UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-1150 (L); 11-1294 (CON) Caption [use short title] Chevron v. Donziger, et al.

Motion for: Renewed motion for Stay of Proceedings Pending Appeal

Set forth below precise, complete statement of relief sought:

A stay of all proceedings in the lower court pending resolution of this appeal.

MOVING PARTY: Hugo Gerardo Camacho Naranjo & Javier Piaguaje Payaguaje
☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Chevron Corp.

MOVING ATTORNEY: James E. Tyrrell, Jr.; Julio C. Gomez

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Court-Judge/Agency appealed from: S.D.N.Y. - The Honorable Lewis A. Kaplan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this Court? ☑ Yes ☐ No

Requested return date and explanation of emergency: Appellants will be irreparably harmed absent a stay and respectfully request that the merits panel issue a stay of proceedings at the earliest practicable time.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: Week of September 12, 2011

Signature of Moving Attorney:
s/ James E. Tyrrell, Jr. **Date:** 06/21/2011

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

Form T-1080

11-1150-cv (L)

11-1264 (CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEVRON CORPORATION,

Plaintiff-Appellee,

—against—

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

Defendants-Appellants.

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

BRIEF OF APPELLANTS HUGO GERARDO CAMACHO NARANJO AND JAVIER PIAGUAJE PAYAGUAJE IN SUPPORT OF RENEWED MOTION FOR A STAY OF PROCEEDINGS PENDING APPEAL

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Lawrence Hurley, *Ecuador's U.S. Ambassador Speaks Out on Chevron Case*, New York Times (Mar. 10, 2011) 19

Pursuant to this Court's May 12, 2011 Order, Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (collectively, the "Ecuadorian Plaintiffs") hereby renew their motion for a stay of proceedings pending appeal.[1] (*See* Ex. 1.)[2] They respectfully request that the merits panel consider this motion on an emergency basis and issue a stay of proceedings at the earliest practicable time.

INTRODUCTION

This appeal arises from the extraordinary and unprecedented preliminary injunction entered by the district court on March 7, 2011 (the "Injunction").[3] By exercising exclusive worldwide jurisdiction over this case and entering the Injunction, the lower court needlessly thrust the United States into the center of a dispute that is still pending in Ecuador—a dispute that this Court has previously found has "everything to do with Ecuador and nothing to do with the United

[1] On June 13, 2011, this Court issued a notice advising the parties that the case had tentatively been calendared for the week of September 12, 2011, suggesting that the merits panel has been empaneled. The Ecuadorian Plaintiffs request that this motion be directed to that panel.

[2] All exhibits referenced herein are to the Declaration of James E. Tyrrell, Jr. filed herewith.

[3] The district court entered a global anti-foreign-suit injunction that enjoins *Ecuadorian* citizens from taking any steps toward enforcing a Judgment entered by an *Ecuadorian* court under *Ecuadorian* law for environmental destruction in *Ecuador*. This Court has already partially stayed the Injunction pending appeal. (Ex. 1.) The Ecuadorian Plaintiffs do *not* seek a stay of any other parts of the Injunction and seek *only* a stay of proceedings pending appeal.

States."[4] All of this has been done in the name of protecting Appellee Chevron Corporation ("Chevron")[5] from the purported harm of *potentially* being required to defend against still non-existent enforcement proceedings relating to a judgment rendered by an Ecuadorian trial court in February 2011 (the "Judgment"). The Judgment is currently unenforceable and may never be enforceable because *both* parties' *de novo* appeals (in which the parties may even submit new evidence) are still pending before a three-judge panel in Ecuador.[6]

Just prior to the entry of the Judgment, Chevron brought suit in the Southern District of New York ("S.D.N.Y.") against more than fifty defendants, including the Ecuadorian Plaintiffs and certain of their counsel alleging fraud in the Ecuadorian litigation[7] and claiming, among other things, that the entire Ecuadorian

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[4] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

[5] Chevron merged with Texaco, Inc. in 2001, changed its name to "ChevronTexaco" and, in 2005, changed its name back to "Chevron Corporation." For ease of reference, the various iterations of the company will be referred to as "Chevron." *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 390 n.3 (2d Cir. 2011).

