, Judge Kaplan acknowledged the potential overlap of factual issues between Claim Nine and Chevron's other claims, but observed that Donziger might prove not to be a proper party to Claim Nine, or could be dropped as a defendant to that claim.[108]

Chevron took the hint and soon filed an amended complaint dropping Donziger and his law firm from Claim Nine, while at Paragraph 427 incorporating

[107] Second Circuit Docket No. 137 (Order dated May 12, 2011), at 1.
[108] A 8916.

into that claim every single paragraph of the complaint, including dozens of allegations relating specifically to Donziger.[109]

Donziger therefore moved to intervene in the trial of Claim Nine. On May 31, 2011, Judge Kaplan severed Claim Nine under Rule 21, observing that, because Donziger is "not a party to that now separate action," he would have "no right to participate in it"—even for purposes of discovery—absent intervention.[110]

Judge Kaplan then ***denied*** Donziger's intervention motion, allowing him only some trivial rights to participate in other parties' discovery, but forbidding him from taking his own discovery, filing motions, or participating as a party in the trial of Claim Nine.

In denying Donziger any meaningful intervention, Judge Kaplan lost sight of all propriety. Judge Kaplan rejected Donziger's argument that he has a direct interest in the proceedings, and thus a right to intervene, because he has an undisputed contingent-fee financial interest in the Ecuadorian judgment and does not want to be enjoined from collecting his fees from that judgment. In rejecting that argument, Judge Kaplan stated that "Donziger is not a party to the [Claim Nine] action, which seeks no injunction against him individually." But Judge Kaplan knows that that assertion is seriously misleading: Claim Nine is the ***only***

[109] *See* Dkt. No. 283.

[110] Dkt. 327 at p. 4.

claim underlying the preliminary injunction, which the district court entered against Donziger "individually," and from which he now individually appeals.[111]

In another galling aspect of his ruling, Judge Kaplan stated that one of the facts militating against any broader intervention is Donziger's "failure to adhere to a schedule fixed by the Court on the preliminary injunction motion."[112]

Judge Kaplan thus intends to deprive Donziger of any significant role in proceedings that are intended to defame him and to destroy the case to which he has devoted the last 18 years of his life. Donziger intends to appeal from the intervention order, and will ask this Court to expedite that appeal and consolidate it with this one.

F. This Court calls the prospect of a final, enforceable Ecuadorian judgment "purely hypothetical" and rejects Chevron's attempts to evade its commitment to be sued in Ecuador.

Ten days after Judge Kaplan issued his preliminary injunction, this Court handed down a ruling that rejected attempts by Chevron to evade its commitment to litigate the Lago Agrio matter in Ecuador.

The background for this Court's decision is as follows: In September 2009, after years of bitterly contentious proceedings in Ecuador, Chevron filed an arbitration demand against Ecuador under the Bilateral Investment Treaty ("BIT")

[111] *See* SpA 69; SpA 88-91.

[112] Dkt. 327 at p. 15.

between Ecuador and the United States.[113] In the BIT arbitration (from which the Ecuadorian plaintiffs were barred),[114] Chevron argued that ***any*** judgment issued against it in Ecuador would violate a previous settlement between Texaco Petroleum ("TexPet") and Ecuador;[115] that the Ecuadorian government had interfered with the Lago Agrio suit; and that Ecuador's judicial branch had acted lawlessly and without due process in administering that suit.[116] Chevron and TexPet asked the arbitral panel to order Ecuador's executive branch to terminate the Lago Agrio judicial proceedings and to absolve them of all liability.[117]

The Ecuadorian government and the plaintiffs responded by asking the federal district court in the Southern District of New York to enjoin the BIT arbitration on the ground that it sought to interfere with the ongoing Lago Agrio proceedings; but Judge Leonard B. Sand denied that motion[118] and this Court recently affirmed that order.

Ruling more than a month after the Ecuadorian judgment issued, this Court reasoned that any conflict between the BIT arbitration and the Lago Agrio suit

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[113] *See* A 9377 (*Aguinda III*, slip op. at 7).

[114] *See* A 9391 (*Aguinda III*, slip op. at 21) ("Plaintiffs are not parties to the BIT, and that treaty has no application to their claims; their dispute with Chevron therefore cannot be settled through BIT arbitration.").

[115] A 9377-9379 (*Aguinda III*, slip op. at 7-9).

[116] A 9378 (*Aguinda III*, slip op. at 8).

[117] A 9378 (*Aguinda III*, slip op. at 8).

[118] *See Republic of Ecuador v. Chevron Corp.*, Nos. 09 Civ. 9958, 10 Civ. 316, 2010 WL 1028349 (S.D.N.Y. Mar. 16, 2010).

