

1 *** UNCERTIFIED ROUGH DRAFT ***
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3 IN THE MATTER OF

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5

6 CHEVRON

7

8 -against-

9

10 DONZIGER

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2 HON. POOLER: I understand all
3 parties are here so due to the length
4 of the challenge, I won't call it.

5 We'll start with the first case
6 on our calendar which is Chevron
7 Corporation versus Camacho and others.

8 The panel has determined that
9 the first five minutes will be on the
10 mandamus motion, the movants and the

11 opponents, and then we will turn to
12 the other issues on appeal.

13 So five minutes on the clock on
14 the mandamus motion.

15 MR. TYRELL: May it please the
16 court, my name is James Tyrell from
17 the firm of Patton Boggs and I
18 represent individual Ecuadorian
19 citizens, Mr. Camacho and Mr.
20 Payaguaje. The court surprise me. I
21 was going to start the other way, but
22 I'm happy to start on the mandamus
23 petition.

24 HON. POOLER: Thank you.

25 MR. TYRELL: I start with the

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2 standard. The standard for
3 application of mandamus is an
4 objective analysis. Recusal under 28
5 USC 455A is based upon what the man in
6 the street perceives the
7 reasonableness of judicial conduct.
8 Any doubt is to be resolved in favor
9 of recusal. We maintain that the
10 standard here is one of deep
11 antagonism, that deep antagonism has
12 been demonstrated by the district
13 court to the judicial system of
14 Ecuador, to my individual clients, and
15 to my individual clients' lead
16 counsel, Mr. Danziger.

17 We ask that, in addition to
18 mandamus, that the court consider as
19 an alternative but also available,
20 reassignment.

21 The conduct of the district
22 court can be put into several broad
23 categories, each of which we believe
24 mandates recusal or reassignment.

25 Number one, prejudice and

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2 visceral snap judgment. This court
3 had this case at the time of the
4 Berlinger 1782 and in that case with
5 no reason to do it, it discredited the
6 Ecuadorian court system saying that it
7 would be happy to wait for a judgment
8 if it was the high court of London but
9 not a court in Ecuador. That was in
10 April of 2010.

11 In September of 2010 in the
12 Danziger Section 1782 --

13 HON. LYNCH: I'm sorry, I don't
14 understand, isn't the very issue in
15 this case whether the Ecuadorian
16 system of justice is to be credited?
17 Isn't that the whole point? I
18 understand that you take the position
19 that it should be and that the judge
20 was wrong in his view that there are
21 deep problems with the Ecuadorian
22 judicial system, but are you just

23 saying that he came to a conclusion
24 that is erroneous about that issue?
25 MR. TYRELL: It's the timing,
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2 your Honor, in the Berlinger 1782, the
3 issue was the discovery of the
4 outtakes. The legitimacy of the
5 Ecuadorian court system was not before
6 the court. He went out of his way to
7 disparage the Ecuadorian court system
8 at that time. In the Danziger 1782,
9 which I'm about to get to, there was
10 no issue yet because there was no
11 filing for declaratory judgment. He
12 again went out of his way to disparage
13 the Ecuadorian court system. In
14 short, it demonstrates a prejudgment,
15 a snap visceral reaction which is
16 precisely the kind of thing that this
17 court in a recent case in 2010 said
18 has to be looked at for purposes of
19 recusal.
20 In the Danziger 1782, what does
21 the court say? And it's the court's
22 own words. Mr. Danziger is trying to
23 become the next big thing in fixing
24 the balance of payments deficit. Key,
25 I got it from the beginning. In other
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2 words, he knew from the prior
3 proceedings before involving Berlinger
4 what that case was about. It was a
5 fraud, a sham by American class action
6 lawyers to, as he said it, hit Chevron
7 big, and the statements are in our
8 brief; I won't go through them. Those
9 particular comments disparaging Mr.
10 Danziger before this case is ever
11 filed dealing with declaratory
12 judgment or civil RICO evidenced a
13 predisposition and unwillingness to
14 have an open mind with respect to
15 issues now before the court in this
16 case.
17 HON. LYNCH: Had Judge Kaplan
18 seen the film by the time he made
19 those comments about Mr. Danziger?
20 MR. TYRELL: He had seen five
21 minutes of outtakes of six hundred
22 hours of film. And as we have put
23 forward in our brief, Chevron is a
24 master and their counsel are a master
25 of taking two words here, a snippet
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2 there, gluing them together. We have
3 set forth in our brief the entire
4 context.
5 The bottom line is Judge Kaplan

6 is not changing his mind; he will
7 never change his mind. He believes
8 Mr. Donziger is some sort of PR guy,
9 as he said, not a lawyer, not entitled
10 to an attorney-client privilege.
11 With Mr. Donziger, as this court
12 well knows, he made Mr. -- my clients,
13 my Ecuadorian plaintiffs forfeit
14 eighteen years of privileged documents
15 because Mr. Donziger, who he has no
16 respect for, supposedly missed a
17 deadline to get a privilege log in at
18 the same time that he moved to strike
19 the entire subpoena or limit its
20 scope. When we were before this
21 court, and I argued it last December,
22 the court said there's only one reason
23 why that would be appropriate and that
24 is the criminal proceedings, their
25 imminence pending in Ecuador. It had
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2 instructed the district court that if
3 that imminence went away, he should
4 sua sponte go back and look at that
5 privilege waiver. Of course, the
6 court never did it. In fact, right
7 now that privilege waiver has been
8 extended by the district court in ways
9 we've never seen before to potentially
10 include the documents of thirty other
11 law firms and consultants, including
12 my law firm Patton Boggs, who is
13 somehow deemed to have waived the
14 privilege derivative of Mr. Donziger's
15 waiver of the privilege. These aren't
16 the kinds of things that are judge,
17 who has an open mind and is willing to
18 demonstrate the appearance of
19 impartiality, does.
20 Your Honor, I'm out of time, but
21 there's more to say. I'll do whatever
22 you wish.
23 HON. POOLER: We'll hear from
24 Chevron on the recusal motion.
25 MR. TYRELL: And so I can
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2 clarify, will I come back to speak to
3 the merits argument and will I have
4 nine minutes at that time?
5 HON. POOLER: Yes.
6 MR. TYRELL: Thank you very much,
7 your Honor.
8 MR. MASTRO: Thank you, your
9 Honors.
10 Actually, the standard on
11 mandamus, it's one of the highest
12 standards that can possibly be --
13 HON. POOLER: Could you do
14 something with the microphones?
15 MR. MASTRO: Your Honor, the
16 standard on mandamus, as this court
17 well knows, are that it is an

18 extraordinary measure and only granted
19 in the most extreme circumstances.
20 One, it has to be a circumstance of
21 mandamus where an appeal would not
22 suffice; two, it has to be such a
23 clear and undisputable abuse of
24 discretion, because we're talking
25 about abuse of discretion here; and

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2 three, it has to involve significant
3 issues.