[6] Chevron has submitted extensive briefing to the Ecuadorian appellate court along with thousands of pages of exhibits, including evidence not submitted to the trial court. And it did so despite representing to the district court that the company could not submit new evidence to the appellate panel in Ecuador. (A6170-A6171.)

[7] Chevron has made each of its various allegations of fraud to either the trial court or the appellate court (or both) in Ecuador. If these claims fail in Ecuador, Chevron should not be entitled to employ U.S. courts for a second bite at the apple. (*See* Brief for Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguuaje Payaguaje dated June 2, 2011 (Dkts. 163/213) ("Merits Br.") at 76-79.)

judiciary is incapable of providing impartial tribunals and due process. Chevron seeks a declaration that the Judgment is unenforceable under New York law and a permanent worldwide anti-foreign-suit injunction enjoining the Ecuadorian Plaintiffs and others from taking any steps to enforce the Judgment anywhere in the world (except Ecuador). Rather than wait to see if the Judgment will be affirmed, modified, or vacated by the Ecuadorian appellate court and without any evidence that enforcement of the Judgment may *ever* be sought (or even threatened) in New York or anywhere else in the United States, the district court acceded to Chevron's demands that the parties rush forward on Chevron's now-severed claim for declaratory and injunctive relief. The clear absence of an actual case or controversy should have caused the district court to decline to even entertain Chevron's extraordinary requests for relief. Instead, the district court fast-tracked those claims—forcing two Ecuadorian nationals to litigate the enforceability of an as yet unenforceable judgment in a jurisdiction they did not choose.

Apparently believing that the Ecuadorian litigation is nothing more than a "game" sprung from the "imagination of American lawyers," the lower court has facilitated Chevron's wasteful war of attrition. (*See* Ex. 2 at 9-13.) Throughout the proceedings before it (including two of Chevron's many 28 U.S.C. § 1782 discovery actions), the district judge has made no secret of its disdain for the

Ecuadorian Plaintiffs and their counsel, the merits of their claims in the Ecuadorian courts, the government of Ecuador, the Ecuadorian trial court, and the entire Ecuadorian judicial system—even where the claims before it did not invite consideration of such matters, and absent a hearing or mutual discovery. (*See* Ex. 2.) The district court has tried to stifle any meaningful opposition to Chevron's extraordinary machinations by finding repeatedly that the Ecuadorian Plaintiffs and their co-defendants have committed some procedural waiver that precludes consideration of their arguments, and by openly and actively frustrating their appellate rights. (*See* Ex. 2 at 26-35.) The district court's hasty conclusion that the entire litigation is nothing more than an elaborate fraud concocted by American plaintiffs' lawyers has infected every stage of Chevron's "non-enforcement" action, beginning with the district court's Injunction and continuing in every decision to this day. Compelled by the district judge's appearance of partiality, apparent deep-seated antagonism, and pre-judgment of the merits of this action, the Ecuadorian Plaintiffs have requested that this Court reassign this case to a new district judge upon remand (Merits Br. at 6) and also filed a Petition for a Writ of Mandamus (No. 11-2259) seeking an order directing the district judge to recuse himself. (Ex. 2.)

Speculating there may be dozens of foreign defendants eagerly planning to defy its Injunction prohibiting enforcement of the Judgment and also desiring to

rule upon the enforceability of the Judgment before this Court has the opportunity to reverse the Injunction, the district court first bifurcated, then—on May 31, 2011—severed and expedited Chevron's claim for a declaration of "non-enforceability," staying proceedings related to all of the other counts. (*See* A8922; Ex. 3.) The district court's ambitious schedule contemplates discovery ending on September 15, 2011, and commencing trial on Ecuador's judicial system on November 14, 2011—all while the Ecuadorian appeal and this appeal remain pending.

