UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION,

Plaintiff,

v.

STEVEN DONZIGER, et al.,

Defendants,

CASE NO. 11-CV-691 (LAK)

DEFENDANTS STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, AND DONZIGER & ASSOCIATES, PLLC., JAVIER PIAGUAJE PAYAGUAJE, AND HUGO GERARDO CAMACHO NARANJO'S OPPOSITION TO CHEVRON CORPORATION'S MOTION FOR AN ORDER OF ATTACHMENT AND OTHER RELIEF

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Defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (collectively, the "Ecuadorian Plaintiffs") and Defendants Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC. (collectively, "Donziger") respectfully submit this Opposition to Plaintiff Chevron Corporation's ("Chevron") motion for an order of attachment and other relief.[1]

PRELIMINARY STATEMENT

For the past year, Chevron claimed that it faced the "imminent" harm of immediate enforcement of the Ecuadorian Judgment. First, this claim was used to justify an improper worldwide injunction, now vacated "in its entirety" by the Second Circuit. *See Chevron Corp. v. Naranjo*, Nos. 11-1150, 11-264, 11-2259, 2011 WL 4375022, at *1 (2d Cir. Sept. 19, 2011). Now Chevron uses the "imminent harm" claim to justify a novel attachment order that would function as a *de facto* worldwide injunction. The truth is that Chevron faces no risk of "imminent harm." There is still no final, enforceable judgment in Ecuador, the appellate court in Ecuador has not rendered a decision, and the Ecuadorian Plaintiffs continue to abide by their commitment to the Second Circuit that they will not commence enforcement proceedings until the court in Ecuador issues a decision. Nevertheless, Chevron tries to circumvent the Second Circuit's stay by asking the Court to take an action that would have the same practical effect as a worldwide injunction and that is just as offensive to the courts of foreign sovereigns and the principles of international comity. The Court should deny Chevron's unprecedented request to attach the proceeds from the judgment that Chevron itself may someday owe because Chevron

[1] By filing this opposition, the Ecuadorian Plaintiffs do not intend to waive any defenses they may have in connection with this proceeding or case No. 11-cv-3718-LAK, including but not limited to, a lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process. In fact, their appeal of this Court's earlier finding of jurisdiction to the United States Court of Appeals for the Second Circuit remains pending. *See* No. 11-1150 (2d Cir.).

has no valid causes of action and because it has suffered no harm. Chevron's apparent aim is not to prevent any injury to itself but rather to cut off the Ecuadorian Plaintiffs' ability to fund their defense in this case and in the multitude of other actions brought by Chevron. The request for attachment is Chevron's latest attempt to re-litigate the entire Ecuadorian litigation before the Ecuadorian appellate court issues a final judgment and should be rejected.

ARGUMENT

I. CHEVRON'S MOTION IS PREMATURE AND INTERFERES WITH PROCEEDINGS IN ECUADOR AND THE SECOND CIRCUIT

Chevron does not provide a credible explanation for why the Court must consider this motion now. None exists. Discovery as to Chevron's RICO and state law claims has been stayed since April 15, 2011. (Dkt. 279.) After the Second Circuit vacated the injunction and stayed proceedings as to Count 9, Chevron twice asked the Court to lift the stay. Exs. A (requesting that the Court "lift the stay"), and B (same). The Court declined, with good reason.[2]

A. There is no final judgment in Ecuador and no risk of enforcement of such a judgment.

To start, Chevron's motion is premature. The appellate court in Ecuador is still conducting its *de novo* review of both parties' appeals and has all of Chevron's allegations of fraud and wrongdoing before it. An Ecuadorian court is best situated to assess the conduct of the Ecuadorian Plaintiffs and their attorneys under Ecuador law and to determine whether Chevron is liable for the environmental devastation of the Ecuadorian Plaintiffs' communities. Until the appellate court in Ecuador rules, there is no enforceable judgment. Without an enforceable judgment, there is no enforcement, no harm to Chevron, and no damages to support a cause of action or an attachment order.

[2] Although attachment is improper for all of the reasons discussed herein, it would be procedurally improper to grant Chevron's motion when no discovery has been taken on Counts 1-8.

There is no threat that enforcement activities will commence before the appellate court in Ecuador completes its review and issues a decision. The Ecuadorian Plaintiffs have stipulated that they will not attempt to enforce the judgment or attach any of Chevron's assets until the court in Ecuador issues its decision. (*See* Dkt. 356.) The Ecuadorian Plaintiffs have also stipulated in this Court that they will never invoke the New York Recognition Act and would never seek to enforce any Ecuadorian Judgment against any assets in New York. (Dkt. 296.) The Ecuadorian Plaintiffs have not commenced any enforcement proceedings in New York or elsewhere, nor could they under Ecuador law. (Dkt. 181 at 70; Dkt. 278 at 5.) In short, Chevron has suffered no harm, and there is no threat of imminent harm.

B. Chevron's motion violates and is an attempt to circumvent the Second Circuit's stay.

Chevron's motion violates the Second Circuit's stay and its decision to vacate the preliminary injunction. Chevron seeks a TRO to restrain the Ecuadorian Plaintiffs from "seeking to convert [the Ecuador judgment] into proceeds." (Memo. at 34.) A creditor converts a judgment into proceeds by enforcing or executing on the judgment. (*See* Memo. at 35 ("Defendants should be temporarily restrained from seeking to convert their judgment interest into proceeds (***e.g.*, by attaching or seizing Chevron's assets**)." (emphasis added).) This end run around the Second Circuit's order is improper.

Chevron's motion is a request that the Court declare preemptively that any judgment that might issue from the court in Ecuador *and* any decision by another court elsewhere in the world to enforce that hypothetical judgment would be fraudulent and invalid. To order attachment of the judgment against Chevron, the Court must decide that no court anywhere in the world could recognize a judgment that issues from Ecuador in the underlying case. Such a decision implicates the same issues of international comity and international enforcement that are

currently before the Second Circuit, concerns that Chevron ignores. The Second Circuit vacated the worldwide injunction that Chevron sought—perhaps for reasons of international comity—and stayed Chevron's declaratory judgment action. (*See, e.g.*, Ex. C., Sept. 16, 2011 Oral Arg. Tr., at 52:20-53:3 (Wesley, J.: "Don't we have some sense of comity to the legitimacy of the process? Are we just to say to the people of Ecuador ['']you're all corrupt and your process doesn't matter to the United States or a United States federal judge is not going to hear anything about the legitimacy of your process, a process by the way, which [Chevron] invoked?['']").) Neither the parties nor this Court can predict what guidance the Second Circuit will offer, but the Second Circuit has promised that an opinion will issue. The prudent course is for the Court to wait for that guidance instead of granting Chevron's *de facto* worldwide injunction in the guise of an attachment that prohibits Chevron from satisfying any judgment that might issue from Ecuador—even within Ecuador[3]—or from complying with any order from a court outside Ecuador that decides to enforce the judgment. Were the Court to grant Chevron's motion, Chevron would claim that the attachment is a get-out-of-jail-free card that it can wave in front of any foreign court who later considers enforcement of a judgment from Ecuador.

Because Chevron's proposed order of attachment "effectively restricts the jurisdiction of the court of a foreign sovereign," the end result will be conflict between this Court and the foreign courts inherently disrespected by an attachment order. *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654-55 (2d Cir. 2004); *see also China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-36 (2d Cir. 1987) (reversing anti-foreign suit injunction entered by district court); *In re Vivendi Universal, S.A. Sec. Litig.*,

[3] Chevron's proposed order of attachment goes even further than the Preliminary Injunction entered by this Court, which did not restrict the ability of the Ecuadorian Plaintiffs to enforce and collect their judgment for assets located in Ecuador or otherwise available through that sovereign nation's court processes. (*See* Dkt. 181, at 125 (enjoining and restraining activities "outside the Republic of Ecuador").)

No. 02 CIV.5571 RJH HBP, 2009 WL 3859066, at *4 (S.D.N.Y. Nov. 19, 2009) (denying request for anti-foreign suit injunction). The effect of the proposed attachment order would be to prevent any foreign court from assessing the Ecuadorian judgment under its own laws. Just as principles of comity weigh heavily in the anti-suit injunction context, so too the Court must respect foreign fora when considering Chevron's unusual request to attach its own judgment debt based on allegations that the Ecuadorian judgment—the basis for the debt being attached—is a fraud. The Court would disrespect the courts of Ecuador were it to find that the Ecuadorian appellate court could not enter a judgment against Chevron after a *de novo* review of the entire record, including all of Chevron's allegations and purported evidence of wrongdoing. The Court would simultaneously insult every other foreign sovereign in which potential enforcement actions could be brought by entering an attachment order that effectively prohibits those sovereigns' courts from *considering* enforcement of a judgment from Ecuador pursuant to their own laws and procedures.