4 HON. POOLER: The defendants
5 argue that they have lost every single
6 time they've come before this judge.

7 MR. MASTRO: Actually, they've
8 lost every single time they've been
9 before this court, your Honor. And
10 the very thing that Mr. Tyrell
11 complains about --

12 HON. POOLER: Not exactly.

13 MR. MASTRO: Mr. Tyrell complains
14 about the privilege waiver and the
15 ramifications of that and Judge
16 Kaplan's as to Mr. Danziger and
17 ramifications of that. This court
18 affirmed, affirmed with an opinion
19 that made crystal clear that Judge
20 Kaplan had handled the cases -- he'd
21 had multiple cases at that point --
22 in, quote, an exemplary manner and
23 that all concerned, not least this
24 court, are well served by his
25 stewardship.

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2 Now, your Honor, Litek is the
3 standard and Litek tells us, the
4 Supreme Court has told us flat out the
5 judicial rulings alone almost never
6 are a cause for mandamus, that it's
7 not reviewable, a decision for bias or
8 prejudice whether it's based on his
9 knowledge or opinion based on what's
10 properly happened in the case. And in
11 this case, Judge Kaplan's
12 observations, Judge Kaplan's rulings,
13 they were, your Honor, when Danziger
14 ruled -- when he ruled on Danziger's
15 waiver, he had seen the crude outtakes
16 because this court confirmed the crude
17 outtakes being released. And they
18 showed Mr. Danziger saying that
19 Ecuador, the judges in Ecuador are
20 corrupt, it's their birthright, saying
21 that they don't decide by the law,
22 they decide by who they fear, saying
23 that maybe the judge won't be killed
24 but if he thinks he will, that's good
25 enough. These are the kinds of things

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2 that he admitted and on those crude
3 outtakes, they showed the plaintiff's
4 leading -- the court's global damages
5 expert, supposedly an independent --
6 HON. POOLER: Counsel, what
7 you're describing is evidence.
8 MR. MASTRO: And that's what
9 Judge Kaplan --
10 HON. POOLER: But has he made
11 findings based on that evidence up
12 until his last decision? He had not.
13 I think that's what counsel is saying
14 is that before he made a decision, he
15 seemed to have prejudged the issue.
16 MR. MASTRO: Absolutely not, your
17 Honor. In the Danziger waiver
18 context, we had to show that we were
19 entitled to have a subpoena issued and
20 he reviewed the evidence to date,
21 including the crude outtakes which
22 showed Mr. Danziger's blatant
23 misconduct, in fact his criminal
24 conduct. So your Honors, he made a
25 ruling that this court affirmed based
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2 on the evidence before him which
3 included the crude outtakes. And your
4 Honor, he made rulings in our case
5 based on an overwhelming record. In
6 thirty years of practice and as a
7 former prosecutor, I've never seen a
8 record so shocking of illegal and
9 improper conduct; a fraud on the court
10 in Ecuador blackmailing the judge to
11 get them to appoint a court-appointed
12 officer and then ghostwriting his
13 report word for word and submitting
14 other false expert reports and now the
15 evidence -- with complicity of counsel
16 of trying to cleanse that fraud by
17 offering new experts who did no work
18 themselves, relied simply on the old
19 fraudulent Cabrera report. And your
20 Honor, the latest efforts even that
21 these plaintiffs and their agents --
22 I'm referring to the LAPs, not Chevron
23 as the plaintiff -- they even
24 ghostwrote the judgment that issued
25 out of Ecuador. We see whole sections
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2 of internal memos of theirs that were
3 never submitted to the court that
4 showed up word for word in the
5 Ecuadorian judgment as well as their
6 own internal database, never turned
7 over to the court called Selva Viva
8 which turned out to be a hotel room.
9 That shows up word for word in the
10 judgment.
11 HON. POOLER: Counsel, the issue
12 as to the validity of the Ecuadorian

13 judgment is, in fact, to be tried by
14 Judge Kaplan.
15 MR. MASTRO: Correct, your Honor.
16 HON. POOLER: And what these
17 defendants, plaintiffs in other
18 contexts, are saying is that he
19 appears to have prejudged the issue of
20 the validity of the Ecuadorian
21 judgment. That has not been decided
22 yet.
23 MR. MASTRO: But your Honor, what
24 he has done is issue -- and we're now
25 getting into the second part of the
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2 argument -- he issues a status quo
3 preliminary judgment based on what was
4 undisputed evidence before him of
5 fraud in the procurement of the
6 judgment and lack of impartiality
7 in --
8 HON. WESLEY: Well, that's not
9 true because the timelines were pretty
10 tight; weren't they? Donziger didn't
11 have much time to respond. You had
12 showed up with a thousand pages,
13 didn't you, of exhibits and Donziger
14 got how many days to respond?
15 MR. MASTRO: Actually, your
16 Honor --
17 HON. WESLEY: It's a just
18 question. I need you to respond.
19 MR. MASTRO: He, from the time he
20 had notice of the complaint and the
21 TRO which was issued on notice, it was
22 not issued at the outset, he had eight
23 days to come into the court on the TRO
24 and then until the eleventh, that's
25 eleven days, to submit additional
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2 papers. He chose not to. The LAPs
3 did. The LAPs, in fact, put in a
4 sixty-plus page brief at the TRO
5 hearing and hundreds of pages of their
6 own of exhibits. Mr. Donziger chose
7 not to do that. The LAPs put in more
8 papers by the eleventh. Mr. Donziger
9 chose not to do that even while he had
10 a prominent criminal defense attorney
11 in the New York City, Jay Lefkowitz,
12 speak on his behalf the very first day
13 the complaint was filed.
14 HON. POOLER: How can you say the
15 evidence then was uncontroverted?
16 They did attempt to controvert it;
17 didn't they?
18 MR. MASTRO: But your Honor, they
19 didn't put in any evidence, no sworn
20 statement from anyone, not Mr.
21 Donziger, no one in Ecuador, nowhere
22 disputing our evidence from the crude
23 outtakes and from their own internal
24 documents, including their own

25 Ecuadorian lawyers who wrote, when the
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2 fraud was going to be revealed, that
3 this is a disaster for our case, it
4 will destroy it. We, your Ecuadorian
5 lawyers, may all go to jail. Their
6 words, not mine. They didn't put in a
7 single sworn statement from anybody,
8 not Donziger, not an Ecuadorian
9 lawyer, not a plaintiff, no one,
10 disputing the fraud in the submission
11 of falsified expert reports, you had
12 ghostwriting in the Cabrera report --
13 HON. POOLER: We're a little off
14 the topic. This is an recusal.
15 MR. MASTRO: But your Honor, I
16 was just coming to Judge Kaplan who's
17 not prejudged, he has done what a
18 judge should do which is to decide a
19 preliminary injunction, decide whether
20 there is a likelihood or success or
21 serious questions going to the merits,
22 evaluated all of the evidence before
23 him, and that evidence, your Honors,
24 showed undisputed, because they put
25 nothing in to dispute this core
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2 evidence, that they had ghostwritten
3 expert reports, that they --
4 HON. POOLER: We'll hear from
5 them on the merits.
6 MR. MASTRO: I understand. I
7 just want to make the point --
8 HON. POOLER: So you're opposing
9 recusal of Judge Kaplan?
10 MR. MASTRO: Oh, without
11 question, your Honor. This court has
12 had recusal motions time and time
13 again. This is the same tactic they
14 tried with Judge Rakoff when he was
15 overseeing the Aguinda case and it had
16 failed then, the judge vilified him --
17 HON. LYNCH: Mr. Mastro, you may
18 take notice of the fact that the
19 presiding judge has told you to sit
20 down.
21 MR. MASTRO: I'm sorry, your
22 Honor. I just wanted to make that
23 point.
24 Thank you very much.
25 HON. POOLER: Before I turn to
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2 the merits argument, we gave
3 permission to Chevron to have a
4 reporter here. Of course, a copy of
5 the transcript should be sent to the
6 clerk's office as well.
7 You're aware of that, counsel?