"remains ***purely hypothetical***" since ***"[t]he Ecuadorian courts have not issued—and may never issue—a final judgment against Chevron***, and the arbitral panel has yet to rule on the merits of Chevron's claims . . . ."[119] (In Part VII.D.1., below, we discuss the implications of that holding for Judge Kaplan's irreparable-harm finding in this case.).[120]

But this Court also rejected Chevron's claim that it was not bound by its predecessors' commitment to be sued in Ecuador—the very commitment "upon which we and the district court relied in dismissing Plaintiffs' [New York] action."[121] The Court observed that "Texaco assured the district court that it would recognize the binding nature of any judgment issued in Ecuador. Doing so displayed Texaco's well-founded belief that such a promise would make the district court more likely to grant its motion to dismiss. Had Texaco taken a different approach and agreed to participate in the Ecuadorian litigation, but announced an intention to disregard any judgment the Ecuadorian courts might issue, dismissal would have been (to say the least) less likely."[122]

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[119] A 9397-9398 (*Aguinda III*, slip op. at 27-28) (emphases added).
[120] A 9392 (*Aguinda III*, slip op. at 22).
[121] A 9376 n.3 (*Aguinda III*, slip op. at 6 n.3).
[122] A 9377 n.4 (*Aguinda III*, slip op. at 7 n.4).

This Court likewise rejected as "without merit" Chevron's contention that it need not honor its commitment to submit to Ecuadorian jurisdiction in the Lago Agrio suit because "the Lago Agrio litigation is not the refiled *Aguinda* action."[123]

VI. SUMMARY OF ARGUMENT

This Court should vacate the preliminary injunction for the following reasons:

1. The district court violated the due-process rights of all of the appellants. The court denied Donziger sufficient time to engage appropriate counsel, read and analyze Chevron's massive application for a preliminary injunction, and prepare a thorough and comprehensive opposition to that application. The district court violated the due-process rights of all of the appellants by setting an impossibly short briefing schedule and then closing the record prematurely. The district court violated due process again when it refused to accept even those papers that Donziger's counsel managed with great effort to pull together and submit only a week after being hired—and still two weeks before the court ruled. And the district court violated due process yet again when it refused to accept a submission by the Ecuadorian plaintiffs containing evidence, obtained in early March, of Chevron's unclean hands.

[123] A 9377 n.5 (*Aguinda III*, slip op. at 7 n.5). That ruling appears to contradict Judge Kaplan's holding that "[t]he Lago Agrio litigation, though it was brought on behalf of similar and, in many cases, the same individuals, was a fundamentally different lawsuit than *Aguinda*." SpA 18.

2. The district court violated Circuit law by refusing to hold an evidentiary hearing to resolve the many factual disputes raised by Chevron's voluminous motion papers.

3. The district court erred in finding that Chevron had demonstrated imminent, irreparable harm absent a preliminary injunction. That finding rested on speculation—recently refuted by this Court—that a final and enforceable Ecuadorian judgment is imminent. The irreparable-harm finding also rested on a paper-thin factual showing, consisting of an untimely declaration from a Chevron executive who predicted that enforcing the Ecuadorian judgment would delay product shipments and harm Chevron's business reputation—harms insufficient as a matter of law to qualify as "irreparable." And the district court cited no basis for its contention that Chevron would be irreparably harmed if required to answer enforcement actions in multiple international jurisdictions. In fact, few entities in the world have proven more willing and able than Chevron to wage global litigation—as Chevron has done in this case.

4. The district court's finding that the balance of interim harms tips decidedly toward Chevron is erroneous as a matter of law because it took no account of the physical risks that continued environmental contamination poses to the residents of the affected region of Ecuador.

5. The preliminary injunction is both overbroad and vague, as this Court recognized when it temporarily stayed the part of the injunction effectively prohibiting any and all preparations to enforce the Ecuadorian judgment.

In addition, this Court should reassign this case to a different judge on remand. Judge Kaplan either has, or appears to have, prejudged this case, as evidenced by his willingness to bar Donziger and his counsel from participating meaningfully in proceedings that vitally concern him.

VII. ARGUMENT

A. Preliminary-injunction test and standards of review.

In this Circuit, a party seeking a preliminary injunction must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

This Court reviews for abuse of discretion a district court's decision to grant a preliminary injunction. The district court abuses its discretion "'when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.'" *Mastrovincenzo v. City of New*

York, 435 F.3d 78, 88 (2d Cir. 2006) (citation omitted); *see generally Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001).

The abuse-of-discretion standard "does not fully reflect the complexity of appellate review of preliminary injunction rulings. A court considering a preliminary injunction motion must make many subsidiary findings, such as the risk of irreparable harm, whether the movant is likely to win on the merits after trial, and the balance of hardships. To the extent this entails making legal conclusions, such as the movant's likelihood of success, then that finding is reviewed de novo. Findings of fact are reviewed for clear error. . . . Thus, while the overall standard is one of abuse of discretion, the review of preliminary injunction rulings is not as deferential as that standard suggests because there are so many subsidiary findings that are subject to more exacting scrutiny." 1 Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary*, Rule 65 (2011) (footnotes omitted).

This Court reviews de novo whether Donziger had a fair opportunity to respond to Chevron's preliminary-injunction motion. *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 103 (2d Cir. 2009). This Court also reviews de novo whether an injunction violates Federal Rule of Civil Procedure 65(d) because it is impermissibly vague or overbroad. *See id*.