As the Ecuadorian Plaintiffs predicted when they first moved for a stay of proceedings in April, Chevron is attempting to steamroll its way to victory—both here and in the lower court—by engaging in unreasonably burdensome and vexatious pretrial discovery and motion practice designed to stretch the Ecuadorian Plaintiffs' modest resources past the breaking point. (*See, e.g.*, Ex. 4 at 4, 17-18; Ex. 5 at 1-2.) And while Chevron will undoubtedly claim once again that it must be allowed to barrel toward trial on an expedited basis because "it faces the imminent prospect of asset seizures, multi-billion-dollar enforcement proceedings, and disruptions in its worldwide operations" (Ex. 6 at 6), time and experience have proven that this Court should view Chevron's tired refrain that the sky is falling with a jaundiced eye. More than four months have passed since the Judgment was entered and none of Chevron's doomsday scenarios have come to pass: no

enforcement proceedings have been initiated and none of Chevron's assets have been seized. Chevron is already armed with an unprecedented worldwide Injunction; there is no need to allow the company to suck the Ecuadorian Plaintiffs' resources dy just to obtain what all know will be nothing more than an advisory opinion.

The demands placed on the Ecuadorian Plaintiffs by Chevron's vexatious discovery practices are far from those typically imposed on defendants in civil litigation. Chevron is leveraging its near limitless resources, its purported "urgent need" for discovery, and an obviously sympathetic district court to bludgeon its way to nearly eighteen years-worth of privileged documents in the possession of the Ecuadorian Plaintiffs' current and former attorneys, consultants, and experts. Chevron and the district court are forcing the Ecuadorian Plaintiffs to brief the numerous and complex legal issues implicated by Chevron's demands in impossibly short timeframes. And the district court's prior decisions and comments leave little doubt that, without a stay, Chevron will prevail in eviscerating the Ecuadorian Plaintiffs' privilege, even though other federal courts, including the Third Circuit, have rejected Chevron's attempts to obtain *identical* privileged documents under *identical* legal theories. Indeed, the proceedings below are not only causing a strain on U.S. international relations, but also on relations between sister federal courts who have devoted substantial resources to

resolving the parties' § 1782 discovery disputes, only to have Chevron use the district court to end-run the decisions it disagrees with.

Chevron fought for nine years to wrest jurisdiction from the American courts in favor of litigating in Ecuador, only to come running back to the United States for a home-cooked bailout when things did not go as planned in Ecuador. The district court's unabashed eagerness to deliver Chevron that bailout as quickly as possible and with minimal resistance is a particularly sad irony in a case where that court has been asked to condemn the bona fides of a foreign judicial system. This litigation needlessly threatens the credibility of the United States judicial system both at home and abroad. The Ecuadorian Plaintiffs were forced to wait eighteen years before they finally secured the Judgment against Chevron. Surely Chevron can wait a few months while this appeal and the appeal in Ecuador are resolved.

REASONS FOR GRANTING A STAY OF PROCEEDINGS[8]

I. THE ECUADORIAN PLAINTIFFS WILL BE IRREPARABLY HARMED ABSENT A STAY

The Ecuadorian Plaintiffs come before this Court desperate for relief. In the weeks that have elapsed since this Court declined to stay the proceedings below without prejudice, Chevron's effort to drown the Ecuadorian Plaintiffs with discovery and motion practice (all while the underlying action remains pending in

[8] A detailed summary of the facts and history of this long-running litigation is included within the Appellants' principal merits briefs (Dkts. 159 and 163(redacted)/213 (sealed)) filed with this Court on June 2, 2011.

Chevron's chosen forum of Ecuador) is now reaching its crescendo, and the district court is all too content to let the Ecuadorian Plaintiffs drown.

To allow the district court to justify fast-tracking Chevron's request for an advisory opinion and a permanent worldwide injunction, Chevron represented repeatedly that it would need little or possibly even *no* discovery on its claim for declaratory relief.[9] But soon after receiving its requested bifurcation, Chevron issued a rapid succession of troubling discovery demands and non-party subpoenas in no fewer than six federal district courts around the country—almost all of which target the Ecuadorian Plaintiffs' current or former counsel and consultants and demand their entire litigation files—including privileged and confidential communications and attorney work product.[10] Some of these subpoenas even demand discovery already *denied* by or pending in other courts considering Chevron's many § 1782 applications.[11] (*See infra* pp. 11-13.)