8 MR. MASTRO: Of course, your
9 Honor.
10 MR. TYRELL: May it please the
11 court, eighteen years of litigation do
12 not easily lead to a recitation of the
13 facts, so I'll skip them. But I would
14 like to frame, particularly in light
15 of Judge Wesley's questions, some
16 headlines which are both important to
17 the merits and to what we've just
18 discussed.

19 After nine years of litigation
20 in New York, this court dismissed on
21 forum non conveniens, as you're aware,
22 the action brought here. It did so
23 based on promises exclusively made by
24 Chevron that representations that the
25 court in Ecuador was fair and

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2 impartial, that they would submit to
3 jurisdiction in Ecuador, and that they
4 would pay a judgment if it was
5 entered, subject to reserving their
6 rights under the New York recognition
7 Act.

8 The first thing they did when
9 they went to Ecuador was to contest
10 jurisdiction. After nine more years
11 of litigation in Ecuador, the
12 Ecuadorian court finally rendered a
13 judgment which is not final, which is
14 on appeal de novo, but in that one
15 hundred eighty-seven-page opinion, it
16 found Chevron liable for contaminating
17 a Rhode Island-sized piece of the
18 Ecuadorian rainforest and awarded
19 damages of approximately \$18 billion.

20 Before the Ecuadorian judgment
21 was entered, Chevron, who has eschewed
22 any activity in the Southern District
23 of New York, rushes back to the
24 Southern District of New York of
25 course, I suggest, after sampling

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2 sixteen other federal courts to find a
3 judge that looked most favorable to
4 them. They then, using the related
5 case doctrine, managed to usher the
6 case to the very judge that they
7 wanted who we've already argued showed
8 predisposition in their favor. That
9 judge then enters a temporary
10 restraining order, a full scope
11 antifoign suit injunction, before
12 anything is there to enjoin in
13 Ecuador.

14 HON. WESLEY: Mr. Tyrell, can you
15 tell me the status of the Ecuadorian
16 judgment now?

17 MR. TYRELL: It is on de novo
18 appeal, which is intermediate appeal
19 in Ecuador. Both sides have

20 cross-appealed. Both sides have
21 stipulated that the judgment is not
22 final until that cross-appeal is
23 resolved. And even then Chevron has a
24 right to seek a further appeal to a
25 higher court in Ecuador.

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2 HON. WESLEY: Does the final
3 appeal require posting of the bobbed?

4 MR. TYRELL: It is disputed. We
5 think it should.

6 HON. WESLEY: Is it disputed as
7 to the period of time it will take the
8 Ecuadorian intermediate court to
9 resolve the matter?

10 MR. TYRELL: It isn't disputed,
11 but no one knows.

12 HON. POOLER: At what stage could
13 collection of the judgment be
14 initiated?

15 MR. TYRELL: The judgment cannot
16 be enforced until the final
17 disposition of the Ecuadorian
18 intermediate court and a decision by
19 Chevron not to appeal further or, if a
20 bond is required, not to post the
21 bond. If it posts a bond, it's
22 required and they then appeal. Not
23 until -- I forget what the name of the
24 court is but it's equivalent to their
25 Supreme Court -- until their Supreme

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2 Court decides it so it should be.

3 HON. WESLEY: After they say that
4 the intermediate court issues a
5 decision, what is the maximum amount
6 of period of time that Chevron, by
7 considering or seeking additional
8 appeals, prior to an actual appeal
9 beginning in the highest court, what
10 is the maximum period of time they
11 could accomplish?

12 MR. TYRELL: I'm not sure but I
13 believe it's a minimum of thirty days.
14 We can certainly find that out and
15 submit it to your Honor.

16 HON. LYNCH: Just so it's clear,
17 I take it what you're saying is if the
18 Ecuadorian intermediate court affirms
19 this judgment which could happen
20 tomorrow or it could happen a year
21 from now since at least in this
22 country appellate courts are not under
23 any deadline, perhaps unfortunately,
24 for litigants with respect to issuing
25 their opinions. I take it you're

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2 saying that's true from Ecuador as

3 well, so we don't know when a judgment
4 might come, we don't know what that
5 judgment might be, and if that
6 judgment is adverse to Chevron, then
7 there would be some further
8 disputation as to whether a bond would
9 be required to appeal to the Supreme
10 Court. That issue would be resolved
11 possibly favorably to Chevron. And
12 either way with if posting a bond is
13 required or without if not required,
14 they would then have an appeal to the
15 Supreme Court but we don't know how
16 long that would take.

17 And your position to this court
18 today is that if all those steps are
19 taken, this judgment would not be
20 appealable -- would not be enforceable
21 until the Supreme Court has ruled;
22 that's what you're telling us?

23 MR. TYRELL: That's correct, your
24 Honor. In fact, I should add my
25 clients, in connection with the de

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2 novo appeal in Ecuador, put in a
3 declaration that they will never seek
4 to enforce this judgment in New York
5 and put in a complementary declaration
6 before Judge Kaplan.

7 So your question leads me to my
8 argument. There's no actual case or
9 controversy here. There is nothing so
10 fixed in form that this court or the
11 district court can seize upon it.

12 And I'd like to turn, if I can,
13 to both of my intertwined arguments
14 which first has to do with comity in
15 China Trade and intertwined with it no
16 case or controversy.

17 The salient case here is of
18 course China Trade. The standard in
19 this circuit is very vile. Used
20 sparingly with great restraint before
21 any antiforesh suit injunction is
22 entered. I suggest to the court that
23 the standard set here in 1987 was
24 reaffirmed by the Supreme Court as
25 recently as June 16 in Smith versus

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2 Bayer, which was an anti-injunction in
3 that case, but the same principles
4 applied. In fact, in the Chesney
5 decision rendered by this court in
6 1991, it said those principles
7 applied, those comity principles a
8 fortiori in the international context.

9 HON. LYNCH: Do you agree, Mr.
10 Tyrell, that this is just a China
11 Trade kind of case, that that's --
12 that this is the sort of simple case
13 where the China Trade standard
14 occurred just like a lot of other

15 cases where Plaintiff sues Defendant
16 in New York and Defendant sues
17 Plaintiff or may sue Plaintiff
18 somewhere else? I would have thought
19 your position would be that this is it
20 even more dramatic than the situation
21 in China Trade.