The Second Circuit is also considering whether there is any legal basis for Chevron's offensive attack here on enforcement of an Ecuadorian judgment in other countries. Chevron's RICO and state law claims pose this same issue. May Chevron—absent any threat of enforcement in New York—maintain an offensive action against the Ecuadorian judgment here? The Ecuadorian Plaintiffs have already disclaimed any future efforts to enforce a judgment in New York. Once again, the prudent course of action is to await the guidance of the Second Circuit on this issue rather than permit Chevron to continue with its improper indirect attack on the Ecuadorian judgment. Whether Chevron relies on New York's Recognition Act or state law prejudgment attachment procedures, there is no authority permitting an offensive attack against an Ecuadorian judgment in the absence of any enforcement efforts initiated by the Ecuadorian

Plaintiffs in New York or anywhere in the United States; there is a serious question as to whether subject matter jurisdiction now exists over this effort.

This Court has already recognized that Chevron's RICO and state law claims are heavily dependent on the resolution of the declaratory judgment claim under consideration by the Second Circuit. Count 9 is the core of Chevron's case, and once the Second Circuit issues its opinion, "it is likely that the rest of the case will vanish or at least pale in significance." (Dkt. 278 at 13.) In particular, the forthcoming opinion will likely be dispositive of the unjust enrichment claim, "dramatically narrow or eviscerate the RICO and fraud claims, and leave little incentive to pursue what remains." (*Id.*) Should the Second Circuit conclude that a plaintiff may not conduct an offensive attack upon a foreign judgment absent an attempt by the judgment creditor to invoke the New York Recognition Act to enforce the judgment, there will be nothing left for this Court to decide. If a claim seeking a declaratory judgment of unenforceability is impermissible, Chevron's attempt to re-litigate the entire Ecuadorian litigation in New York via RICO and state law claims is doubly so.

Finally, the Second Circuit is also considering whether this Court has personal jurisdiction over the Ecuadorian Plaintiffs. In the absence of personal jurisdiction, the Court could not consider any claims, mooting any motion for attachment. This issue, too, counsels in favor of waiting for the Second Circuit's opinion before proceeding.

C. Chevron's attempt to deprive the Ecuadorian Plaintiffs of funding has already been rejected by the Second Circuit.

Given that Chevron has not suffered any harm and is not faced with any imminent risk of harm, it is clear that Chevron seeks not prejudgment security but instead to deprive the Ecuadorian Plaintiffs of the funding necessary to mount a defense to Chevron's legal onslaught and to prosecute their own appeal in Ecuador. The Second Circuit rejected Chevron's first

attempt to deprive the Ecuadorian Plaintiffs of funding when it stayed the preliminary injunction's original restraint of activities other than commencement of enforcement or recognition of the Ecuadorian Judgment, including funding. (Dkt. 181 at 125; Dkt. 280 at 2 (concerning "activities to secure funding for the eventual enforcement of the Ecuadorian court's judgment"); Dkt. 314.) Chevron's present motion is a second attempt to deny the Ecuadorian Plaintiffs the funding. Chevron concedes that the Ecuadorian Plaintiffs have no assets of significance other than the non-final judgment against Chevron—indeed, this fact is a *basis* for their current motion for an order of attachment. (*See* Memo. at 10.) The attempt to restrain the Ecuadorian Plaintiffs from assigning interests in the Ecuadorian litigation is an effort to end the litigation via starvation. As the Court knows, it is a common and necessary practice for plaintiffs with limited resources to obtain litigation funding by assigning interests in their claims to lawyers and third parties. *See* Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 Vt. L. Rev. 615, 618 (2007) (discussing litigation loans "in exchange for an assigned share of the litigation proceeds"). In many cases—including this one—such assignments are the only means by which plaintiffs can pursue their claims because they lack the resources to go it alone, especially against Chevron who has committed to fighting until hell freezes over and beyond. *See* N.C. State Bar, 2000 Formal Ethics Op. 4, at 1, http://www.ncbar.gov/ethics/index.asp (Jan. 18, 2001) (an assignment of litigation proceeds "may be the only way for an indigent [plaintiff] to obtain the funds necessary for living expenses during the pendency of the…lawsuit"). The Court should reject Chevron's attempt to end the Ecuadorian litigation by depriving the Ecuadorian Plaintiffs of their rights to assign interests in any potential future proceeds.

Given the potentially case-dispositive issues pending before the Second Circuit and the international comity concerns presented by Chevron's continued attacks on the judicial systems of Ecuador and every other country in the world, the Court should deny Chevron's motion.

II. CHEVRON CANNOT SATISFY THE REQUIREMENTS FOR PREJUDGMENT ATTACHMENT UNDER NEW YORK LAW

Chevron can satisfy none of the requirements for prejudgment attachment under New York law, which requires Chevron to show "that there is a cause of action, that it is probable that [Chevron] will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to [Chevron]." N.Y. CPLR § 6212(a) (McKinney 2006); *Musket Corp. v. PDVSA Petroleo, S.A.*, 512 F. Supp. 2d 155, 160 (S.D.N.Y. 2007). Even if Chevron could do so, satisfaction of the statutory criteria does not guarantee that an attachment order will issue. Because of their "extraordinary" nature, "attachments sought under New York law must be strictly construed against the party seeking to utilize this particularly severe provisional remedy." *Correspondent Servs. Corp. v. J.V.W. Inv. Ltd.*, 524 F. Supp. 2d 412, 417-18 (S.D.N.Y. 2007); *see also Interpetrol Bermuda, Ltd. v. Trinidad & Tobago Oil Co.*, 513 N.Y.S.2d 598, 604 (N.Y. Sup. Ct. 1987) ("[A]ttachment is a 'harsh' and 'extraordinary' remedy which must be construed 'strictly in favor of those against whom it may be employed.'"). Under this exceedingly demanding standard, Chevron is not entitled to an attachment order.

A. Chevron has no valid cause of action and cannot show a likelihood of success on the merits.

Chevron has no valid cause of action against Donziger or the Ecuadorian Plaintiffs because Chevron's claims fail for the reasons stated in Donziger's Motion to Dismiss (Dkt.

243).[4] Even were there valid causes of action, Chevron would be required to show more than a *prima facie* case,[5] and must "demonstrate by affidavit that it is more likely than not that it will succeed on its claims." *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 319 (E.D.N.Y. 2009). Chevron cannot satisfy this standard, which requires "evidentiary detail stronger than the summary and conclusory allegations which suffice in a pleading." *Perrotta v. Giannoccaro*, 532 N.Y.S.2d 998, 1000 (N.Y. Sup. Ct. 1988) (denying attachment).

1. Chevron is not likely to succeed on its RICO claims.

Chevron's RICO claims for obstruction of justice or witness tampering under 18 U.S.C. §§ 1503 or 1512(b) fail because Chevron has not shown that Donziger[6] acted with any wrongful intent or improper purpose in any U.S. proceeding. *U.S. v. Bashaw*, 982 F.2d 168, 170 (6th Cir. 1992) (describing § 1503 *mens rea* requirement); *see also U.S. v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (interpreting the element "corruptly" in § 1503 to mean "motivated by an improper purpose"); *U.S. v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006) (requiring "knowingly corrupt" mental state for § 1512). For example, Chevron's allegations of obstruction concern discovery disputes, one of which includes an order from a magistrate judge stating that he had no

[4] Donziger and the Ecuadorian Plaintiffs adopt in full and incorporate by reference such briefing, which is not repeated here pursuant to the Court's November 29, 2011 order.

[5] Chevron's claim to the contrary, (Memo. at 19), is false. "[P]robability of success on the merits for purposes of an order of attachment requires that the moving party demonstrate that it is more likely than not that it will succeed on its claims and must show proof stronger than that required to make a *prima facie* case." *Musket Corp.*, 512 F. Supp. 2d at 160; *see also Perrotta*, 532 N.Y.S.2d at 1000; *Contemporary Commc'ns Corp. v. Scorpions GMBH*, 1991 WL 45044, at *2 (SDNY 1991) ("a *prima facie* showing is no longer the standard").

[6] As the Court has already recognized, the Ecuadorian Plaintiffs are not parties to Chevron's RICO claims. Dkt. 278, at 7. ("It is important to recognize that none of the LAPs, who as judgment creditors are the prime targets of Chevron's declaratory judgment claim, is a party to Counts 1 and 2."). As such, an order of attachment as against the Ecuadorian Plaintiffs cannot be based on Chevron's RICO claims.

complaints about *any* counsel.[7] Another allegation concerns the Ecuadorian Plaintiffs, (Memo. at 24-25), who are not parties to the RICO claim. Chevron cannot elevate discovery disputes to the level of racketeering.