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[9] *See, e.g.*, Ex. 7 at 6 ("This much is clear: Chevron's declaratory judgment claim requires little or no discovery to resolve, as is typically the case in declaratory relief actions.").

[10] The district court shrugged off Chevron's about-face and accused the Ecuadorian Plaintiffs of "manufactur[ing] a 'crisis.'" (Ex. 8 at 3-5.) However, the district court expressed no such skepticism when Chevron's counsel repeatedly declared that the "Sword of Damocles" is "touching [Chevron's] forehead." (*See, e.g.*, A6107.) And the district court itself "manufactured a crisis" when, with no evidentiary support, it opined that enforcement proceedings could lead to a worldwide fuel shortage. (*See* A5230-A5231.)

[11] Chevron's counsel appears to be no stranger to abusive litigation, particularly abusive discovery tactics. *See, e.g.*, *Seltzer v. Morton*, 154 P.3d 561, 606-09

While the magnitude of Chevron's discovery demands is itself striking given Chevron's assurances, it is more the character and scope of these demands, as well as the expedited motion practice they have engendered, that threatens the Ecuadorian Plaintiffs with needless and irreparable harm.[12] Of the seventeen subpoenas and deposition notices propounded by Chevron to date, ten seek testimony and/or document production from certain of the Ecuadorian Plaintiffs' *current* and former American and Ecuadorian counsel (including legal interns) (*see, e.g.*, Exs. 9-11 and 13-15); and three seek testimony and/or document production from the Ecuadorian Plaintiffs' non-testifying, consultant experts (*see, e.g.*, Exs. 12 and 16). This is no "ordinary" discovery—the document demands propounded by Chevron seek predominantly privileged material and core attorney

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(Mont. 2007); *E & J Gallo Winery v. Encana Energy Services, Inc.*, No. CV-F-03-5412, 2005 WL 6408198, at *42-43 (E.D. Cal. July 5, 2005); *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 589 F. Supp. 2d 331, 341-46 (S.D.N.Y. 2008).

[12] Chevron set the return date for its hundreds of document requests, as well as the first of Chevron's noticed depositions, for June 3, 2011—one day after the deadline for Appellants' principal brief in this appeal. (*See, e.g.*, Exs. 9-16.) Chevron also attempted to "revive" dormant § 1782 discovery proceedings in recent weeks and time them so as to interfere with the Ecuadorian Plaintiffs' briefing deadline. For example, Chevron applied on May 17, 2011 for an Order to Show Cause in a § 1782 action pending in the District of New Jersey seeking documents Chevron learned about *almost a full month earlier* and requested that the court grant the Ecuadorian Plaintiffs only four days to oppose and schedule a "hearing date of June *1, 2, or 3*, 2011." (Ex. 18.) The district court ruled that Chevron "fail[ed] to show that emergency relief is warranted" and also failed to confer in good faith prior to making the application. (Ex. 19 at 2.) Undeterred, Chevron demanded a supplemental production by, naturally, June 2. (Ex. 20.)

work product. And not just a handful of documents—for example, Chevron's demands require counsel to produce every document they possess in any way relating to their role as advisor to the Ecuadorian Plaintiffs without regard to subject matter or time.[13] Chevron has put the Ecuadorian Plaintiffs in a position where they must fight on multiple fronts to protect the privilege.

Much of the privileged material Chevron demands bears no relationship to the limited grounds for judgment "non-recognition" that it asserts as part of its claim for declaratory and injunctive relief. Apparently not satisfied with the eighteen-year windfall of privileged materials it has already received from the district court in its still pending § 1782 application targeting the Ecuadorian Plaintiffs' longtime lead counsel, Steven Donziger (*see infra* pp. 14-15), Chevron now demands that certain of the Ecuadorian Plaintiffs' counsel produce documents divulging their strategy for ultimately enforcing the Judgment.[14] Chevron also apparently intends to relitigate the merits of the underlying environmental claims

[13] *See, e.g.*, Ex. 15 at Req. 26 (demanding from counsel "All DOCUMENTS RELATED TO YOUR representation of yourself as, or any WORK undertaken by YOU in YOUR capacity as, an advisor to the Amazonian communities or the LAGO AGRIO PLAINTIFFS"); *see also* Ex. 10 at Req. 25.