22 MR. TYRELL: Absolutely, which is
23 why I said I didn't know whether to
24 argue my second point first or my
25 first point second. But in reality,

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2 this is a case where there is
3 absolutely no case or controversy. As
4 you wrote, Judge Lynch, in the
5 Republic of Ecuador opinion, no one
6 knows what's going to happen in
7 Ecuador. In those circumstances, we
8 believe under Dow Jones, under all the
9 principles articulated by this court
10 there is no case or controversy now.
11 That goes to this court's subject
12 matter jurisdiction if you agree with
13 us and the right result, the right
14 result would be to send this back
15 hopefully not to Judge Kaplan but to a
16 different judge or to the wheel with
17 instructions to dismiss this case.

18 This isn't a simple China Trade
19 decision. There is no firm fixed
20 issue that can now be resolved by the
21 district court. And I suggest to you
22 it can never be resolved by a district
23 court in New York because my clients
24 and all of the Ecuadorian plaintiffs
25 have eschewed ever seeking enforcement

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2 in New York.
3 When you look at what the
4 underlying premise is for the
5 substantive law ruling that Chevron
6 seeks, it's the New York Recognition
7 Act. The New York Recognition Act,
8 aside from the fact that it says on
9 its face will not apply unless the
10 judgment is final and enforceable
11 where rendered, and both sides have
12 stipulated that that isn't the case,
13 our clients have said we're not coming
14 to New York when that is met. We're
15 never going to come to New York.

16 HON. LYNCH: I think your client
17 said that after this preliminary
18 injunction action got going.

19 MR. TYRELL: There's no doubt
20 about that, your Honor, there's no
21 doubt about that. But nonetheless --

22 HON. LYNCH: Well, at the time
23 Chevron sought its preliminary
24 injunction and whatever the merits of
25 entry or other arguments, they had no

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2 way of knowing that your clients would
3 never come to New York if indeed your
4 clients at that point had already
5 decided that they would never come to
6 New York; right?

7 MR. TYRELL: What they did know
8 is that there was no ability with a
9 final enforceable judgment to invoke
10 at that time the New York Recognition
11 Act. This was a preemptory strike for
12 an advisory opinion and Judge Kaplan
13 permitted it.

14 HON. WESLEY: Excuse me a second,
15 but I hoping the chair will indulge us
16 just bit.

17 The fact that they choose New
18 York doesn't have to necessarily be
19 tied to whether you decide to come to
20 New York to enforce the judgment
21 because if you're here, present in an
22 in personam sense, they can go
23 wherever they wish because if they can
24 get a judgment precluding you from
25 enforcing a judgment based on in

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2 personam grounds, they can pursue that
3 anywhere that you are, in the
4 jurisdictional sense. So that
5 assurance is not necessarily a
6 jurisdictional deterrent; is it?

7 MR. TYRELL: Let me try to answer
8 your question.

9 HON. WESLEY: I mean, there may
10 be serious questions as to whether the
11 LAP plaintiffs in the Ecuadorian
12 action are here because of what
13 Danziger does.

14 MR. TYRELL: That's what I was
15 going to respond. We don't think
16 they're here under 301 or whatever.
17 But the other point is not right, I
18 don't think, your Honor. We don't
19 agree with that. We think that it
20 would stand the law on its head for
21 the loser in a judgment to be able to
22 go anywhere in the world and select
23 the forum of its choice to argue for
24 nonenforcement. The only substantive
25 law predicate, even if there were

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2 personal jurisdiction over my clients,
3 the only substantive law predicate
4 that lets them come to New York is
5 judgment enforcement. This court has
6 already concluded the case is all
7 about Ecuador.

8 HON. WESLEY: Let me make it
9 easier.

10 If they lived here, if they
11 lived here, wouldn't this be an
12 appropriate forum to seek that
13 determination?

14 MR. TYRELL: I don't believe so.
15 Because the party who wins the
16 judgment can enforce it where they
17 wish.

18 HON. WESLEY: Well, no, I
19 understand that. But if you have
20 personal jurisdiction over them, then
21 you have the ability to preclude them
22 from doing something anywhere.

23 MR. TYRELL: You may have the
24 power but you then have to have a
25 substantive law right and the

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2 substantive law right here is
3 derivative of the -- is based on the
4 Recognition Act and the Recognition
5 Act can't apply. What other
6 substantive law basis could you have
7 to come to just come to New York and
8 go after my client but the Recognition
9 Act?

10 HON. POOLER: Which was
11 preserved.

12 HON. WESLEY: I appreciate your
13 fervor, but the judgment is a piece of
14 property and they own it, your
15 plaintiffs own it. If they're here,
16 wherever they are, that shows an
17 action is here and you have control
18 over them because they're the only
19 people who can enforce.

20 MR. TYRELL: Just if I may, your
21 Honor, I don't want to take any
22 additional time. But in response to
23 your point do they own it, one of the
24 points I was going to get to if time
25 permitted under the China Trade

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2 analysis is they don't own it. The
3 court in Ecuador has decided that a
4 commercial trust to be established
5 under the control of the court in
6 Ecuador will own the judgment, not my
7 clients. My clients are no longer the
8 real party in interest. But the real
9 part is even that can change. Because
10 the de novo intermediate appellate
11 court can make somebody else the real
12 party in interest. So there is no
13 real party in interest in New York now
14 that is firm and fixed as required by
15 the first prong of China Trade.

16 HON. WESLEY: Does Judge Kaplan's
17 order deal with that trust issue?

18 MR. TYRELL: He says yes, that
19 it's one and the same thing because
20 the beneficiaries of the trust are the
21 forty-seven LAPs and the front, the

22 Amazonian Front. Well, if you read
23 the judgment itself, it says the
24 beneficiary is all the residents of
25 the area affected by Chevron's

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2 conduct. And if I could just -- the
3 second piece, it can't be dispositive.

4 HON. POOLER: So you argue on the
5 first ground of China Trade that it's
6 not identity of the parties?

7 MR. TYRELL: We do. But we even
8 argue more persuasively on the second
9 grounds, and you're indulging me with
10 time and I do not want to follow the
11 prior examples so the moment you say
12 stop -- when I clerked for Judge Garth
13 on the Third Circuit, he said the most
14 important thing is to answer the
15 court's questions and even more
16 important to stop. So when you say
17 stop, I guarantee I will.

18 HON. POOLER: Well your time has
19 expired.

20 You're reserving time for --

21 MR. TYRELL: Yes, I reserve three
22 minutes.

23 Would you wish an answer to your
24 second point or not?

25 HON. POOLER: Yes, just answer

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2 that.

3 MR. TYRELL: Just briefly, it
4 can't be dispositive because the law
5 says that every jurisdiction, every
6 foreign country has the right to apply
7 its own standards to judgment
8 enforcement. So whatever Judge Kaplan
9 decides or whoever decides it here in
10 New York can only govern New York
11 enforcement standards can never be
12 dispositive around the world if that
13 judgment is taken to --

14 HON. POOLER: But what I asked
15 you I had more question on --

16 MR. TYRELL: Thank you, your
17 Honor. I'm going to consider myself
18 entitled to respond to that, too.

19 HON. POOLER: He said the
20 recognition under New York was
21 preserved in the original forum non
22 conveniens decision?