2. Chevron cannot prevail on a fraud claim.

Chevron has not shown that it is likely to succeed on the merits of its common law fraud claim, which is an attempt to have a second bite at the apple. Chevron lost the decade-long trial in the Ecuadorian litigation and cannot re-litigate the merits of the case in New York using state law claims like fraud. *See Cattani v. Marfuggi*, 895 N.Y.S.2d 772, 775 (N.Y. Sup. Ct. 2009) (observing that New York does not permit a civil action for damages arising out of perjury in a prior civil proceeding). Chevron's remedy is the direct appeal in Ecuador; it is not "permitted to try the cause over again in another suit." *See id.* (finding that fraud claim was an attempt to re-litigate the claims in the underlying actions). Chevron's complaints about the Ecuadorian litigation—including the claims of fraud—are being addressed in the direct appeal Chevron took in Ecuador.[8] Chevron is not permitted to re-litigate the merits here.

In any event, Chevron's claims of third party reliance on alleged misrepresentations do not support a fraud claim. Chevron cannot accuse Ecuadorian judges of knowing complicity with a purported conspiracy while at the same time arguing that the Ecuadorian judges were

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[7] The magistrate judge pointedly declined to comment on any matters of intent and specifically noted that "all counsel in this action [(including counsel to the Ecuadorian Plaintiffs who appeared and litigated there)] have acted professionally and appropriately in my presence. I have nothing negative to say about any of them." (Chevron Ex. 1025 at 4.) This is no evidence of a consistent, intentional pattern to obstruct justice.

[8] Chevron's glib assertion "that there is no way an Ecuadorian appellate can 'cleanse' the judgment—try as it might" (Memo. at 29) is additional evidence that Chevron's suit is an affront to the principles of international comity and a brazen attempt to retry the merits of the Ecuadorian litigation, albeit only part of the merits—Chevron's defenses in avoidance—and not the merits of Chevron's culpability for the despoliation and contamination of the Oriente Region of the Amazon rainforest with devastating impacts on the more than 30,000 Afectados.

misled by alleged fraud. Chevron alleges that the judgment was "fraudulent," "fabricat[ed]," and "corrupt," (Memo. at 4), and that the purported "wrongdoing" was "abetted by Ecuadorian judges at the behest of and in collusion with other Ecuadorian officials" (Memo. at 29.) As alleged co-conspirators, the Ecuadorian judges and officials cannot be third-party victims of any alleged deception by the Ecuadorian Plaintiffs. Chevron cannot have it both ways.

Moreover, Chevron cannot show that any other third party relied on alleged misrepresentations to Chevron's detriment. Although Chevron complains about statements made in the U.S. to "various tribunals" and "several regulatory bodies," (Memo. at 28.), it does not show that any such entity detrimentally relied on any alleged misrepresentation.[9]

Finally, Chevron provides no evidence of a specific pecuniary loss caused by any alleged fraud. The Ecuadorian judgment caused Chevron no harm because it is not final and has not been enforced. Chevron's reliance on "litigation costs and fees" ignores the fact that the crux of this litigation is not an allegation of fraud but an allegation of overseas environmental contamination. Chevron incurred attorneys' fees and litigation expenses because of the litigation in Ecuador. The investigation and litigation of the Ecuadorian case has certainly resulted in substantial litigation costs and fees for all parties involved, but such costs are not fraud damages. Chevron also does not offer any evidence of concrete harms it suffered because of actions taken by then-Attorney General Cuomo, Congress, or any other unidentified regulatory bodies. Chevron's fraud claim cannot be grounds for attachment.

[9] When presented with "evidence" of a so-called "misrepresentation," the District of Colorado court—which Chevron claims was "deceived"—made no such finding. *See* Chevron Ex. 1025 at 4.

3. Chevron cannot show that it is likely to succeed on its claim for tortious interference with contract.

Chevron also fails to show that it is likely to succeed on a tortious interference with contract claim because the release on which it relies does not apply to or bar personal claims of Ecuadorian citizens. (*See* Ann. Am. Compl. Ex. 46.) The Ecuadorian Plaintiffs could not cause Ecuador to breach the terms of the Release by bringing personal claims to which the Release did not apply. Curiously, Chevron never explains how it has standing to complain about the breach of this Texaco/TexPet release after it repeatedly argued to this Court that Texaco and TexPet are separate and distinct from Chevron. Chevron has no right to assert tortious interference with contract unless it is a party to that contract, and Chevron repeatedly insists that it is not Texaco and that it is not bound by Texaco's promises. (Dkt. 235 at 3.) Chevron cannot claim rights under TexPet's contract while avoiding Texaco's promises to satisfy any judgment from Ecuador, promises that were also made by Chevron lawyers.

4. Chevron has not shown it is likely to prevail on its trespass to chattels claim, which does not apply to goodwill or reputation.

Chevron's trespass to chattels claim also cannot succeed. Chevron's claim is based on litigation expenses and alleged damage to its business, reputation, and goodwill, but there is no evidence that anyone interfered with Chevron's ability to fund litigation or deprived Chevron of the use of intangible assets. Nor has Chevron directed the Court to evidence of interference with "Chevron's use of its own resources." The claim that Chevron was forced to defend the Ecuadorian litigation (Am. Compl. ¶ 405) is—like Chevron's fraud claim—an improper attempt to re-litigate the Ecuador case here. Chevron chose to litigate the case in Ecuador and defend it on the merits. It may not use a trespass to chattels claim to recover attorneys' fees and litigation costs from that litigation.

5. Chevron has not shown it is likely to prevail on an unjust enrichment claim because it has produced no evidence to support the claim.

Chevron cannot prevail on its unjust enrichment claim because there is no evidence to support Chevron's claim that "Defendants have already been enriched in myriad ways." (Memo. at 30.) The judgment in Ecuador is not final, and there have been no enforcement proceedings from which Donziger or the Ecuadorian Plaintiffs have been enriched. The receipt of fees or publicity are not unjust, *see id.,* nor could they justify attachment of an inchoate chose that may (or may not) be worth billions of dollars at some point in the future. Additionally, Chevron does not claim that it would have received the fees or had some right to the publicity. As such, any "enrichment" that has actually happened to date has not occurred "at [Chevron's] expense." (Memo. at 30); *see also Labajo v. Best Buy Stores, L.P.*, 478 F. Supp. 2d 523, 531 (S.D.N.Y. 2007) (stating that unjust enrichment in New York requires enrichment at plaintiff's expense).

Chevron's allegations about "fees and publicity" are misdirection. The real focus is on the Ecuadorian judgment. Because there has been no enforcement, there can be no claim of unjust enrichment. The possibility that the Ecuadorian Plaintiffs might receive proceeds from an eventual collection on a hypothetical judgment from the Ecuadorian appellate court on some future date cannot support a claim for unjust enrichment. *See, e.g., Axel Johnson, Inc. v. Arthur Andersen & Co.*, 830 F. Supp. 204, 212 (S.D.N.Y. 1993) ("[N]o cause of action for unjust enrichment lies for hypothetical future liabilities. To be actionable, a claim for unjust enrichment requires that the defendant already has been enriched.").

6. Chevron has not shown that the Ecuadorian Plaintiffs were part of a civil conspiracy or took any overt acts in furtherance thereof.

Chevron's claim for civil conspiracy—an attempt to impose vicarious liability on the Ecuadorian Plaintiffs—also fails. Even if Chevron had a valid tort claim, it has not provided evidence to show it can satisfy the elements of a civil conspiracy as to the Ecuadorian Plaintiffs.

It provides no evidence that the Ecuadorian Plaintiffs entered any agreement to commit fraud, trespass to chattels, or tortious interference with contract. Nor has Chevron ever alleged a single act taken by the Ecuadorian Plaintiffs—much less provided any evidence of such an act—that could satisfy the "overt act" element. *Am. Bldg. Maint. Co. of N.Y. v. Acme Prop. Servs., Inc.*, 515 F. Supp. 2d 298, 318 (N.D.N.Y. 2007) (requiring overt act in furtherance of conspiracy). The Ecuadorian Plaintiffs retained attorneys to represent them in their suit to redress the environmental devastation of their homeland. Hiring attorneys to file a lawsuit under the laws of one's country does not satisfy the elements of a conspiracy.

Chevron has no valid cause of action and cannot satisfy the stringent burden to show, by "evidentiary detail," the likelihood of success on the merits that attachment requires.

B. Chevron has not established any ground for attachment under N.Y. CPLR § 6201.

Next, Chevron cannot satisfy the grounds for attachment on which it relies—N.Y. CPLR §§ 6201(1) and (3).