[14] *See, e.g.*, Ex. 10 at Req. 33 (demanding from counsel "All DOCUMENTS RELATED TO the enforcement of the LAGO AGRIO JUDGMENT"); *see also* Ex. 15 at Req. 35; Ex. 11 at Req. 31.

pending against it in Ecuador[15]—a notion antithetical to the Uniform Foreign Money-Judgments Recognition Act.[16] Chevron also demands all documents related to the Ecuadorian Plaintiffs' ongoing efforts to finance their case.[17] Such demands serve no purpose other than to harass and, more importantly, to assure that, no matter the outcome of the pending appeal, the Ecuadorian Plaintiffs will be forever burdened by Chevron having been made privy to *every* nuance of their legal strategy and funding efforts.

Chevron's duplicative and abusive discovery practices are also pitting sister federal district and circuit courts against each other by exploiting the district court's apparent bias to circumvent the jurisdiction of other courts that have already rejected Chevron's arguments outright or that have failed to give in to Chevron's demands for hasty relief at the expense of sound legal analysis. Less than a month ago, the Third Circuit reversed a Pennsylvania district court's holding that the Ecuadorian Plaintiffs' former attorney Joseph Kohn's appearance in a 2009 documentary film constituted a wholesale waiver of the Ecuadorian Plaintiffs'

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[15] *See, e.g.*, Ex. 12 at Req. 20 (seeking, *inter alia*, "[a]ll DOCUMENTS RELATING TO any damage or harm purportedly caused by . . . oil exploration and production activities in the FORMER CONCESSION AREA").

[16] *See* Merits Br. at 76-79.

[17] *See, e.g.*, Ex. 11 at Req. 2 (demanding from counsel "All DOCUMENTS RELATED TO COMMUNICIATIONS . . . with . . . any PERSON . . . asked to finance . . . the LAGO AGRIO LITIGATION"; *see also* Ex. 15 at Req. 2; Ex. 10 at Req. 2; and Ex. 17 at Rog. 3.

privilege. The Third Circuit also cautioned that there appeared to be an inadequate basis in the record upon which to apply the crime-fraud exception to effect a waiver of privilege.[18] Apparently dissatisfied with the Third Circuit's careful and considered analysis, as well as that court's unwillingness to bend to Chevron's repeated cries of urgency—Chevron chose to end-run that decision entirely by issuing new subpoenas through its favorite forum, the S.D.N.Y. (*See* Ex. 24; Ex. 13.) Chevron now requests that the S.D.N.Y. compel production of the very same privileged documents denied to it by the Third Circuit on the very same theories rejected by the Third Circuit.[19] In so doing, Chevron bluntly asked the S.D.N.Y. to disregard the Third Circuit's ruling. (*See* Ex. 24; Ex. 21 at 25.) And in a separate expedited motion to compel production of privileged materials, Chevron has advanced the same waiver arguments rejected by the Third Circuit without even

[18] *See In re Application of Chevron Corp.*, __ F.3d __, 2011 WL 2023257 (3d Cir. May 25, 2011). Perhaps troubled by the potential international consequences of what is transpiring in the S.D.N.Y., the Third Circuit also added: "Though it is obvious that the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system. American courts, though justifiably proud of our system, should understand that other countries may organize their judicial systems as they see fit." *Id*. at *14.

[19] *Compare* Ex. 22 at Reqs. 55 and 73, *with* Ex. 13 at Document Reqs. 26 and 32; *see also* Ex. 21 at 20-21, 25; Ex. 24.

mentioning that court's likely binding decision.[20] (*See, e.g.*, Ex. 23 at 7-10; Ex. 24.)