B. Donziger adopts the arguments of the Ecuadorian plaintiff-appellants.

Many aspects of the district court's order are discussed and challenged in the Brief of the Ecuadorian Plaintiff-Appellants. Donziger adopts all arguments in that brief by reference under Federal Rule of Appellate Procedure 28(i). In addition, Donziger raises other arguments below.

C. The district court's refusal to allow Donziger and the Ecuadorian plaintiffs to marshal and present evidence in opposition to Chevron's application violated due process and Rule 65(a) of the Federal Rules of Civil Procedure.

The district court violated due process and the notice requirements of Federal Rule of Civil Procedure 65(a)(1) by depriving Donziger and the Ecuadorian plaintiffs of any meaningful opportunity to marshal their evidence and arguments in opposition to Chevron's motion for a sweeping preliminary injunction.

1. The district court violated Donziger's due-process rights by refusing to give him adequate time to engage counsel and oppose Chevron's massive filings, and by rejecting even the hastily prepared opposition papers that he managed to submit just one week after obtaining counsel.

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard" and to be granted enough advance notice to be heard "at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) (citations and internal quotation marks omitted).

Those precepts are reflected in Rule 65(a)(1) of the Federal Rules of Civil Procedure, which states that "a court may issue a preliminary injunction only on notice to the adverse party." "The purpose of this requirement is to give the opposing party a fair opportunity to oppose the motion for a preliminary injunction, and the court must allow that party sufficient time to marshal his evidence and present his arguments against the issuance of the injunction." *Rosen v. Siegel*, 106 F.3d 28, 31-32 (2d Cir. 1997) (internal quotations and citations omitted); *see also Garcia*, 561 F.3d at 105. "The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 433 n.7 (1974).

The district court flouted those precepts in this case, first choosing not to accept opposition from the individual whom it identified as the central figure in the dispute before it, and then—perhaps recognizing how that might look to this Court—penning a detailed, eight-page defense of its conduct.

The district court gave Chevron every procedural advantage over Donziger. Chevron spent "thousands of hours" preparing its 148-page, 397-paragraph complaint in this action, not to mention its 71-page application for a TRO and

preliminary injunction, which was supported by 589 exhibits.[124] Yet the district court only gave Donziger 10 days' notice of the February 18, 2011 hearing on Chevron's preliminary-injunction motion, and only three days' notice of the due date for any opposition to that motion.

Donziger only was able to retain counsel to represent him in this action on February 17th—one day before the preliminary-injunction hearing. Before the hearing, Donziger and his counsel did not even have time to read all of Chevron's pleadings, much less to prepare a response to them. And Donziger had no opportunity to test the evidence submitted by Chevron or to obtain additional evidence through discovery.

After the hearing, by dint of enormous effort, Donziger's counsel managed to assemble opposition papers and to submit them only one week after the hearing and nearly two weeks before the district court issued its preliminary-injunction order. But the district court declared the record "closed" and refused to accept Donziger's filing.[125] The district court claimed to have "examined" Donziger's filings and to have concluded that they would not have altered the result "even if they were considered part of the record"; but the court's "examination" must have

[124] Dkt. 283, Complaint, ¶ 338. Chevron submitted an additional 12 affidavits and 121 exhibits with its 36-page reply.

[125] The district court also refused to accept a supplemental submission by the Ecuadorian plaintiffs on March 4, detailing Chevron's unclean hands and including evidence first obtained just one day earlier from a § 1782 proceeding in California. *See* Dkt. 172; Dkt. 183.

been cursory, since its reasons for not accepting the filing included "the difficulty of carefully considering such extensive materials submitted so near the deadline."[126]

The district court's truncated procedures warped every aspect of its ultimate decision. Most notably, Judge Kaplan based his all-important irreparable-harm finding on the slender evidence provided by three paragraphs of the Rex Mitchell declaration,[127] which Chevron withheld from scrutiny until it filed its reply—thereby depriving either Donziger or the Ecuadorian plaintiffs of any opportunity to test or to counter Mitchell's representations.[128]

The district court tried to justify its procedures by invoking an imaginary crisis—the supposedly imminent issuance of a final and enforceable Ecuadorian judgment. As this Court recently observed, however, that possibility remains "purely hypothetical" because "[t]he Ecuadorian courts have not issued—and may never issue—a final judgment against Chevron . . . ."[129] The Ecuadorian judgment that issued on February 14, 2011 is not final and enforceable, but rather, is stayed pending an initial appeal as of right in which the intermediate court reviews the

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[126] SpA 124.

[127] A 5341-5344, ¶¶ 7, 8, 10.

[128] Although Donziger's opposition commented on the facial inadequacy of the Mitchell affidavit, the court refused to accept the opposition; and in any event, Donziger had no opportunity to cross-examine Mitchell or to conduct discovery relating to Mitchell's claim of irreparable harm.