1. Chevron cannot demonstrate that attachment of Donziger's interest in the Judgment is proper under CPLR § 6201(3).

Chevron claims that there are "multiple grounds" under CPLR § 6201 to support its request for a prejudgment attachment, but the only ground that Chevron has identified with respect to Donziger is § 6201(3). In order for § 6201(3) to apply, Chevron must establish that (1) Donziger "has assigned, disposed of, encumbered or secreted property or removed it from the state"; *and* (2) Donziger undertook such action "with the intent to defraud [Chevron] or to frustrate the enforcement of a judgment that" Chevron might obtain against him in this case. Chevron has not demonstrated—and cannot possibly demonstrate—either of these statutory prerequisites for several independent reasons.

Chevron claims that an attachment against Donziger under § 6201(3) is proper because he has attempted to render any proceeds from the Ecuadorian judgment "unreachable by a United States court through a series of fraudulent maneuvers." (Memo. at 15.) To support this speculative conclusion, Chevron offers two pieces of evidence: (1) that on January 5, 2011, Donziger and other counsel for the Ecuadorian plaintiffs entered into a funding agreement which provided that Donziger would receive 31.5% of the total contingency fee payment ultimately received by the Ecuadorian plaintiffs' attorneys, and (2) that, in another agreement, Donziger and various litigation funders agreed that proceeds from the judgment would be held in a trust "in Ecuador or elsewhere in the world where those proceeds are received." *Id.* Chevron argues that these two agreements demonstrate fraud because they show that Donziger has tried to keep his share of the judgment "outside of the United States," and away from Chevron' reach. *Id.*

The first flaw in Chevron's argument is that § 6201(3) is "designed to deal with the removal or attempted fraudulent removal of assets within the State of New York, and *the statute does not apply in a situation where the assets were never within the State of New York.*" *Brastex Corp. v. Allen Int'l, Inc.*, 702 F.2d 326, 331 (2d Cir. 1983) (emphasis added); *accord Sax Shoe Export, S.L. v. L.J. Simone Inc.*, No. 92 Civ. 1522 (PKL), 1992 WL 51553, at *4 (S.D.N.Y. Mar. 12, 1992) (quoting *Brastex* and holding that § 6201(3) does not apply "[i]n the absence of any evidence that the goods were ever in New York"). The funding agreements cited by Chevron do not purport to "remove" any assets from the State of New York. The Ecuadorian judgment that is the subject of the agreements, if affirmed on appeal, would not be a debt owed by Chevron to the Ecuadorian Plaintiffs *in New York.* The Ecuadorian Plaintiffs have stipulated that they will not seek to collect on that debt in New York, and Chevron itself has argued that the agreements are relevant because they are supposedly intended to "keep … money outside of the United

States." (Memo. at 15.) Because Chevron itself has conceded that the assets at issue—the ultimate proceeds of any Ecuadorian judgment—are not within New York, § 6201(3) is inapplicable.

Second, even if CPLR § 6201(3) applied to assets outside of New York, Chevron cannot show that Donziger has taken any action with the specific intent to "defraud" Chevron or to frustrate its enforcement of a potential judgment in this case. A party seeking a prejudgment attachment under § 6201(3) must establish the defendant's fraudulent intent. *Computer Strategies, Inc. v. Commodore Bus. Machs., Inc.*, 105 A.D.2d 167, 173 (N.Y. App. Div. 1984). Courts have further held that "fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth in the moving affidavits." *Abacus Fed. Sav. Bank v. Lim,* 8 A.D.3d 12, 13 (N.Y. App. Div. 2004); *Brastex*, 702 F.2d at 331 ("Fraud is not lightly inferred, and the moving papers must contain evidentiary facts—as opposed to conclusions—proving the fraud"). Thus, to obtain an attachment against Donziger under § 6201(3), Chevron must prove that Donziger had the specific intent to prevent Chevron from collecting on a potential judgment in this case.

The funding agreements Chevron relies upon do not even suggest—let alone prove—any fraudulent intent by Donziger to thwart Chevron's ability to collect on any judgment in its favor in this action. There is nothing fraudulent or unlawful about assigning portions of an interest in a potential judgment in order to raise needed funds for litigation. *See Litigation Funding*, 31 Vt. L. Rev. at 618; N.C. State Bar, 2000 Formal Ethics Op. 4, at 1. And it is well-established that the mere assignment or other disposition of property is insufficient to establish fraud for attachment purposes. *Abacus,* 8 A.D.3d 12; *Bank of China, N.Y. Branch v. NBM L.L.C.*, 192 F. Supp. 2d 183 (S.D.N.Y. 2002); *Rosenthal v. Rochester Button Co., Inc.*, 148 A.D.2d 375, 376 (N.Y. App.

Div. 1989) ("From disposition of property no presumption of intent to defraud arises."); *Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 783 N.Y.S.2d 758, 774 (N.Y. Sup. Ct. 2004) ("The mere removal or assignment or other disposition of property is not grounds for an attachment."). Nor is there anything inherently fraudulent with an agreement to place proceeds of the Ecuadorian judgment in a trust, in Ecuador or wherever they are received.

Additionally, the funding agreements that Chevron has pointed to cannot constitute evidence of any fraudulent intent because they were entered into before Chevron commenced this lawsuit. The two agreements cited by Chevron were executed on October 10, 2010 and January 5, 2011. Chevron did not commence this litigation until February 1, 2011. The law is clear that if a transfer was made before any proceedings were initiated against the defendant, such a transfer cannot support a finding of fraudulent intent. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004) (no inference of fraudulent intent where transfers in question occurred "nearly two years before [defendant] filed for bankruptcy and before the judgments were entered against [him] that would motivate him to conceal his assets"); *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 323 (E.D.N.Y. 2009) (listing cases). Because the agreements at issue were entered into before Chevron initiated this litigation, the agreements do not constitute evidence of a fraudulent intent by Donziger to thwart Chevron's ability to collect on any potential judgment in this case.

Finally, "[i]t is beyond cavil that attachment will only lie against the property of the debtor, and that the right to attach the property 'is only the same as the defendant's own interest in it.'" *Bank of N.Y. v. Nickel*, 14 A.D.3d 140, 145 (N.Y. App. Div. 2004); *Eaton Factors Co. v. Double Eagle Corp.*, 17 A.D.2d 135, 136 (N.Y. App. Div. 1962) (stating that property involved must be that of defendants). In opposing Donziger's motion for intervention in the Count 9

action, Chevron argued that Donziger had no "personal or financial interest" in the judgment. (Dkt. 312 at 4-5.) This Court found that Donziger could not intervene in Count 9 because "Donziger asserts no 'interest' [in the Ecuadorian judgment] within the meaning of Rule 24(a)." (Dkt. 327, at 6.[10]) The Court further found that Donziger is not a "creditor on the judgment" and that only the Ecuadorian Plaintiffs and the Amazon Defense Front are judgment creditors. (Dkt. 278 at 16 n.42; *see also* Dkt. 327, at 7 (describing "Donziger's contingent fee agreement" as providing "at best … a right to collect *from his clients* a share of any proceeds of the Judgment that may eventually be collected on their behalf" (emphasis added)).) Donziger contested Chevron's position and appealed this Court's ruling denying him intervention, unsuccessfully. But, having advanced these arguments with success, Chevron should not now be heard to argue the opposite, by seeking to attach an interest it previously asserted was non-existent.

2. Chevron cannot satisfy CPLR § 6201(1) because the Court does not have personal jurisdiction over the Ecuadorian Plaintiffs and their interest in the Ecuadorian Judgment is not within the court's jurisdiction.

Second, Chevron relies on N.Y. CPLR § 6201(1), which permits attachment as to a nondomiciliary defendant "residing without the state." The Ecuadorian Plaintiffs are not residents of New York, and "[i]t is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction." *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 538 (2009). The Court does not have personal jurisdiction over the Ecuadorian Plaintiffs, and their interests in the Ecuadorian judgment—if any—are not located in New York.

[10] Pursuant to Rule 24 of the Federal Rules of Civil Procedure, a party may intervene in an action if he or she "claims an interest relating to the property or transaction that is the subject of the action." Dkt. 327 at 5-6. This Court has pointed out that its May 31, 2011 Order denying Donziger's application for intervention in Count 9 was based on "two independent, alternative grounds," the first of which is that "Donziger asserts no 'interest' within the meaning of Rule 24(a)." Dkt. 164 at 1.

(a) The Court does not have personal jurisdiction over the Ecuadorian Plaintiffs.

Attachment is improper because New York has no jurisdiction over the Ecuadorian Plaintiffs under its jurisdictional statutes, N.Y. CPLR §§ 301 and 302.