Not surprisingly, any resistance to Chevron's demands has been met with Chevron's typical effort to steamroll its way to victory—blunderbuss motions to compel have begun raining down in "shock and awe" style. For example, Chevron's attempt to end-run the Third Circuit and obtain privileged materials from Kohn via motion to compel is more than 3,000 pages long and includes more than *200 exhibits*. True to form, Chevron has requested that these motions be handled on expedited schedules. And the district court has not offered relief from this onslaught—instead blithely characterizing the Ecuadorian Plaintiffs' concerns as "grossly exaggerated."[21]

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[20] Chevron's blatant forum shopping is presently under consideration by the Third Circuit. (Ex. 24.) Chevron is also seeking a second bite at the apple by arguing to the S.D.N.Y. that the crime-fraud exception should be applied to the Ecuadorian Plaintiffs' consulting experts, the Weinberg Group, as well as its testifying expert, Douglas Allen. (*See* Exs. 12 and 16.) In the District of Columbia, Chevron's § 1782 action filed against the Weinberg Group (which was fully briefed as of February 23, 2011) is pending. In that action, Judge Colleen Kollar-Kotelly expressly refused to rule on the application of the crime-fraud exception, citing authority which held that the question of whether anything that occurred in Ecuador was "fraudulent" is properly committed to the jurisdiction of the Ecuadorian Court. (Ex. 25 at 30.) And in a § 1782 action filed last year against Mr. Allen, Judge William Sessions of the District of Vermont found the crime-fraud exception inapplicable after an in camera review of documents. (A9536-A9537.)

[21] *See, e.g.*, Ex. 26. In one instance, the Ecuadorian Plaintiffs and Chevron reached an agreement that would have afforded the Ecuadorian Plaintiffs two additional

The writing is on the wall; the prior actions of the district court in connection with § 1782 discovery leave little doubt that, absent relief from this Court, the Ecuadorian Plaintiffs will be stripped of their privileges. (*See* Ex. 2.) In October 2010, the district court held that the Ecuadorian Plaintiffs' lead counsel for eighteen years waived any and all privileges adhering to his litigation file because he did not produce a privilege log contemporaneously with his motion to quash the § 1782 subpoena served on him (when arguing that preparing a log of eighteen years of litigation would itself be unduly burdensome). (*See* A8590-A8591.) On appeal, this Court opined that "the severity of the consequences imposed by the District Court in this case are justified almost entirely by the urgency of petitioners' need for the discovery in light of impending criminal proceedings in Ecuador."[22] Thus, this Court stated that, if the urgency related to the criminal proceedings were to dissipate, it should "stay the enforcement of the subpoenas *sua sponte* to permit a more probing (and time-consuming) review of the parties' various arguments with respect to privilege and relevance."[23] In fact, the purported imminence of the criminal proceeding was greatly overstated: the proceedings

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days to respond to one of Chevron's motions to compel and Chevron two additional days to submit a reply brief. However, the district court inexplicably gave the Ecuadorian Plaintiffs only *one* additional day to respond—while giving Chevron *three* additional days. (Ex. 26.)

[22] *Lago Agrio Plaintiffs v. Chevron Corp.*, Nos. 10-4341-cv, 10-4405-cv(CON), 2010 WL 5151325, at *2 (2d Cir. Dec. 15, 2010).

[23] *Id.*

were adjourned until *May 2011*, and the charges have since been dismissed. (Ex. 27.) But the district court never conducted the more searching analysis of the Ecuadorian Plaintiffs' privilege claims contemplated by this Court. They have no reason to believe it will do so now.

II. THE RESOURCES BEING EXPENDED BY THE PARTIES BELOW WILL LIKELY ALL BE FOR NAUGHT

The parties and the lower court are expending substantial time, effort, and resources preparing for the severed trial on Chevron's declaratory "non-enforcement" claim that is scheduled to commence on November 14, 2011, while the Ecuadorian appellate court and this Court consider issues that will likely render the proceedings moot or substantially alter how they proceed.[24] Chevron should not be permitted to continue waging its war of attrition against the Ecuadorian Plaintiffs while these important threshold issues are being resolved by this Court.