[129] A 9397-9398 (*Aguinda III*, slip op. at 27-28) (emphasis added).

facts and law de novo. Then the parties have another appeal as of right on legal issues, during which the intermediate court's judgment may be stayed upon the posting of a bond.[130]

The district court's unnecessary rush to judgment placed Donziger in a position analogous to that described and condemned in *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*, 446 F.2d 353 (5th Cir. 1971). As in that case, the district court "thrust the defendants into an impossible position insofar as both preparing and presenting an effective response to the motion for preliminary injunction. Prior to the hearing the defendants were obliged, within a few days, to undertake a task which was at least difficult and at most almost insurmountable. They were under the necessity of retaining counsel, locating the numerous persons and investigating the multitude of occurrences alleged in the complaint and separate affidavits, determining if there was evidence to controvert what was said to have occurred, and either procuring affidavits or arranging for live testimony from witnesses." *Id.* at 356-57 (holding one-week notice of preliminary-injunction proceedings insufficient) (cited with approval by this Court in *Garcia*, 561 F.3d at 105).

The district court's disregard for due process is especially disturbing in this case, where a member of the bar has been accused of racketeering. Courts repeatedly have remarked on the stigmatizing effect that the mere assertion of

[130] A 6122-6123, ¶¶ 15-33.

racketeering claims has on defendants.[131] In this case, Chevron's devastating allegations now have been ratified by a judicial opinion that, despite its preliminary nature, leaves little doubt about the ultimate result in the district court.[132] To endorse Chevron's accusations without even hearing from the targeted individual was irresponsible.

2. The district court violated the due-process rights of Donziger and the Ecuadorian plaintiffs by refusing to hold an evidentiary hearing before issuing the preliminary injunction.

"It is settled law in this Circuit that motions for preliminary injunctions should not be decided on the basis of affidavits when disputed issues of fact exist." *Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) (quoting *Commodity Futures Trading Comm'n v. Incomco, Inc.*, 649 F.2d 128, 131 (2d Cir. 1981)). "The existence of factual disputes necessitates an evidentiary hearing . . . before a motion for a preliminary injunction may be decided." *Id.*

The leading Second Circuit case on this issue explains: "Generally, of course, a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper to another.' This is

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[131] *See, e.g., Purchase Real Estate Grp. Inc. v. Jones,* No. 05–CV–10859, 2010 WL 3377504, at *6 (S.D.N.Y. Aug. 24, 2010; *Manhattan Telecomms. Corp. v. DialAmerica Mktg., Inc.,* 156 F. Supp. 2d 376, 380 (S.D.N.Y.2001); *Grimes v. Fremont General Corp.*, 2011 WL 1899403, at *18 (S.D.N.Y. 2011); *Katzman v. Victoria's Secret Catalogue,* 167 F.R.D. 649, 655 (S.D.N.Y.1996); *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 300 (S.D.N.Y. 2010).

[132] Although Judge Kaplan only granted injunctive relief with respect to Claim Nine (Declaratory Judgment), that claim rests upon and incorporates the racketeering and fraud allegations of Claim One. *See* Dkt. 283, ¶ 427.

particularly so when the judge without holding an evidentiary hearing, resolves the bitterly disputed facts in favor of the party who has the burden of establishing his right to preliminary relief. This caveat is most compelling 'where everything turns on what happened and that is in sharp dispute; in such instances, the inappropriateness of proceeding on affidavits attains its maximum . . . .'" *Forts v. Ward*, 566 F.2d 849, 851-52 (2d Cir. 1977) (citations omitted).

Here, the parties contest many of the "facts" on which Chevron bases its preliminary-injunction application—including its claims about imminent, irreparable harm; its accusation that Donziger and others tried to defraud and intimidate the Ecuadorian court; and its claim that the Ecuadorian judicial system that it championed in 2002 has become incapable of rendering justice. The district court's finding that the facts were undisputed—which Chevron has touted in nearly every subsequent court filing—is specious. The district court denied Donziger and the Ecuadorian plaintiffs any meaningful opportunity to oppose Chevron's slanted "facts," many of which concerned Donziger's alleged conduct. If given that opportunity, Donziger would offer substantial evidence rebutting Chevron's claims. Thus, the district court's decision not to hold an evidentiary hearing on Chevron's application was contrary to law and another means by which the court denied Donziger and the Ecuadorian plaintiffs an adequate opportunity to oppose the application.

In sum, the proceedings before the district court violated due process and the notice requirements of Rule 65(a)(1). The district court's order preliminarily enjoining Donziger therefore must be vacated.

D. This district court erred as a matter of law in concluding that Chevron would suffer irreparable harm absent an injunction.

Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999). To justify an injunction, the harm alleged may not be "remote [or] speculative but actual and imminent" and incapable of being "remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995).[133] A preliminary injunction "should issue ***not*** upon a plaintiff's imaginative, worst case scenario on the consequences flowing from the defendants alleged wrong but upon a concrete showing of imminent injury." *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989) (emphasis added).

As discussed below, the district court ignored these principles and erroneously found that Chevron faced irreparable harm from the imminent enforcement of the Ecuadorian judgment. In fact, there is not and may never be a final, enforceable Ecuadorian judgment; and even if there were, Chevron submitted

[133] *See also JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (emphasis in original) (a party seeking injunctive relief must establish that it is "*likely* to suffer irreparable harm if equitable relief is denied").

no adequate evidence that the Ecuadorian plaintiffs' enforcement efforts would cause legally cognizable, irreparable harm.