Although § 301 establishes personal jurisdiction over those "doing business" in New York, the Ecuadorian Plaintiffs have not "engaged in "continuous, permanent, and substantial activity in New York." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000); *id.* (stating that business with New York must have "a fair measure of permanence and continuity," not be occasional or casual). The Ecuadorian Plaintiffs are Ecuadorian nationals who have never been to New York. Their sole connections to New York are that they hired a New York attorney to represent them in claims arising out of an environmental disaster in their home country of Ecuador and that attorney filed a suit in New York, later dismissed as having no connection to New York, and intervened in discovery actions in New York concerning the litigation in Ecuador. The Ecuadorian Plaintiffs have not engaged in any commerce in New York, *Nilsa B.B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579, 586 (N.Y. App. Div. 1981) (holding that § 301 does not apply to individuals not engaged in commercial activity in the state), much less a "continuous and systematic course of doing business," *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57-58 (2d Cir. 1985).

In addition, the Ecuadorian Plaintiffs did not purposefully avail themselves of the New York forum. Chevron is unable to produce evidence that the Ecuadorian Plaintiffs ever communicated or met with counsel in New York, executed any agreements in New York, directed any communication to New York, or reached into New York for any other purpose. Nor did they control or direct their counsel's activities in New York. An assertion of personal jurisdiction under § 301 is therefore inappropriate.

Similarly, the Court cannot assert jurisdiction under § 302 because the Ecuadorian Plaintiffs have not transacted any business in New York that gave rise to Chevron's claims. *See Three Five Compounds, Inc. v. Scram Techs., Inc.*, 2011 WL 5838697, at *3 (S.D.N.Y. Nov. 21, 2011) (slip op). Their hiring of New York counsel is not "related to some transaction that had its center of gravity inside New York, into which [the Ecuadorian Plaintiffs] projected [themselves]." *Id.* at *4. The center of gravity for the Ecuadorian litigation has always been Ecuador. The environmental devastation occurred in Ecuador, the Ecuadorian Plaintiffs live in Ecuador, and the Ecuadorian litigation was tried in Ecuador. Even their counsel's interventions in New York courts were "intended to further [their] assertion of rights under [a foreign country's laws]" and are the "antithesis of purposeful activity in New York." *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 509 (N.Y. 2007). Even assuming their counsel's actions were equivalent to "transacting business" in New York—and they are not—Chevron's claims do not arise out of those actions. Chevron's claims of fraud, corruption, and ghost-writing all arise out of the litigation in Ecuador and submissions to or actions taken by the court in Ecuador. The retention of New York counsel did not give rise to an allegedly fraudulent judgment in Ecuador. The Court does not have personal jurisdiction over the Ecuadorian Plaintiffs under CPLR § 302.

Finally, any exercise of jurisdiction over the Ecuadorian Plaintiffs violates due process. Due process requires that a foreign litigant have "minimum contacts" to the forum state and that the exercise of personal jurisdiction over the litigant is "reasonable." *See Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010). "Minimum contacts" with the forum state requires either "continuous and systematic contacts with the forum" or "purposeful availment of the privilege of conducting activities within the forum." For the reasons above, the Ecuadorian Plaintiffs lack "minimum contacts" with New York sufficient to satisfy due process. This

Court's exercise of jurisdiction over the Ecuadorian Plaintiffs is also unreasonable and fails to comport with "traditional notions of fair play and substantial justice" because (1) the burden on these residents of the Amazon who have never been to New York is extreme, (2) New York has no interest in resolution of a controversy between non-residents, and (3) Ecuador's substantial interest in the application of its laws and procedures in the Ecuadorian litigation would be detrimentally affected by the Court's assertion of jurisdiction.[11] *Opticare Acquisition Corp. v. Castillo*, 25 A.D.3d 238, 247, 806 N.Y.S.2d 84, 92 (2005). The Ecuadorian Plaintiffs could not reasonably anticipate being haled into court in New York, *id.*, and the exercise of personal jurisdiction by this Court violates due process.

(b) The Ecuadorian Plaintiffs' interests in any Ecuadorian judgment are not subject to attachment.

Even were the Ecuadorian Plaintiffs subject to New York's jurisdiction, Chevron is not entitled to attachment because the Ecuadorian Plaintiffs' interests in the non-final Ecuadorian Judgment are not located in New York. "[A]n article 62 attachment proceeding operates only against *property*, not any person." *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533, 538 (N.Y. 2009) (emphasis in original). "[I]t is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction." *Id.* The interests of the Ecuadorian Plaintiffs, Ecuadorian citizens who have never been to New York, are not "within the jurisdiction of the Court."

The cases upon which Chevron relies are readily distinguishable. The issue in *ABKCO Industries v. Apple Films, Ltd.*, 39 N.Y.2d 670 (1976), was whether the plaintiff was entitled to attachment as a means of obtaining *quasi in rem* jurisdiction over the defendant. The court held

[11] These interests far outweigh Chevron's interest in avoiding the judgment of the Ecuadorian courts that it insisted should decide the claims against it.

that the British company's rights under a licensing agreement with a New York company were "found in New York" because the contractual counterparty obligated to perform was "a New York corporation." Unlike *ABKCO*, this case does not involve a contractual counterparty who is a New York corporation, but rather a Delaware corporation judgment-debtor that owes a money judgment in Ecuador. The decision in *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303 (N.Y. App. Div. 2010), is likewise inapplicable. There, the court held that an attachment levy may be made on a defendant's intangible interest in out-of-state entities if the defendant is *within the court's personal jurisdiction* and a proper garnishee is physically present in New York for the levy. This Court lacks personal jurisdiction over the Ecuadorian Plaintiffs and cannot enter an attachment order purporting to attach property interests that are not located within New York.

Second, Chevron is not, as it blithely asserts, "present" in New York. Chevron is admittedly "a citizen of Delaware and California." (Dkt. 283, at 4 ("Chevron is a Delaware corporation with its principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California 94583").) Because Chevron is not a New York corporation, like the contractual counterparty in *ABKCO*, Chevron is not obliged to pay the Ecuadorian Judgment in New York. Accordingly, even assuming *ABKCO's* rule based on contractual obligations applies to the payment of a foreign money judgment, the only potential "situs" for the Ecuadorian Plaintiffs' intangible interest in the Ecuadorian Judgment under that rule would be Delaware or California, not New York.

This Court cannot order the U.S. Marshal to levy upon the Ecuadorian Plaintiffs' interests in the Ecuadorian Judgment, which are not located in New York. *See* N.Y. CPLR § 6211 ("The order shall direct the sheriff to levy *within his jurisdiction*, at any time before final judgment,

upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.") (emphasis added).

3. Chevron cannot attach the Ecuadorian Plaintiffs' interest in an Ecuadorian Judgment against *Chevron.*

Finally, Chevron's attachment of a debt that Chevron itself owes is improper and unprecedented. Chevron's requested attachment order would be served upon Chevron, who would turn over "constructive possession" of the debt Chevron owes to the Ecuadorian Plaintiffs to the U.S. Marshal, to be held for the benefit of Chevron "until further order of this Court." Proposed Order, at 2. In other words, the money owed by Chevron would leave Chevron's left hand to (if Chevron prevails) go to Chevron's right hand.

The cases Chevron cites involving attachment of an interest in a judgment all concern a judgment debt owed by a *third party*, not by the attachment plaintiff.[12] For example, in *JPMorgan Chase Bank, N.A. v. Motorola, Inc.*, 846 N.Y.S.2d 171 (N.Y. App. Div. 2007), the plaintiff obtained a judgment against IITL and then sought post-judgment garnishment of the Indian judgment debt owed to IITL by Motorola, a third party. *Id.* Similarly, in *Breezevale Ltd. v. Dickinson*, 262 A.D.2d 248 (N.Y. App. Div. 1999), the plaintiff obtained a judgment against Breezevale and then sought to levy upon a Texas judgment debt owed to Breezevale by Exxon, a third party. *See also Orient Overseas Container Line v. Kids Int'l Corp.*, No. 96 Civ. 4699 (DLC), 1998 WL 531840, at *1 (S.D.N.Y. Aug. 24, 1998) (defendant/third-party plaintiff sought attachment of money judgment owed by plaintiff to third-party defendants as a basis for obtaining *quasi in rem jurisdiction* over third-party defendants). Chevron has not cited any

[12] Chevron cites *Wehle v. Conner*, 83 N.Y. 231, 238 (1880), for the proposition that Chevron may attach an interest in a debt that it owes. The plaintiff in *Wehle* was a judgment debtor whose property was already attached and in the hands of the sheriff. The plaintiff then sought attachment over that property based on a debt owed her by the defendants. By contrast, Chevron's assets have not been attached, nor are they in the hands of the sheriff.

relevant authority for the proposition that Chevron can attach an interest in a judgment debt that *Chevron itself may someday owe*.