23 MR. TYRELL: No, in the original
24 forum non conveniens decision, they
25 unilaterally said we'll make all these

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2 representations to let it go to
3 Ecuador but we're reserving this
4 right. My clients never agreed to

5 anything about that.
6 Do they have a right to try to
7 bring the case into New York? They
8 have the right to try. I suggest they
9 can because of the argument I made.
10 Judge Lynch held that they had a try
11 to try to do something with the BIT
12 arbitration.
13 HON. LYNCH: It wasn't me, it was
14 a unanimous panel.
15 MR. TYRELL: Judge Pooler
16 decided, you decided, and your
17 colleague decided.
18 HON. POOLER: Thank you, counsel.
19 MR. TYRELL: Thank you very much,
20 your Honor.
21 HON. POOLER: We'll hear from
22 your co-counsel.
23 HON. LYNCH: You know, Mr.
24 Tyrell, I used to be able to decide
25 things in my days in the district
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 court but, as the saying goes, now I'm
3 only one-third of a judge. So in this
4 case, it was one-third of a judge that
5 decided this.
6 MR. TYRELL: Your Honor, if
7 you'll indulge me, when I clerked for
8 Judge Garth, it was his first year on
9 the circuit and he had moved up from
10 the district court. He told me he was
11 -- he apologized. He said he hired me
12 for the district court and he said my
13 experience on the circuit would be
14 much less exciting.
15 MR. KEKER: Good morning, your
16 Honors. I'm John Keker. I represent
17 Mr. Danziger. Mr. Danziger, in our
18 view, has been convicted by Judge
19 Kaplan in the court below already
20 without any meaningful opportunity to
21 fight back, to talk back, to present
22 any evidence. But because I have
23 three minutes, I'm not going to talk
24 about that today.
25 There is a silver bullet in this
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 appeal. You've been talking about it
3 already. The silver bullet is that
4 there is no subject matter
5 jurisdiction because there's not an
6 actual controversy before the court
7 first on the preliminary injunction
8 when the preliminary injunction was
9 issued, only on the Declaratory
10 Judgment Act. And then second and
11 equally important to us, there won't
12 be any subject matter jurisdiction in
13 this trial that Judge Kaplan intends
14 to have in November where he's going
15 to try the Ecuadorian court system
16 without ever looking, having a

17 judgment to evaluate.
18 HON. POOLER: Did he set that
19 November day with reference to what
20 the Ecuadorian courts will do?
21 MR. KEKER: Yes, ma'am. Judge
22 Kaplan said he was quite sure the
23 appeal would be immediately affirmed,
24 further showing his attitude, and
25 therefore he was going to set as
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2 speedy a trial as he could, set it in
3 November, promptly went through
4 various machinations to cut Mr.
5 Donziger out of the trial, did it in
6 such a way that Mr. Donziger, because
7 he left him enough intervention rights
8 so that this court has said it's not
9 an appealable order, we have to wait
10 until after Judge -- until after the
11 final decision.
12 So during a period where the
13 LAPs, the Lago Agrio plaintiffs were
14 doing no discovery, not getting any
15 experts, now they've begun in late
16 July, after all this period the case
17 has simply been undefended and it's
18 about to be a show trial where Chevron
19 gets to put on its evidence with the
20 Lago Agrio plaintiffs, if you'll
21 excuse me, basically tethered to a
22 stake like a goat during that trial.
23 HON. POOLER: Is there any
24 indication that should the
25 intermediate court not issue a
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2 decision before the November trial
3 that Judge Kaplan would adjourn the
4 trial?
5 MR. KEKER: Totally the opposite,
6 your Honor. We kept going back and
7 saying please let us intervene now
8 that, for example, Chevron filed
9 twenty-nine experts which they
10 eventually cut down to nineteen
11 experts, making plain that the trial
12 is going to be a do-over of this
13 environmental dispute that's going on
14 in Ecuador, a complete do-over;
15 scientific evidence, whether there was
16 pollution, the whole thing. We said
17 all right, let us in. You're deciding
18 something about whether or not
19 Donziger is guilty of fraud as you've
20 alleged, please let us participate.
21 No way. We're going to go ahead with
22 this. The Lago Agrio plaintiffs filed
23 motions saying there's a difference
24 between extrinsic and intrinsic fraud.
25 You can't try things that are being
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2 tried in Ecuador and were tried by the
3 court. That's intrinsic fraud. No,
4 there's no distinction says Judge
5 Kaplan, we're going ahead with the
6 whole thing.

7 But my point is, with respect to
8 what's before you now, which is the
9 preliminary injunction decision, if
10 there is no -- on this record, if
11 there is no actual controversy, it's
12 very important that that be said now
13 because it will make plain to whatever
14 district court judge handles this case
15 that it cannot be tried, there's no
16 jurisdiction to try it under this
17 severed case. Because they've severed
18 the RICO. The dispute now is whether
19 the judgment in Ecuador is enforceable
20 anywhere in the world.

21 HON. POOLER: Is that the count
22 nine?

23 MR. KEKER: That's count nine.

24 And what Judge Kaplan suggested
25 to Chevron is why don't we sever that,

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2 cut Donziger out of that, and then
3 we'll just try that quickly and I'll
4 make a decision about essentially
5 whether or not Ecuador stinks, if you
6 permit me the colloquialism.

7 What Judge Wesley was asking
8 about are questions that we believe go
9 to what might be considered after you
10 actually have a judgment in Ecuador
11 and then questions about can you use
12 the recognition statute defensively
13 under the Declaratory Relief Act would
14 become important, was there estoppel
15 because there was promises. That
16 would become important. But until
17 that happens and there's no guarantee,
18 nobody knows what's going to happen in
19 Ecuador, I wanted to emphasize one
20 other thing. That not only is it de
21 novo review in Ecuador but both
22 parties are throwing tremendous amount
23 of new information into the record,
24 both arguments and facts. Everything
25 -- the diatribe that you just heard

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2 from Mr. Mastro is being presented to
3 the Ecuadorian court. Presumably at
4 some point they will make a decision.
5 Either Chevron will win or they'll say
6 let's do the case again down in
7 Ecuador or they will say we completely
8 affirm or they will say we partially
9 -- who knows what they're going to
10 say? And who knows what that decision
11 will look like? They may say we've

12 ignored all of this evidence and
13 therefore make the following -- we
14 just don't know. It's completely,
15 purely hypothetical, as this court
16 collectively has said, in the Republic
17 of Ecuador case.

18 HON. LYNCH: Mr. Keker, one other
19 question. You said -- you used most
20 of your argument to the idea that this
21 is premature and that the judgment is
22 not enforceable. There's something I
23 wanted to clarify.

24 Let's suppose it does become
25 enforceable. Some day, I take it, it

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 is the position of your -- I hope of
3 your side of the table that it will be
4 affirmed and it will become
5 enforceable.