There Is No Actual Controversy. Because any possible controversy regarding the enforceability of the Judgment in New York is "purely hypothetical,"[25] there is no jurisdiction under the Declaratory Judgment Act. (*See*

[24] Space limitations do not permit the Ecuadorian Plaintiffs to fully explain herein why they are likely to succeed on the merits of this appeal. The Court is respectfully referred to Appellants' principal merits briefs (Dkts. 159 and 163(redacted)/213 (sealed)) filed with this Court on June 2, 2011 and the numerous briefs of *amici curiae* filed in support of Appellants on June 9, 2011 (Dkts. 225, 228, 231, 249, and 286) for a detailed explanation of why the district court's unprecedented decision is likely to be reversed.

[25] *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 399 (2d Cir. 2011).

Merits Br. at 53-60.) New York's Foreign Country Money-Judgments Recognition Act ("Recognition Act") only applies where a foreign judgment is "final, conclusive and enforceable where rendered." N.Y. C.P.L.R. § 5302. Chevron concedes that the Judgment will only become final and enforceable in Ecuador if the three-judge appellate panel upholds the Judgment.[26] (A6157.) And even if that happens, there will still be no actual case or controversy involving New York's Recognition Act because there is no evidence that enforcement of the Judgment will ever be sought in New York or anywhere else in the U.S.[27] Nothing in the Recognition Act permits recognition (or non-enforcement) of a judgment beyond the territorial boundaries of New York. Thus, there cannot possibly be a case or controversy requiring a declaration under New York law.[28] But even if there is an

[26] *See, e.g., Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 408 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2002) (holding that "the mere prospect" that a final and enforceable judgment "may be rendered at some indefinite point in the future" does not create an actual controversy").

[27] The sole "evidence" relied upon by the district court for its conclusion that there is an actual controversy in New York is the so-called *Invictus* memorandum—a privileged and preliminary memorandum prepared by counsel over a year ago. (A3714.) The *Invictus* memorandum provides a broad and preliminary overview of lawful enforcement options if an enforceable judgment were issued. (A3733–A3736.) It reaches no final conclusions on the strategy for or location of enforcement proceedings, but suggested that enforcement in the U.S. was unlikely. (A3733.) Thus, the *Invictus* memorandum can hardly be viewed as a threat of litigation in New York or anywhere else in the U.S.

[28] Nothing in Chevron's unilateral reservation to challenge the Judgment under N.Y. C.P.L.R. § 5304 requires that those defenses be raised in the S.D.N.Y. or any other New York court. *Republic of Ecuador*, 638 F.3d at 397.

actual controversy—and there is not—the district court erred by needlessly placing the judicial system of a fellow democracy and trading partner on trial. (*See* Merits Br. at 56-60.)

Comity. The district court incorrectly held that a single U.S. district judge may issue a preemptive anti-foreign-suit injunction claiming for itself the authority to determine the validity and enforceability of a still non-final foreign judgment for every tribunal the world over. The unprecedented Injunction offends principles of international comity because it assumes that no other court can fairly adjudicate the claimed rights of judgment debtors such as Chevron and purports to deny foreign courts the opportunity to decide if the Judgment is enforceable under their laws. (*See* Merits Br. at 39-53.)

Estoppel. For nine years, Chevron fought relentlessly for dismissal from the S.D.N.Y. on *forum non conveniens* grounds, arguing that Ecuador's courts would provide a fair and impartial forum to adjudicate the claims. Having successfully obtained that dismissal by extolling the fairness and impartiality of Ecuador's judicial system, Chevron is estopped from now claiming that the Judgment is unenforceable because that same system supposedly does not provide impartial tribunals or procedures compatible with the requirements of due process of law. (*See* Merits Br. at 61-76.) The lower court's primary basis for denying the estoppel defense—that the statements relied upon by the Ecuadorian Plaintiffs

were "made by Texaco, not Chevron"—was recently rejected by this Court in a related appeal.[29] Moreover, Ecuador's judicial system is as fair now as when Chevron lauded its fairness to secure a dismissal from the S.D.N.Y.[30]