In fact, because there is no New York authority to support Chevron's position, Chevron purposefully misrepresents the holding of *Motorola Credit Corp. v. Uzan*, 739 F.Supp.2d 636, 641 (S.D.N.Y. 2010). In that case, the plaintiff sought to attach an arbitration award owed to the defendant's alter ego *by a third party*, the Government of Turkey. The court's decision did not, as Chevron asserts, "reliev[e] prevailing plaintiff of obligation to pay arbitration award to defendant's alter ego." (Memo. at 18 n.17.) The "prevailing plaintiff" was not involved in the arbitration and not liable to pay the arbitration award, which was owed by the Turkish Government. The decision in *Motorola Credit Corp.* provides no support for the proposition that Chevron can attach an interest in a judgment debt that Chevron owes.

Consistent with *Orient Overseas*, *JPMorgan Chase Bank*, and *Breezevale*—all cited by Chevron—a plaintiff can attach an interest in a judgment only where the judgment debtor is a third party. If a judgment debtor could attach a judgment creditor's interest in the judgment by using New York's prejudgment attachment statute, then every judgment debtor facing liability overseas could file a lawsuit in New York against the judgment creditor, allege a cause of action challenging the underlying litigation, move for attachment on the basis of that cause of action, and thereby effectively preclude enforcement or collection of the judgment. That end-run around the proper channels to challenge the enforceability of a foreign judgment is neither permitted by, nor consistent with the purposes of, New York's statutory scheme for attachment or its express statutory scheme for enforcement of foreign judgments.

Chevron misleadingly cites N.Y. CPLR § 6214(b) for the proposition that a U.S. Marshal may levy the Ecuadorian Plaintiffs' interests in the Ecuadorian judgment and require them to

transfer or deliver those interests to the Marshal. But this statute, when fully quoted, deals with the sheriff's service of an attachment order upon "a person other than the defendant" to levy a "debt [that] is owed by the person served to the defendant." N.Y. CPLR § 6214(b). In other words, New York law provides that where a debtor, like Chevron, owes a debt, the sheriff may serve the debtor (Chevron) with an attachment order and levy the amount of the debt owed. New York law mandates that the *debtor*, or garnishee, "shall forthwith transfer or deliver all such property, and pay all such debts upon maturity, up to the amount specified in the order of attachment." N.Y. CPLR § 6214(b).

Chevron's proposed attachment order would direct the United States Marshal to "take any debts and property in which Defendants claim a right [including their interest in the Ecuadorian judgment] into the Marshal's constructive possession by serving this order *upon a garnishee*." Proposed Order, at 2 (emphasis added). By Chevron's own admission, the only relevant "garnishee" is Chevron. (*See* Memo. at 3 (Defendants' "only asset relevant to satisfying Chevron's claims against them" is the Ecuadorian judgment owed by Chevron).) Chevron asks the Court to order the U.S. Marshal to take "constructive possession" of the debt Chevron owes but to require that Chevron not "make actual payment of debts to the Marshal." Proposed Order, at 2. The effect of Chevron's proposed order is that Chevron would not have to pay the Ecuadorian Judgment to anyone "until further order of this Court." *Id.* This is a renewed attempt to obtain an improper worldwide injunction against enforcement of the Ecuadorian judgment despite the Second Circuit's rejection of such an injunction.

III. CHEVRON'S UNCLEAN HANDS PRECLUDE AN ORDER OF ATTACHMENT OR TEMPORARY RESTRAINING ORDER

Chevron fails to meet the statutory requirements for attachment, but even assuming it had, Chevron would not be entitled to an attachment order or TRO because it comes to this Court

with unclean hands. "Attachment is an equitable remedy, subject to the equitable maxim that 'he who comes into equity must come with clean hands.'" *ENH, Inc. v. Int'l Diffusion SRL*, No. 97 CIV. 3202 (LAP), 1997 WL 294388 (S.D.N.Y. June 2, 1997) (citation omitted); *see also Drexel Burnham Lambert Inc. v. Ruebsamen*, 138 Misc. 2d 884, 886, 525 N.Y.S.2d 184, 185 (N.Y. Sup. Ct. 1988) *aff'd*, 531 N.Y.S.2d 547 (N.Y. App. Div. 1988) (doctrine of unclean hands applies to "provisional remedy of attachment"). Chevron's misconduct bars the request for attachment.

A. Chevron's manipulation of the sampling process during the Ecuador trial and subsequent efforts to cleanse the tainted sampling process.

Evidence obtained by the Republic of Ecuador through 28 U.S.C. § 1782—and not previously available to the Defendants—proves that: (1) Chevron pre-tested sites to guarantee results the company sought during the Judicial Inspections in Ecuador; (2) Chevron directed its experts to limit their testing to areas earlier determined to be "clean"; (3) in an effort to whitewash their rigged sampling procedures, Chevron made false representations to the Ecuadorian court; and (4) Chevron attempted to thwart the Ecuadorian Plaintiffs' ability to obtain this discovery because it would "cause substantial harm to Chevron." (Ex. D at 1, 5.)

Under subpoena, Chevron expert Bjorn Bjorkman disgorged a copy of Chevron's 2006 "Judicial Inspection Playbook," outlining the company's protocol for soil and water sampling at the many "judicial site inspections." (Ex. E) Chevron's Playbook for a given site describes how the company had visited the site prior to the judicial inspection and taken samples to locate clean "delineation points" within an otherwise contaminated area.[13] (*See id.* at BJORKMAN00049540.) A related document, titled "Summary of Sampling and Testing

[13] For instance, the Playbook for the "Sacha Norte 1 Production Station" indicates that of three borings Chevron made at the Pre-Inspection in the vicinity of a particular closed pit, only one afforded Chevron an acceptable "delineation point" to return to at the subsequent judicial inspection. The others either showed or tested positive for contamination. (*See* id.)

Program for Judicial Inspection Sites," instructs Chevron's experts that "[l]ocations for perimeter sampling should be chosen to emphasize clean points around pits when possible." (Ex. F, at BJORKMAN00046359 (emphasis added).) The experts were directed to "collect soil samples at 4 or more locations surrounding the site, *using locations that the PI [Pre-Inspection] team has shown to be clean.*" (*Id.* (emphasis added).) Bjorkman's documents further reveal that Chevron's experts were also instructed to send "dirty" samples to a laboratory called "Newfields," and not to SevernTrent Labs, which was Chevron's laboratory of record–Chevron only sent "clean" pre-inspection samples to SevernTrent.[14]

Chevron then induced its experts, including Douglas MacKay, to issue a series of "independent review[s]" lauding Chevron's "representative" sampling methods which were submitted to the Ecuadorian court. (*See, e.g.*, Exs. G, H.) One such report by MacKay concluded "there is no foundation for the serious allegations . . . that the sampling program that Chevron's experts are conducting *deliberately hides or minimizes the existing contamination and associated risks.*"[15] (Ex. G, at 2 (emphasis added).) MacKay, however, was apparently provided with a *different* (altered) version of the "Summary of Sampling and Testing Program for Judicial Inspection Sites" document than Chevron's judicial inspectors actually received, a version which omitted discussion of Chevron's selective sampling:

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[14] (*See id.* ("Clean soil samples are analyzed for PAHs at STL w/a split sent to Newfields to hold. Samples showing field evidence of contamination are sent to Newfields for PAH analysis and fingerprinting (no STL PAH analysis)").) If the science supports Chevron's position, it is unclear why the company engaged in gymnastics to assure that its official samples would look as clean as possible and its dirty samples would be shielded from the Ecuadorian court and the plaintiffs.

[15] The company also issued multiple press releases defending the integrity of its rigged sampling process. (*See, e.g.*, Exs. I, J.)

"Summary of Sampling and Testing Program for Judicial Inspection Sites" (produced by Bjorkman) (Ex. F, at BJORKMAN00046359.)	**"Summary of Sampling and Testing Program for Judicial Inspection Sites"** (misleading version produced by MacKay) (Ex. H, at MACKAY0004064.)
3) Perimeter Sampling: Define clean line around site to show no widespread impacts. Locations for perimeter sampling should be chosen to emphasize clean points around pits when possible.	3) Site Perimeter Sampling: Access potential migration of petroleum constituents from the site and absence/presence of widespread impacts.

Chevron's decision to withhold this information from the Ecuadorian court, to defend its otherwise indefensible sampling methodology, and to submit expert reports that rely on altered documents is a fraud on the Ecuadorian justice system.

This manipulation of evidence of contamination is consistent with testimony that Chevron's contractor Diego Borja (and others) would swap out contaminated samples collected from judicial inspection sites with clean samples collected at different locations to send to the supposedly independent Severn Trent Laboratories. Ex. K, Escobar Depo., at 32:14-34:24. Severn Trent Laboratories was not truly independent, but "belonged to Chevron." *Id.* at 84:6-25. This proves that the sworn testimony of Chevron's corporate representative in the Count 9 case on the issue of the lab's independence was false. Ex. L, Reis Vega Depo. at 163:21-164:9.