1. The district court's finding of imminent irreparable harm was erroneous, because the Ecuadorian courts have not issued—and may never issue—any enforceable final judgment.

On March 17, 2011, over a month after the Ecuadorian judgment issued, this Court observed that the prospect of a final and enforceable Ecuadorian judgment remains "purely hypothetical" because "[t]he Ecuadorian courts have not issued—and may never issue—a final judgment against Chevron . . . ."[134] That observation was correct. As this Court recognized, the pendency of Chevron's *de novo* appeal in Ecuador means that any claimed harm is not imminent and is in fact mere speculation. Chevron has filed an appeal in Ecuador, has submitted voluminous briefing to the appellate court, and may yet prevail. Moreover, Chevron has conceded, and the district court has acknowledged, that the judgment will remain unenforceable at least until the intermediate Ecuadorian appeals court renders its decision.[135] Enforcement actions and asset seizures are "'something merely feared as liable to occur at some indefinite time" and thus do not warrant injunctive relief. *USA Network*, 704 F. Supp. at 493; *see also Shapiro*, 51 F.3d at 332.

[134] A 9397-9398 (*Aguinda III*, slip op. at 27-28) (emphasis added).

[135] SpA 74; *see also* N.Y. C.P.L.R. § 5302 (New York's Recognition Act only "applies to . . . foreign country judgment[s] which [are] final, conclusive and enforceable where rendered").

Accordingly, the district court's finding of imminent irreparable harm rested on speculation, and this Court should vacate the preliminary injunction.

2. Even if enforcement proceedings commenced tomorrow, Chevron failed to show that they would cause irreparable harm.

Mere business disruptions do not constitute irreparable harm. "[W]here [this Court has] found irreparable harm, the very viability of the plaintiff's business, or substantial losses of sales . . ., have been threatened." *Tom Doherty Assocs., Inc. v. Saban Enter., Inc.*, 60 F.3d 27, 38 (2d Cir. 1995).[136] "[I]f the wrongful activity threatens only the disruption as opposed to the destruction of an ongoing business there is no irreparable injury." *Vera, Inc. v. Tug "Dakota,"* 769 F. Supp. 451, 454 (E.D.N.Y. 1991).[137]

At most, Chevron's meager and untimely irreparable-harm showing raised a possibility of business disruption. Rex Mitchell's declaration—which Chevron submitted only on reply—speculates that "[t]he seizure of Chevron assets, such as

[136] *See also Ass'n of Legal Aid Attorneys v. City of New York*, No. 96 Civ. 8137 (SHS), 1997 WL 620831, at *6 (S.D.N.Y. Oct. 8, 1997) ("[B]usiness disruption . . . is insufficient by itself to establish irreparable harm."); *Jessup v. Am. Kennel Club*, 862 F. Supp. 1122, 1127 (S.D.N.Y. 1994) ("[D]isruption in business does not constitute irreparable harm.") (citing *Truglia v. KFC Corp.*, 692 F. Supp. 271, 279 (S.D.N.Y. 1988)); *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488 (S.D.N.Y. 1989) (same).

[137] *See also Tom Doherty Assocs.*, 60 F.3d at 38; *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (holding that disruption of sales and "delivery relations" with customers was not enough to support a finding of irreparable harm); *Soap Opera Now, Inc. v. News Am. Publ'g Inc.*, No. 90 CIV 2631, 1990 WL 124335, * 4 (S.D.N.Y. Aug. 17, 1990) (to show irreparable harm the plaintiff must demonstrate that it "is threatened with going out of business entirely, not simply that it loses some business . . . .").

oil tankers, wells, or pipelines, in any one of [the countries in which Chevron has such assets], would disrupt Chevron's supply chain and operations" and "cause Chevron to miss critical deliveries to business partners."[138] Mitchell provided no factual support or further elaboration to buttress that conclusion. His vague, speculative assertions of potential business disruption and loss of good-will do not come close to demonstrating irreparable harm.

Indeed, publicly available facts demonstrate that the hypothetical asset seizures would not threaten Chevron's viability. As the district court observed, Chevron is not a "fly-by-night operation," but a major enterprise that would be "quite able to pay the entire judgment . . . ."[139] Chevron had sales and operating revenues of more than $198 billion in 2010—more than 11 times the amount of the Ecuadorian judgment.[140] In short, Chevron would remain a viable entity, able to serve its customers' needs, even if some of its thousands of assets scattered across the planet were to be subjected to attachment.

Unable to demonstrate irreparable harm, Chevron asserts, in effect, that special rules apply to it due to its size and importance. Where lesser companies must demonstrate a threat to their very existence, Chevron need only show that

[138] A 5343, ¶ 7 (emphasis added); *see also* A 5344, ¶ 10.

[139] SpA 73.

[140] Chevron Form 10K for Year Ending December 31, 2010, at p. 198, *available at* http://www.chevron.com/annualreport/2010/.

some business activities ***may*** face disruption, which ***may*** temporarily tarnish Chevron's business reputation.