III. A STAY WILL NOT HARM CHEVRON

Chevron is not harmed by a stay of proceedings because Appellants are not seeking to stay the Injunction's prohibition against initiating enforcement proceedings anywhere in the world (except Ecuador). The notion that Chevron would be harmed by a stay of proceedings is even more far-fetched now because this Court has placed this appeal on an expedited schedule and appears ready to consider the merits as soon as September 12, 2011. Chevron's contention that it must be allowed to plow forward because the Ecuadorian Plaintiffs and others are poised to initiate enforcement and attachment proceedings around the world in violation of the Injunction is simply not credible. Chevron has been making this claim since before the Ecuadorian court entered the Judgment, but even now—four months after the Judgment was issued—no enforcement proceedings have been initiated and none of Chevron's assets have been attached. And, of course, if a stay is entered, Chevron is free to seek appropriate relief from the Court should circumstances change to warrant lifting the stay.

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[29] *Republic of Ecuador*, 638 F.3d at 390 n.3.

[30] *See* Merits Br. at 68-76; *see also* Ex. 28 (amicus brief of the Republic of Ecuador dated June 9, 2011).

IV. A STAY WILL PROTECT IMPORTANT PUBLIC INTERESTS

A stay is in the public interest because U.S. international relations with Ecuador and other Latin American countries have been negatively impacted by this needless litigation and will continue to be strained as long as it is allowed to proceed.[31] Moreover, as set forth above, Chevron is abusing the discovery process before the district court, *inter alia*, by re-litigating before its favored judge the exact same discovery issues that it litigated and lost before other courts. More than just the parties' resources, the resources of other federal courts, including the Third Circuit, the Eastern District of Pennsylvania, the District of New Jersey, the District of Columbia, and the District of Vermont, will all be wasted if Chevron succeeds in this ploy. The taxpaying public has a keen interest in ensuring that civil litigants are not rewarded for employing these tactics.

[31] *See, e.g.*, Lawrence Hurley, *Ecuador's U.S. Ambassador Speaks Out on Chevron Case*, New York Times (Mar. 10, 2011), *available at* http://www.nytimes.com/gwire/2011/03/10/10greenwire-ecuadors-us-ambassador-speaks-out-on-chevron-c-86771.html. *See also* Ex. 28 at 1-2 (amicus brief of the Republic of Ecuador dated June 9, 2011 stating that the "undisguised castigation of, and lack of respect afforded, the Ecuadorian judicial system by the District Court runs counter . . . to long-established jurisprudential norms").

CONCLUSION

For Chevron, this case has always been a war of attrition. After eighteen years of abusing process first in New York and later in Ecuador,[32] that war of attrition has now reached a fever pitch under the stewardship of a district court that appears bent on allowing Chevron to deliver the knockout blow. But there is *no good reason* that Chevron's war of attrition should continue right now (1) where appeals are pending in Ecuador and before this Court that could render the proceedings in the district court moot, or at least, dramatically reshape them; (2) where there is a pending Petition for a Writ of Mandamus to recuse the district judge (as well as a request for reassignment) that raises serious questions of partiality in a case of far-reaching international consequence; and (3) where the harm to the Ecuadorian Plaintiffs becomes more obvious and acute by the day while, in contrast, the potential for injury to Chevron—protected from the supposed "Sword of Damocles" by an unprecedented Injunction and a continuing appeal in Ecuador that renders the Judgment non-final and, thus, non-enforceable *even in Ecuador*—looks fainter and more speculative each day. For the reasons stated herein, the Ecuadorian Plaintiffs request that this motion be granted in its entirety at the earliest practicable time.

[32] *See, e.g.*, A9600 (S.D.N.Y. noting in 1995 that Chevron "generate[d] vast amounts of filings . . . to further delay resolution of the pending motions to dismiss"); A7329 (Ecuadorian court noting in 2011 that Chevron attempted to "prevent the normal progress of the discovery process or prolong it indefinitely").

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