B. Chevron's orchestration of an illegal scheme to entrap the Ecuadorian judge.

On August 31, 2009, Chevron publicly released a series of four clandestine video recordings allegedly "reveal[ing] a $3 million bribery scheme implicating" Judge Juan Nuñez who, at the time, was presiding over the trial. (Ex. M.) Chevron made numerous false statements about the incident and its own involvement. According to Chevron, an Ecuadorian citizen, Diego Borja, and an American, Wayne Hansen, created the video recordings between May and June 2009, using a concealed pen and watch camera. Chevron represented that Borja and Hansen were "prospective environmental remediation contractors," and suggested the two inadvertently stumbled upon "serious judicial misconduct" which they videotaped out of concern

for the integrity of the judicial system. (Ex. N.) Chevron acknowledged Borja's past work as a Chevron "logistics contractor" but maintained that Borja had no ties to Chevron at the time of the recordings. (*Id.*) Chevron also claimed that the company did not pay the two men. (Ex. M.) These statements were not true and were intended to mislead this Court.

Chevron's story quickly unraveled. The videos did not reveal the acceptance of a bribe, *i.e.*, those who examined the videos noted the absence of any judicial impropriety.[16] It was revealed that Wayne Hansen was not an American businessman but rather a convicted felon who fled to Peru in or around November 2010 to avoid a subpoena that would have forced him to answer for his conduct.[17] Despite Chevron's repeated representations to the Ecuadorian trial court that Diego Borja was not working for Chevron in any way at the time of the recordings,[18] internal documents reveal that Borja was an active Chevron contractor.[19] Despite representations to Ecuadorian officials that Chevron had no advance knowledge of the meetings,[20] it is now clear that Chevron was aware that the fourth recorded meeting would occur (in advance of that

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[16] (*See, e.g.*, Ex. O (*LA Times*: "On the tapes, the men – a former Chevron contractor and an American businessman – press Nuñez to say how he will rule, without success. Then, as Nunez prepares to leave, one of the men again maintains that Chevron is guilty, and Nuñez replies, 'Yes, sir.' To Chevron, that cinches the argument. But on the video, it's unclear to whom the judge is speaking and whether he is responding to the question or just trying to end the meeting."); Ex. P (*Financial Times*: "The judge refuses several times on the tape to reveal the verdict, before saying, 'Yes, sir,' when asked if he will find Chevron guilty. However, the video raises the question as to whether Judge Nuñez understood what he was being asked."); Ex. Q ("The recordings, made by a former Ecuadorean contractor for Chevron by using hidden recording devices, do not make clear whether Judge Núñez was involved in a bribery scheme — or even whether he was aware of an attempt to bribe him.").) In a secretly recorded conversation, Borja also admitted to his friend "Because really, there was no bribe. I mean, there's was never . . . there was never a bribe." (Ex. R, at 11.)

[17] (*See* Exs. M, S, T, U).

[18] In what can only be regarded as an effort to mislead the Ecuadorian court, Chevron represented in a July 13, 2010 filing that Mr. Borja was an "ex-contractor" who had performed some discrete work for the company *in the past*. (*See* Ex. V, at 5).)

[19] (*See, e.g.*, Ex. W (Email chain between Diego Borja, Chevron officials, and others, regarding contract work performed by Borja's company in August 2009); Ex. X (Email chain between Diego Borja and Chevron employee Allen Verstuyft regarding Borja's August 2009 invoice).)

[20] (Ex. Y, at 1, October 26, 2009 letter from Thomas F. Cullen, Jr. to Ecuador's Solicitor General).)

meeting).[21] In fact, recent testimony in this suit has revealed that Borja and Hansen "received orders" from Chevron and "sprung a trap" by surreptitiously "film[ing] quite a lot of people" for the purpose of "destroy[ing] the trial." Ex. K, Escobar Depo. at 54:2-59:1. Borja and Hansen were assisted by other individuals in filming these videos, all of whom were "carrying out an operation for Chevron" for which they had "already . . . received a down payment" and would receive "a lot of dough" once the operation was completed. *Id.*, at 52:3-55:21. Borja had made "the deal of his life." *Id.*, at 57:15-58:1; 58:5-59:1. Again, this testimony contradicts the testimony of Chevron's corporate representative on these matters. Ex. AA, Mittelstaedt Depo. at 54:23-55:17. Although Chevron disclosed it was making *limited* payments to Borja in the form of "humanitarian" payments,[22] Borja has continued to (as of September 2011) receive substantial stipends which are referred to internally as "Witness Rent Payments," and he and/or his wife have received income tax, furniture, and automobile payments—as well as first-class airfare, free legal services, and even a washer/dryer set—to the tune of ~$1 million.[23] His wife was given a job by Chevron. These payments began shortly after Borja was recorded saying that he possessed evidence that could "close [Chevron] down" and that he would reveal the evidence if he was not well compensated.[24] Borja's attorney recently conceded that Borja's (and necessarily

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[21] (*See, e.g.*, Ex. Z, at 162-74; 177-82 (Borja testifying under oath that, on the very same day he made the third of four recordings, he called U.S.-based Chevron employee Al Verstuyft and notified him of same; that he discussed the recordings three hours later with Chevron attorney Rodrigo Pérez Pallares; that he subsequently met with Chevron attorney Adolfo Callejas in person; that two private investigators were dispatched to Ecuador to meet with Borja; that Borja met with Chevron's in house counsel David Moyer; that he told Chevron officials in San Francisco that he intended to create a final recording once he returned to Ecuador to "[g]ive a closing" to the scheme).)

[22] (Ex. M.)

[23] The Ecuadorian Plaintiffs and Donziger expressly incorporate by reference the Ecuadorian Plaintiffs' March 4, 2011 Supplemental Memorandum of Law in Further Opposition to Chevron Corporation's Motion for a Preliminary Injunction and the exhibits cited therein which provide additional examples of the payments Borja received. (Dkts. 173-176.)

Chevron's) scheme to surreptitiously record a sitting judge was and is illegal under Ecuadorian law.[25] Chevron's involvement in the judicial sting operation and substantial payments of "hush" money and other benefits to Diego Borja are further evidence of Chevron's unclean hands.

C. Chevron's improper *ex parte* contacts with Ecuadorian judges.

Chevron's legal counsel in Ecuador repeatedly had substantive *ex parte* contacts with the presiding judges in the Ecuadorian lawsuit. There is undisputed photographic evidence of one such *ex parte* contact on July 30, 2010 between Chevron lawyer Enrique Carvajal and Judge Leonardo Ordoñez. Ex. EE, Moncayo Depo. at 25:10-26:21; 37:6-23. Chevron's lawyer, accompanied by two bodyguards, entered the Lago Agrio courthouse shortly before closing time at 6:00 p.m. that day. *Id.* at 28:10-20; 30:10-12. With the bodyguards standing behind him, Chevron's lawyer asked to speak with the Judge and then entered his office, where he remained inside with Judge Ordoñez. *Id.* at 34:2-7; 39:2-19; 40:7-12. After approximately 20 minutes, Judge Ordoñez stood up and extended his hand to bid him farewell, but Chevron's lawyer kept talking. *Id.* at 40:22-41:4. Judge Ordonez even shook his head "No" and waved his hand at Chevron's lawyer. *Id.* at 41:5-18. Finally, Chevron's lawyer left Judge Ordoñez's office looking "[un]pleased" and shaking "his head as saying no." *Id.* at 43:17-44:24. This *ex parte* contact in July 2010 is one of at least 15 to 20 occasions on which a Chevron lawyer met alone with the then-presiding judge in Ecuador. *Id.* at 71:4-72:2; 58:5-61:25; 63:24-67:13; 67:14-68:17.

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[24] (Ex. R, at 9) Borja claimed this damaging testimony was stored on his mobile phone which he testified was turned over to agents for Chevron. (*Id.*) Although Chevron now claims these payments were made to Borja to relocate him based on "threats" to his safety, the payments have continued long after Borja arrived in the United States and Borja, under oath, could not identify a single instance in which he or any of his family members reported a threat to law enforcement agencies. (Ex. BB at 494:11-495:10.) Borja has admitted in a recorded conversation that he is not afraid to return to Ecuador but that he was "playing along" so that he could continue to receive benefits from Chevron. (Ex. CC, at CVX-RICO-1188978-79).

[25] (Ex. DD, at ¶ 3("I [ ]understood that Ecuador has criminal statutes prohibiting the public use of secretly-made audio and video recordings, which could arguably have been used against Mr. Borja.").)