6 Are you conceding that at that
7 point it would be appropriate and
8 permissible for Chevron to ask a New
9 York court to apply the New York
10 recognition of foreign judgments act
11 offensively even if the underlying
12 plaintiffs don't come to New York as
13 opposed to defensively to resist
14 enforcement of the judgment in New
15 York?

16 MR. KEKER: I said defensively.
17 I got it mixed up.

18 Absolutely not. At that point
19 that decision would have to be made
20 and those arguments would have to be
21 made. Our position is the New York
22 Recognition Act can only be used or
23 the recognition of judgment act where
24 you claim fraud, you claim it's an
25 impartial tribunal can only be used

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 defensively. If somebody brings the
3 case here, then you can make those
4 arguments. If somebody doesn't bring
5 the case here, you can't, by forum
6 shopping, come to New York, say
7 there's a danger that this is going to
8 be enforced in Kazakhstan and
9 therefore I want a New York court to
10 let me overturn it under the
11 recognition statute when there's
12 absolutely no reason for the court to
13 take that on.

14 HON. POOLER: The court had a
15 memo -- I know you've gone beyond your
16 time -- but the court had a memo that
17 talked about an enforcement strategy
18 that included countries all over the
19 world and the court relied on that
20 memo; didn't it?

21 MR. KEKER: The court -- you can
22 use relied or it certainly cited and
23 used it as its argument for why it

24 made sense.

25 HON. POOLER: Correct.

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 MR. KEKER: What that memo said
3 is we could try -- it was a think
4 piece which you, yourself, identified
5 in another hearing as kind of a think
6 piece and there's probably one like it
7 about resisting enforcement. But
8 basically one of the things it
9 mentioned that the court picked up on
10 is prejudgment attachment. That is
11 magical thinking.

12 I mean, first of all, there
13 hasn't been any prejudgment attachment
14 in all the time that we're there.

15 Second, think of it. You go up
16 and you slap a writ on a pipeline in
17 Kazakhstan and you say a court in
18 Ecuador may some day have a final
19 enforceable judgment and therefore,
20 because this \$200 billion revenue each
21 year corporation might not be able to
22 pay, we'd like to attach this
23 pipeline. I mean, it is -- it's
24 remote, it's kind of silly, and I
25 called it magical thinking.

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2 In our brief, that's our
3 argument about why you can't create an
4 actual controversy out of that kind of
5 magical thinking. An actual
6 controversy has to be more
7 substantial, has to be imminent, has
8 to be kind of real. This idea that
9 some lawyer sitting in an office
10 thought maybe we should think about
11 that in a privileged memo which never
12 should have seen the light of day if
13 it weren't for various rulings, I
14 mean, it's just -- we don't think that
15 makes an actual controversy. And yes,
16 Judge Kaplan used it to create an
17 actual controversy.

18 HON. POOLER: Thank you.

19 MR. KEKER: He gave one paragraph
20 to questions whether or not there was
21 an actual controversy here.

22 HON. POOLER: Thank you, Mr.
23 Keker.

24 MR. KEKER: Thank you, ma'am.

25 HON. POOLER: Mr. Mastro, both

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2 opponents went overtime so I'll be
3 flexible with you.

4 MR. MASTRO: I appreciate it,
5 your Honor, and I will also be
6 cognizant of the time.

7 Mr. Keker just said that Judge
8 Kaplan shouldn't have credited that
9 Invictus memo. He shouldn't have
10 credited all these other statements
11 that come out of the mouths of the
12 plaintiffs' agents themselves, Mr.
13 Donziger and the other lawyers. He
14 credited largely undisputed record
15 evidence that comes right out of the
16 mouths of the plaintiffs' counsel, the
17 plaintiffs' agents, the plaintiffs'
18 attorneys.
19 HON. LYNCH: Wouldn't any
20 plaintiff who had a big judgment
21 against a company with worldwide
22 operations undertake planning as to
23 where it would be advantageous for
24 them to go and enforce the judgment
25 and wouldn't it be a part of that

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 thinking for anybody as to whether a
3 settlement would be more likely if
4 they found the best place among any
5 places?
6 MR. MASTRO: Your Honor, prudent
7 planning on where to enforce is one
8 thing. What Judge Kaplan found and
9 what that memo screams out is not
10 about an enforcement strategy. It is
11 about, their words, using the
12 political connections of the Patton
13 Boggs law firm to find the, quote the
14 path of lease resistance in countries
15 that will not have a, quote, jaundiced
16 eye and won't care whether the
17 judgment was rendered in circumstances
18 that raised substantial doubt about
19 the integrity of the rendering court,
20 obtain, their words, ex parte
21 prejudgment attachments to disrupt
22 Chevron's operations worldwide,
23 pressure it into settlement.
24 HON. WESLEY: Well, you know, way
25 back when I was practicing law in

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 small rural communities, I had a
3 fellow that didn't want to pay child
4 support and I found him on Christmas
5 Eve and I had him thrown in jail. He
6 changed his mind about child support.
7 Sometimes folks have a way of using
8 restraining orders and other things to
9 produce reasonableness.
10 So I mean, seriously, the
11 problem I have here is that presume
12 that this was a judgment by a Canadian
13 trial court and it's a \$12 billion
14 judgment against Chevron in a Canadian
15 trial court and you have reason to
16 believe that the judge was in cahoots
17 with the plaintiff's lawyers.
18 You mean to tell me that because

19 the underlying -- and that they were
20 ready and willing and able to go after
21 this and enforce this against you in
22 Kazakhstan because Kazakhstan
23 regularly recognizes Canadian
24 judgments; we won't worry about other
25 jurisdictions.

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 You mean to tell me that a judge
3 in the Southern District before even
4 an intermediate appeal had been
5 completed would have the appropriate
6 jurisdiction to, under China Trade or
7 any other theory, to enjoin those
8 plaintiffs from pursuing that?

9 MR. MASTRO: Yes, your Honor,
10 under the circumstances presented
11 here. And I think your Honor had it
12 absolutely right. There's no question
13 that New York is not only an
14 appropriate jurisdiction for this
15 action, it's the most appropriate.

16 HON. WESLEY: Don't you have to
17 separate the banality of the conduct
18 from the legitimacy of the process?
19 Don't we have some sense of comity to
20 the legitimacy of the process? Are we
21 just to say to the people of Ecuador
22 you're all corrupt and your process
23 doesn't matter to the United States or
24 a United States federal judge is not
25 going to hear anything about the

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2 legitimacy of your process, a process,
3 by the way, which you invoked?

4 MR. MASTRO: Your Honor,
5 actually, Judge Kaplan hasn't said
6 that. He's issued a --

7 HON. WESLEY: Well, he's issued a
8 restraining order.

9 What's the premise of it?

10 MR. MASTRO: So that he can have
11 a trial to determine whether this
12 judgment was procured by fraud, to
13 determine whether this judgment
14 resulted from a system that failed to
15 enforce due process and impartial
16 tribunal. It's a temporary status quo
17 injunction.