We have heard this type of special pleading before. More than 25 years ago, Texaco faced the prospect of satisfying a civil judgment 22% larger in real terms than the one awarded here. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 4 (1987).[141] Texaco argued, ultimately without success, that it would violate the federal constitution for Texas courts to require it to post a bond equal to 100% of that judgment as a condition for prosecuting its appeal. Justice Stevens's response to that contention bears repetition here, where Texaco's successor entity pleads that any disruption of its global business operations will wreak irreparable harm on its reputation:

> Admittedly, Texaco makes a sympathetic argument, particularly when it describes the potential adverse impact of this litigation on its employees, its suppliers, and the community at large. But the exceptional magnitude of those consequences is the product of the vast size of Texaco itself—it is described as the fifth largest corporation in the United States—and the immensity of the transaction that gave rise to this unusual litigation. The character of harm that may flow from this litigation is not different from that suffered by other defeated litigants, their families, their employees, and their customers. The price of evenhanded administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions.

[141] The judgment in question was $10.53 billion in 1985 dollars, approximately equal to $22 billion today.

Id. at 34 (Stevens, J., concurring in judgment).

Chevron, a global industrial goliath, faces no irreparable harm. Accordingly, this Court should vacate the preliminary injunction.

3. Few entities on earth are better equipped than Chevron to handle litigation on multiple fronts.

The district court also suggested that an injunction is necessary to help Chevron fend off a multiplicity of vexatious enforcement actions.[142] But Rex Mitchell's conclusory declaration supplies no evidence that defending enforcement proceedings would irreparably harm Chevron.[143] Nor could it. Chevron is one of the world's largest companies, with global business operations and legal resources to match. It is far better equipped than the plaintiffs to litigate multiple actions across the world.

Indeed, Chevron has promised "to fight" the Ecuadorian plaintiffs "until hell freezes over . . . [a]nd then . . . [to] fight it out on the ice."[144] And Chevron has made good on that promise, as it continues to pursue a campaign of collateral litigation under 28 U.S.C. § 1782 that the Third Circuit has called "unique in the

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[142] SpA 70.

[143] To the contrary, Chevron has argued to this Court that the costs of litigation do not constitute irreparable harm. (*See* Dkt. 251 (Opp'n Br. to Stay Proceedings, filed Apr. 1, 2011)). In any event, defending parallel proceedings does not establish irreparable harm. *See Dow Jones & Co., Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 425 (S.D.N.Y. 2002) (finding that vexatiousness, expense, and inconvenience associated with defending foreign litigations "alone do not suffice to warrant injunctive relief intended to restrain parties within the Court's jurisdiction").

[144] A8123.

annals of American judicial history." *In re Chevron Corp.*, 2011 WL 2023257, at *3 n.7. Indeed, Chevron has exhibited no difficulty in simultaneously litigating this action, the Lago Agrio litigation and appeal, an international arbitration, and over 25 separate § 1782 discovery actions across the United States. Few entities on earth are better equipped or more eager to wage all-out global litigation. Thus, the "multiplicity of suits" rationale for finding irreparable harm has no place here.

In sum, the district court's finding of imminent and irreparable harm was procedurally unsound and erroneous as a matter of both law and fact. Accordingly, the order granting Chevron a preliminary injunction should be vacated.

E. The district court gave no thought to the physical harm that the Ecuadorian plaintiffs may suffer if enforcement is delayed.

The preliminary-injunction order is fatally flawed to the extent that it rests on the district court's finding that the balance of hardships tipped "decidedly toward Chevron."

That finding was founded upon an unwarranted assumption that "the worst that could befall the [Lago Agrio Plaintiffs] if a preliminary injunction were entered here mistakenly would be a delay in the enforcement of the judgment, outside Ecuador, for a period sufficient to litigate this case to conclusion."[145]

That assumption was wrong. The Lago Agrio suit is as much about imminent and ongoing threats to human health as it is about the physical

[145] SpA 79.

remediation of soils or streams. Viewing the Lago Agrio suit as one for environmental remediation in the narrowest sense allowed the district court to ignore the urgency of the plaintiffs' situation. Had the district court paid some attention to Donziger's side of the story or to the substance of the Ecuadorian court's ruling, it might have better understood the human dimensions and exigencies of the case—and it might have weighed the balance of harms quite differently.

The district court's injunction order repeatedly betrays an unduly narrow understanding of the Lago Agrio lawsuit. The order notes, for example, that Ecuador's Environmental Management Act ("EMA") grants damages "for the cost of remediation of environmental harms generally, as distinct from personal injuries or property damages to specific plaintiffs."[146] The court consequently concludes that the Ecuadorian plaintiffs "brought the Lago Agrio case not to recover for personal injuries or property damage to them, but in a role more akin to private attorneys general, suing to remediate the region."[147] The implication is that the

[146] SpA 15; *see also* SpA 18 ("The Lago Agrio litigation, though it was brought on behalf of similar and, in many cases, the same individuals, was a fundamentally different lawsuit than *Aguinda*. *Aguinda* sought predominantly damages for the plaintiffs and class members for injuries to person or property that each had allegedly suffered. The LAPs, however, sued in something akin to a *parens patriae* capacity to require the defendants to perform, or to pay the cost of performing, environmental and other remediation methods.").