Chevron has attempted to cover up its misconduct by providing sworn interrogatory responses in this lawsuit stating that it has not engaged in any "substantive" *ex parte* contacts. Ex. FF. The evidence demonstrates, however, that Chevron's *ex parte* contacts were not limited to "scheduling and logistical" matters. For example, on one occasion, Chevron's lawyer met with the presiding judge to discuss Richard Cabrera's expert opinion and told the judge that he was not in agreement with "the reasoning" of Dr. Cabrera. Ex. EE, Moncayo Depo. at 58:5-60:25, 61:5-13. The reasoning behind an expert's opinion is inherently substantive—it is not a "scheduling" or "logistical" issue. Chevron's *ex parte* contacts, and its attempts to cover them up in sworn statements in this lawsuit, are further evidence of unclean hands.

The evidence confirms that Chevron comes to court with anything but "clean hands."

IV. CHEVRON IS NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER.

Chevron asserts that "CPLR 6210" "entitle[s]" Chevron to a temporary restraining order that bars "Defendants, their agents, employees, and attorneys, from transferring their interest in the Ecuadorian judgment or seeking to convert it into proceeds, until an order of attachment is issued or denied." (Memo. at 34.) Once again, Chevron snips a portion of the statute out of context. The full text of § 6210 makes clear that a restraining order is authorized only against "a garnishee." N.Y. CPLR § 6210. "Garnishee" is a defined term: "a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest." N.Y. CPLR § 105. In other words, CPLR § 6210 is designed to prevent someone *other than the defendant* from transferring assets. As Chevron itself notes, § 6210 exists to protect the plaintiff during the brief period before "the sheriff is able to levy upon *each garnishee* under the [Court's] order, after it has been granted." (Memo. at 34 (emphasis added).) Because § 6210 does not provide for a temporary restraining

order against a defendant itself, and Federal Rule of Civil Procedure 64 offers no independent remedy, Chevron's request for a temporary restraining order necessarily fails.

Moreover, even if CPLR § 6210 were somehow applicable to the instant matter—and it is not—there is no valid basis for a temporary restraining order. Under New York law, the party seeking a temporary restraining order must show that "immediate and irreparable injury, loss or damages will result" unless a restraining order is granted. N.Y. C.P.L.R. §§ 6201; 6213(a); *see also Gramazio v. Gramazio*, 438 N.Y.S.2d 71, 72 (Sup. Ct. 1981) (requiring "immediate and irreparable injury"). The word "immediate" means "[o]ccuring without delay; instant." Black's Law Dictionary (7th ed. 1999). Chevron falls far short of its burden here because there is still no final judgment in Ecuador, and the de novo appellate review of the Ecuadorian proceedings continues. Because there is no evidence whatsoever suggesting that a final judgment from Ecuador is imminent, there are no grounds for a temporary restraining order.

The Court should reject Chevron's request for a temporary restraining order as an improper—and twice-rejected—attempt to deny the Ecuadorian Plaintiffs the ability to fund their case. Chevron presently seeks a temporary restraining order "barring Defendants, their agents, employees, and attorneys, from transferring their interest in the Ecuadorian judgment or seeking to convert it into proceeds, until an order of attachment is issued or denied." (Memo. at 34.) The practical effect of such an order would be to deny the Ecuadorian Plaintiffs—indigenous peoples who lack the funds to litigate against Chevron's multimillion-dollar legal blitzkrieg—the ability to litigate their case. Chevron ignores that the Second Circuit has twice rejected such restraints on the Ecuadorian Plaintiffs as improper. On May 12, 2011, the Second Circuit agreed that the preliminary injunction was overbroad and stayed the injunction insofar as it restrained the Ecuadorian Plaintiffs from "directly or indirectly funding" recognition or enforcement

proceedings. (*See* Dkt. 135.) On September 19, 2011, the Second Circuit vacated the global injunction in its entirety, indicating that the relief sought by Chevron was overly broad and inappropriate. Chevron's request for a temporary restraining order should be rejected.

V. CHEVRON'S MOTION SHOULD BE DENIED BECAUSE IT IS PREMISED ON REPEATED MISREPRESENTATIONS AND MISSTATEMENTS ABOUT THE EVIDENCE

Finally, the request for attachment—a harsh remedy—is improper because it is based on Chevron's usual misrepresentations and misstatements of the evidentiary record. While there is neither time nor space to deal with Chevron's 4,500 pages, several examples suffice. First, Chevron cites an email from June 2009 as supposed evidence that Defendants "ghostwrote the judgment's language establishing a trust." (Memo. at 7 n.5 & Ex. 1141.) The email contains a cut-and-pasted excerpt from a published Ecuadorian Supreme Court opinion dealing with a trust, noting that the same language appears in other Ecuadorian Supreme Court decisions. This is no evidence that Defendants ghostwrote stock language used by courts in Ecuador that also appears in the Ecuadorian judgment.[26]

Chevron argues that the Ecuadorian Plaintiffs and Donziger "admit in their internal strategy documents, they have pursued [] criminal activities to achieve their ultimate objective of 'pressur[ing]' Chevron to settle."[27] (Memo. at 6 (citing Ex. 1011).) Wrong. The referenced email contains attorney Aaron Marr Page's statement that the Ecuadorian Plaintiffs should only advance arguments they can "factually and ethically maintain." (Ex. 1011.)

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[26] The Ecuadorian Plaintiffs dispute Chevron's claims that the February 2011 judgment was "ghostwritten" and reject Chevron's claim that such allegations are "unchallenged." (Memo. at 7 n.5.) The Ecuadorian Plaintiffs' experts found, in part, that Chevron's plagiarism allegations were "misleading and prejudicial." (*See* Ex. GG, at 37; *see also* Ex. HH.) Chevron's own expert has conceded that not all of the record has been reviewed. (*See* Ex. HH, at 5 (citing Leonard Report).)

[27] Despite referencing "strategy documents," Chevron cites only a single document for this proposition.

As support for the proposition that "[t]here *is no question* that the ROE has breached the 1998 Final Release" and that the Ecuadorian Plaintiffs in prosecuting their claims in Ecuador have "deprived [Chevron] of the benefits of the 1998 Final Release," (Memo. at 32 (citing Exs. 1127, 1153)), Chevron cites two exhibits that "demonstrate" nothing of the sort. The first (Ex. 1127) is the Order of Interim Measures issued in the arbitration between the Republic of Ecuador and Chevron where Ecuador's purported release of Chevron's claims is much in dispute and far from decided. The arbitral panel's Order of Interim Measures (cited as proof of the "breach[]") notes that "[t]his Order is made strictly without prejudice to the merits of the Parties'... substantive disputes, including ... the merits of the Claimants' claims." (Ex. 1127.) The second cited exhibit does not appear to even discuss the 1998 Final Release. (Ex. 1153.)[28]

Thus, even could Chevron satisfy the prerequisites of attachment—and it cannot—the Court should exercise its discretion to deny the request. *See Bank of China*, 192 F. Supp. 2d at 186 (stating that attachment is discretionary).

CONCLUSION

For these reasons, the Court should deny Chevron's motion for an order of attachment and other relief. In any event, the Court should stay all proceedings on Counts 1 – 8 for the reasons stated above.

[28] The 1998 Final Release does not, by its terms or history, suggest that the parties contemplated releasing Chevron from liability for the current civil claims pending against the company in Ecuador. *See Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 374 (S.D.N.Y. 2005) (noting that it was highly unlikely that a settlement intended to cover pending third-party claims would neglect to mention them); (*see* Ex. II (releasing "Texpet . . . from any liability and claims by the Government of the Republic of Ecuador, Petroecuador, and its Affiliates" and not making any provision regarding individual claims); Ex. JJ (draft memorandum in which Texaco proposed broader release which was rejected);) *see also* Ex. KK; Ex. LL.)

Dated: December 13, 2011
Houston, TX

By: */s/ Tyler G. Doyle*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION,
Plaintiff,

vs.

STEVEN DONZIGER, et al
Defendants.

CASE NO. 11 CV 0691-LAK

[PROPOSED] ORDER DENYING CHEVRON CORPORATION'S MOTION FOR AN ORDER OF ATTACHMENT AND OTHER RELIEF

The Court having considered Chevron's Motion for An Order of Attachment and Other Relief, Defendants' Opposition thereto and the accompanying Declaration of Tyler G. Doyle dated December 13, 2011, it is hereby:

ORDERED that C hevron's Motion for an Order of Attachment and Other Relief is DENIED. It is Further

ORDERED that all proceedings on Counts 1-8 are hereby stayed.

Dated: _____
New York, New York

SO ORDERED.

_____
Honorable Lewis A. Kaplan
United States District Judge