18 HON. WESLEY: Doesn't it seem
19 like you're spending an awful lot of
20 money to finish a trial in November
21 where on the last day of trial the
22 Ecuadorian intermediate court vacates
23 the judgment, finds it's procured by
24 fraud, and absolves Chevron of all
25 liability?

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 MR. MASTRO: If that happens,
3 your Honor --

4 HON. WESLEY: I wonder what the
5 shareholders of Chevron are interested
6 in with regard to the money that's
7 being spent on behalf of Defendants
8 pursuing this.

9 MR. MASTRO: Your Honor, here's
10 why a trial is so necessary and
11 appropriate. It's not simply a
12 question of what's the appeal in
13 Ecuador. There is a judgment that has
14 been issued for \$18.2 billion that is
15 now on appeal. But the record
16 evidence was undisputed, undisputed
17 that these plaintiffs could take that
18 judgment right now. Their lawyers
19 Donziger and Fajardo said they don't
20 plan to wait for the appeal, they plan
21 to enforce now.

22 HON. LYNCH: They've already
23 stipulated that they're not going to
24 do that. And it's clear under law
25 that the judgment is not enforceable.

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 MR. MASTRO: They have most
3 definitely not, your Honor. And it
4 is, under treaty with Latin American
5 countries like Colombia, Argentina,
6 and Venezuela right now something that
7 these plaintiffs could take to those
8 countries and seize Chevron's
9 substantial assets in those countries.
10 There is a real and immediate danger
11 right now, and they never stipulated.

12 HON. LYNCH: This is under
13 Venezuelan law?

14 MR. MASTRO: No, under
15 international Latin American treaty
16 which is undisputed, it's in the
17 Coronel affidavit. I'll be happy to
18 give your Honors the exact cite. The
19 exact cite to that, your Honors, is on
20 pages 6167 through 6170 of part
21 twenty-two of the appendix. Coronel,
22 noted Ecuadorian law expert,
23 undisputed by them, and Judge Kaplan
24 credited there's a Latin American
25 treaty to give them the right to ex

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 parte freeze assets right now in those
3 countries. It's a real and immediate
4 danger right now.

5 HON. LYNCH: To take preliminary
6 steps to enforce an order that is not
7 enforceable under Ecuadorian law?

8 MR. MASTRO: Correct, correct,
9 and that's absolutely the state of law
10 in Ecuador and it's undisputed below
11 that they could be doing that right
12 now and the injunction is the only
13 thing that has held them off.

14 HON. WESLEY: But you then said,
15 in response to Judge Lynch's question,
16 that not all of them have so
17 stipulated.

18 MR. MASTRO: Absolutely.

19 HON. WESLEY: Is that the LAP,
20 the LAP plaintiffs?

21 MR. MASTRO: Absolutely, before
22 this court and Judge Kaplan repeatedly
23 asked why don't you all stipulate,
24 because Danziger can't do it alone,
25 stipulate to forbear, that you won't

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 try to get the judgment or to enforce
3 it. They refused. That's because
4 this is their plan and that's why the
5 Invictus memo is so disturbing.

6 HON. WESLEY: Well, what are you
7 going to do if Mr. Tyrell stands up in
8 open federal court and states they'll
9 stipulate that they'll not take any
10 enforcement actions anywhere in the
11 world pending the outcome of the
12 intermediate court? What do you do
13 then?

14 MR. MASTRO: Well, ask him if
15 he'll do that. He's only here for two
16 of the plaintiffs --

17 HON. WESLEY: But there are only
18 two of the plaintiffs in front of us;
19 aren't there?

20 MR. MASTRO: Your Honor, the
21 others all defaulted so there's
22 default judgments against them. They
23 were all sued in our action.

24 But your Honor, Mr. Tyrell, ask
25 him if he'll do that. Because if he

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 really represents all the plaintiffs
3 and they will come into court and
4 stipulate, that would be different.
5 But I have to say this, I have to say
6 this, they've consistently refused to
7 this court and others.

8 And let me come to a few other
9 points that I think are extremely
10 important because --

11 HON. LYNCH: Let me ask you a
12 question first.

13 About the New York judgment act,
14 do you have any precedent of the New
15 York court or the federal court
16 applying New York law utilizing the
17 New York judgment statute offensively
18 as opposed to defensively to rule that
19 an enforcement -- that the act, forget
20 all the jurisdictional questions and
21 everything else and whether it's right
22 and everything else, that the New York
23 law authorizes an action to prohibit
24 the enforcement of a judgment rather
25 than simply being a direction to the

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2 New York courts as to when they may
3 and may not enforce a judgment when
4 someone asks them to? Do you have any
5 case that utilizes the statute that
6 way?
7 MR. MASTRO: Your Honor, we have
8 not cited such a case.
9 HON. LYNCH: You know one but you
10 haven't cited it? You have had some
11 summer associate research this and
12 that person has not come up with such
13 a case; right? Because there is no
14 such case; right? Am I right or
15 wrong?
16 MR. MASTRO: You're correct, but
17 that's because of the unique
18 circumstances of this case.
19 HON. LYNCH: Now, was there
20 anything in the statute that suggests
21 that it creates an affirmative cause
22 of action, is there any language there
23 that says anything other than these
24 are the circumstances in which a New
25 York court may and may not enforce a
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 foreign judgment when someone asks it
3 to? Is there any language suggesting
4 such a cause of action and, if so,
5 could you point me to it?
6 MR. MASTRO: Your Honor, the
7 statute speaks of the defenses. But
8 this is an action brought under the
9 Declaratory Judgment Act as a
10 declaratory judgment to seek a
11 resolution of that question which is
12 ripe and ready for adjudication now.
13 And as your Honor said --
14 HON. LYNCH: If the shoe were on
15 the other foot, the plaintiff called
16 in a not-yet-enforceable foreign
17 judgment -- and the statute refers to
18 a judgment that is enforceable where
19 made, that's what starts it, because
20 after all, this is a statute about the
21 recognition, not about
22 non-recognition, because when would we
23 recognize it, and the answer is it has
24 to be at square one, it has to be
25 enforceable where made.
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 Are you suggesting to me that a
3 plaintiff holding a judgment that was
4 not enforceable where made could evade
5 that requirement of the statute by
6 coming in and saying, you know, the
7 defendants are saying that this is not
8 going to be enforceable in New York,

9 we'd like a declaratory judgment; that
10 if and when we get an enforceable
11 judgment in this other country you
12 will enforce it? Do you think the New
13 York courts would entertain that kind
14 of action?

15 MR. MASTRO: Your Honor, I think
16 that there's a huge difference between
17 the plaintiffs' attempting to do that
18 and Chevron, in defending itself
19 against this judgment where it faces
20 an immediate jeopardy of them being
21 able to take it into Latin American
22 countries and freezing assets in an ex
23 parte manner, being able to get the
24 protection --

25 HON. LYNCH: So you're not

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 concerned, you're not concerned about
3 the enforcement of the judgment in New
4 York at all, you're concerned about
5 the enforcement of the judgment in any
6 -- pick one out of a hat -- Venezuela?