[147] SpA 102.

physical "remediation" of water and dirt can wait, while Chevron's product deliveries cannot.

The Ecuadorian court took a very different view. It noted that article 43 of the EMA authorizes "[t]he persons or entities or human groups . . . affected directly by the harmful action" to recover "for deterioration to health or the environment, including biodiversity and its constituent elements."[148] Among the legal norms that it found applicable during the 1964-1992 contamination period was Article 41 of the Regulations on Hydrocarbon Exploration and Production, published in 1974, which stated that an operator had the obligation "to take all precautionary steps and measures in the situation to avoid damage or hazard to ***individuals***, properties, natural resources and sites of archaeological, religious or tourist interest."[149]

The Ecuadorian court also noted that the plaintiffs had demanded "elimination or removal of the contaminating elements that threaten the environment and the health of the inhabitants,"[150] and had alleged "at least two impacts suffered by human beings: 1. Adverse effect on health, including elevated rates of cancer, miscarriage, high infant mortality and genetic deformities; and 2.

[148] A 7387-7388.
[149] A 7363 (emphasis added).
[150] A 7471.

Impacts on indigenous communities, including displacement from their ancestral territories, and loss of their cultural identity and integrity."[151]

The court then declared that "the subject of human health . . . is the most complex and urgent of all the issues brought before this Court," and that "an assault on people's health is tantamount to an assault on their lives."[152] The court proceeded to review not only epidemiological evidence, but also a wealth of interview evidence documenting the illnesses and injuries to persons and property wrought by the region's widespread contamination.[153]

Judge Kaplan, of course, views the Ecuadorian judgment as likely being the product of fraud, political intimidation, and executive interference. But the district court was obligated to put that view aside when assessing the interim harms to the Ecuadorian plaintiffs, because its task in that instance was to consider what "could befall [the plaintiffs] if a preliminary injunction were entered here ***mistakenly***."[154]

Judge Kaplan therefore should have assumed himself to be "***mistaken***" about the corrupt provenance of the Ecuadorian judgment, and then should have asked himself whether, for example, an indigenous child growing up in a rain forest has at least as urgent an interest in drinking unpoisoned water and in eating food grown in non-toxic soil as the Chevron Corporation has in maintaining the

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[151] A 7418.

[152] A 7418-19.

[153] A 7431-7445.

[154] SpA 79 (emphasis added).

purity of its "business reputation." Had he done so, the balance of interim harms might have appeared quite different.

Accordingly, this Court should vacate the preliminary injunction.

F. This Court should vacate the preliminary injunction because it is overbroad and impermissibly vague, or alternatively, should modify it to cure the overbreadth and vagueness.

Even assuming that some injunction was warranted here, this particular injunction was overbroad—as this Court recognized when it entered a partial stay of the overbroad portions.[155]

District courts must narrowly tailor injunctions to prevent the claimed irreparable harm and "should not impose unnecessary burdens on lawful activity." *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994); *see also Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 220 (2d Cir. 2003).[156] The

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[155] Judge Kaplan's conclusion that appellants "waived" any objection to the injunction's scope is incorrect. *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 WL 1560926 (S.D.N.Y. Apr. 18, 2011). In the first place, that finding rests on his improper refusal to consider Donziger's opposition brief, which challenged the overbreadth of the proposed injunction. A 7573-7574. Moreover, the cases that the court cited do ***not*** require appellants to have specifically challenged the proposed wording of the injunction when initially opposing that injunction. Nor could the appellants have done that. Appellants objected to the entry of any injunction in part because Chevron would not suffer any irreparable harm. Only after the court erroneously found that Chevron would suffer irreparable harm could appellants timely object to the injunction on the ground that it was not tailored to the purported harm. In any event, "a court has an independent duty . . . to assure that the injunctions it issues comply with the directive of Fed. R. Civ. P. 65(d) . . . ." *See Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631-32 (7th Cir. 2003).

[156] *See also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983); *Transamerica Rental Fin. Corp. v. The Rental Experts*, 790 F. Supp. 378, 382 (D. Conn. 1992).

restraints imposed must be proportional to "the irreparable harm alleged by the plaintiffs." *Constitution State Challenge, Inc. v. Nyemchek*, No. 300-cv-650, 2001 WL 640417, *7 (D. Conn. June 1, 2001).

The district court claimed to be concerned about the coercive effect of multiple enforcement proceedings and the seizure or attachment of assets. But Chevron submitted no evidence that it would suffer any "coercive effect" or damage to its goodwill or reputation if compelled to litigate one or two enforcement actions that do not require asset seizures. The sole "evidence" of harm submitted by Chevron, the Mitchell declaration, does not support the broad proscription of ***all*** enforcement efforts. Therefore, the district court only needed to enjoin the Ecuadorian plaintiffs from initiating and prosecuting multiple proceedings and seizing or attaching assets.

Instead, the district court summarily enjoined Donziger and the Ecuadorian plaintiffs from "directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from ***any*** action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment."[157] The district court's outright ban on any and all enforcement proceedings is neither narrowly tailored nor in proportion to the purported irreparable harm, and therefore is overbroad.

[157] SpA 129.

The injunction also is overbroad because it prohibits the Ecuadorian plaintiffs and their counsel from engaging in any activities to even *prepare* for enforcement proceedings that may occur if the injunction is lifted. Counsel are not permitted to advise the Ecuadorian plaintiffs on enforcement issues, conduct legal research for enforcement, or develop work product on enforcement strategy. Nor can the Ecuadorian plaintiffs or their counsel raise the funds necessary to fund these activities. If counsel cannot provide advice or work product, or be paid, the appellants are stripped of their right to counsel.

This Court acknowledged the injunction's overbreadth when it granted the Ecuadorian plaintiffs' application for a partial stay of the injunction pending appeal. There is no evidence that that ruling has caused Chevron to suffer any harm, let alone irreparable harm. Accordingly, even if this Court does not vacate the injunction entirely, it should modify it to ensure that it is narrowly tailored to protect against the purported harm.

Overbreadth aside, the injunction also is impermissibly vague. Rule 65(d) "is satisfied only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden." *Petrello v. White*, 533 F.3d 110, 114 (2d Cir. 2008) (internal quotation marks omitted). The Rule "reflects Congress' concern with the dangers inherent in the threat of a contempt citation for violation of an order so vague that an enjoined party may unwittingly and unintentionally transcend its bounds." *Petrello*, 533 F.3d at 114; *see also Sterling Drug, Inc. v.*

Bayer AG, 14 F.3d 733, 748 (2d Cir. 1994). Here, the injunction's vague prohibition on "advancing in any way" or "benefitting from" the injunction makes it impossible for the appellants to discern what actions are prohibited and could subject them to punishment.

Accordingly, this Court either should vacate the injunction on overbreadth and vagueness grounds, or limit it so that it does not affect any preparations for enforcement short of actually filing an enforcement action.[158]

G. On remand, this case should be reassigned to a different district judge.

This Court has recognized that "'there may be unusual circumstances where both for the judge's sake and the appearance of justice,' an order of reassignment is appropriate" upon remand. *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136, 146-47 (2d Cir. 2000) (citation omitted). The principal factors to be weighed in deciding whether reassignment is appropriate are: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of

[158] *See Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996) (remanding injunction order to district court because its prohibition of enjoined party from engaging in "threats of spurious lawsuits" was too vague for enjoined party to abide by the court's order).

fairness." *Id*. at 147. Where this Court has found these factors to weigh in favor of reassignment, it often has stressed that its remand "'does not imply any personal criticism of the [district] judge.'" *Id*. (citation omitted).

The first and second factors weigh heavily in favor of reassignment. Judge Kaplan has presided not only over this action, but also over two related § 1782 proceedings during which he has built up a cumulative negative impression of the Lago Agrio plaintiffs, their counsel, and their claims. His preliminary-injunction decision reads like a Chevron brief—which is not surprising, since he granted no one time to prepare a compelling opposition. After reading Judge Kaplan's decision, no one can seriously doubt that the die is cast. Judge Kaplan is so committed to Chevron's view of things that he wrote an opinion savaging Donziger's conduct and reputation without allowing Donziger to be heard on the matter. He rushed to judgment despite the lack of any compelling exigency—indeed, he premised his truncated procedures on a thin showing of imminent and irreparable harm that he did not allow Donziger or the Ecuadorian plaintiffs to challenge. And he impugned the integrity and competence of the Ecuadorian court without conducting any substantial review of its lengthy and comprehensive judgment. Indeed, there is reason to doubt that Judge Kaplan even read the Ecuadorian judgment before concluding that it deserved no comity. Moreover, given all these facts, the appearance of justice mandates reassignment, even if one

assumes against all the evidence that Judge Kaplan retains an open mind about Donziger, the Ecuadorian plaintiffs, and the Lago Agrio litigation.

As to the third factor, for two reasons, reassignment will not result in disproportionate waste or duplication.

First, Judge Kaplan has no unique expertise in this matter. Courts across the nation have dealt with the litigation stemming from the *Aguinda* case—indeed, few litigations ever have generated such a profusion of published and unpublished judicial opinions. Those decisions will provide any newly assigned judge with a ready body of reliable information about the history of the case. In this district, moreover, Judge Rakoff and Judge Sand have significant prior involvement with the case.

Second, much of the work on Chevron's preliminary-injunction motion remains unfinished and therefore is in no danger of being wastefully duplicated. Donziger and the Ecuadorian plaintiffs never have had an opportunity to prepare a full opposition; nor has the district court invested any time in reviewing such an opposition.

Accordingly, upon remand, this case should be reassigned to another district judge.

VIII. CONCLUSION

For all the reasons stated above and in the Brief of the Ecuadorian Plaintiff-Appellants, the Court should vacate the preliminary injunction and order that this case be reassigned to a different judge on remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John W. Keker, attorney of record for the Defendant-Appellant, do hereby certify that the foregoing brief complies with the Court's May 12, 2011 order expediting this appeal and setting the maximum word limit on principal briefs at 21,000 words. The total number of words in the foregoing brief is 15,750.

/s/John W. Keker
JOHN W. KEKER