7 MR. MASTRO: I am concerned about
8 their enforcement of the judgment
9 which seems to us and Judge Kaplan
10 found based on his review of an ample
11 record of how much the government has
12 been influencing on this case the
13 courts that the appeal process is
14 likely not to be any different than
15 the trial process. But your Honor,
16 the fact is what we have here is
17 Chevron going to the only jurisdiction
18 that is sure to apply the New York
19 recognition statute.

20 HON. LYNCH: Of course. New York
21 is the only jurisdiction that is going
22 to apply New York law to decide
23 whether a judgment is enforceable in
24 New York. That makes sense.

25 Again, if the shoe were on the

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 other foot, that is speaking of
3 international comity, how do you think
4 the New York courts would react if a
5 Venezuelan court attempted to enjoin a
6 holder of a judgment from Russia and
7 in New York by enjoining the
8 plaintiffs and saying under Venezuelan
9 law, this is not enforceable so do not
10 go into New York and attempt to
11 enforce a judgment which might be
12 enforceable under New York law because
13 we find it not enforceable under
14 Venezuelan law? Do you think there's
15 any chance that the New York courts
16 would respect such a judgment or
17 should respect such a judgment?

18 MR. MASTRO: No, your Honor, but
19 what makes this case unique, as your
20 Honor knows and as you know, Judge

21 Pooler, there were commitments made.
22 It's not true what Mr. Tyrell told
23 you. What you were actually told on
24 the BIT panel and what Judge Sand was
25 told by the LAPs counsel was that
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 there was, quote, an express agreement
3 to adjudicate these claims in Ecuador
4 subject to only 5304 and that 5304 --
5 that's the New York recognition
6 statute -- gives them, Chevron, the
7 forum and a venue post judgment to
8 challenge any judgment. That's page
9 A3756.

10 HON. POOLER: That's in Texaco.

11 Didn't you just say that you
12 would move to be not judicially
13 estopped from declaring that you were
14 bound by Texaco's agreements?

15 MR. MASTRO: Your Honor, you all
16 defined in your opinion on the BIT
17 stay what rights were reserved to
18 Chevron and you told us that we have
19 reserved the right --

20 HON. POOLER: Excuse me, didn't
21 Judge Kaplan recently conclude that
22 you were not judicially estopped from
23 denying the concessions made by
24 Texaco?

25 MR. MASTRO: Judge Kaplan ruled

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2 based on the evidence before him in
3 the context of motion practice that it
4 remained, as far as he was concerned,
5 a matter that Chevron and Texaco had
6 separate corporate forums.

7 HON. POOLER: And if it was
8 Texaco that reserved the 5304, right?
9 So you want it both ways yet again?

10 MR. MASTRO: I don't, your Honor,
11 I want it the way you all directed the
12 parties which was you all said that
13 having reserved our rights under the
14 New York recognition statute, Chevron
15 was free to assert them whenever and
16 wherever. And if there was no --

17 HON. LYNCH: But isn't there a
18 difference between your having the
19 right to resist enforcement of the
20 judgment which otherwise you said you
21 would pay if someone comes to New York
22 and tries to enforce it, you still
23 have the right to resist, you reserve
24 that right? Is that the same thing as
25 saying that you have the right to have

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 a New York court settle for Australia,
3 for Kazakhstan, for Denmark, for

4 Canada, for Chile, whether under --
5 because the law is not -- the judgment
6 is not enforceable under New York law,
7 assuming that's true, that neither is
8 anyone to try to enforce the judgment
9 in any country where it might be
10 enforceable? Is there any indication
11 that that was either the agreement, if
12 you want to call it that, that the
13 parties struck when you were trying to
14 get the case to Ecuador or your
15 predecessors were or what this court
16 was referring to when that issue came
17 up in the completely different context
18 of whether a BIT arbitration was a
19 violation of that agreement?

20 MR. MASTRO: Your Honor, the
21 short answer to your question is that
22 yes, Chevron should be recognized to
23 have those rights because, because
24 Chevron has the right under the
25 Declaratory Judgment Act when there is

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 a ripe controversy as there is now
3 because that judgment, even if there's
4 still an intermediate appeal level --
5 and that, by the way, will make it
6 final -- it can still be enforced in
7 other countries. So if it is enforced
8 in other countries, those Latin
9 American countries, it will, based on
10 the Invictus memo, it will be used to
11 pressure Chevron and disrupt its
12 operations worldwide, force it into
13 making payment, and therefore it will
14 moot out the proceedings in New York
15 to determine under the New York
16 recognition statute whether this
17 judgment passes muster. And your
18 Honors, that's the right that we
19 supposedly had reserved, that's the
20 right this court said we had reserved.
21 If will never get litigated if that
22 happens.

23 HON. LYNCH: Let's look back to
24 when that decision was made. You
25 succeeded in getting the case

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 transferred to Ecuador. I say you, I
3 understand there's a dispute about
4 who's you in the context. But your
5 side of the table got the case sent to
6 Ecuador by promising that you would
7 pay the judgment except that you
8 reserved certain defenses.

9 MR. MASTRO: Yes, your Honor.

10 HON. LYNCH: And now you're
11 telling me that that means that even
12 though, as you just told me, this
13 judgment might be enforceable today in
14 Venezuela under Venezuelan law, the
15 fact that, if it is a fact, the

16 judgment would not be enforceable in
17 New York authorizes a New York court
18 to trump Venezuelan law along with
19 every other country in the world,
20 whatever it may be, by ordering the
21 plaintiffs not to seek to present the
22 judgment to the courts of sovereign
23 countries to see whether they will
24 enforce it or not?
25 MR. MASTRO: That's correct, your
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 Honor. We're back where we started,
3 correct? We're back in New York
4 because there was a reservation of
5 rights that Texaco, now Chevron, in
6 the BIT stay decision, reserved its
7 rights to challenge under the New York
8 recognition statute. The only way we
9 can challenge the judgment under the
10 New York recognition statute and they
11 can't get around that, this is
12 something that they said was, to this
13 court, an agreement, they said it was
14 our escape hatch that we could
15 challenge under the New York
16 recognition statute. If we don't have
17 the right to come into court in New
18 York to make sure that a New York
19 court reviews the New York recognition
20 statute, what do we have --
21 HON. LYNCH: But what if the New
22 York statute does not recognize a
23 cause of action to do that? What if
24 the New York statute only authorizes
25 the defense which you have reserved in
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 the event it should become relevant?
3 MR. MASTRO: But your Honor,
4 again, the New York recognize statute
5 makes plain that these are defenses to
6 enforcement of a judgment. We have a
7 ripe controversy under the Declaratory
8 Judgment Act.
9 HON. LYNCH: But even assuming
10 that you did, what gives you have the
11 right to a declaratory judgment under
12 New York law to anything beyond the
13 statement that this judgment is not
14 enforceable in New York under the New
15 York statute? Assume you could get
16 that. Assume that you can demonstrate
17 first it is a ripe controversy, that
18 it is for declaratory judgment, and
19 the true answer under New York law is
20 that this judgment is not enforceable
21 in New York.
22 MR. MASTRO: Yes, your Honor.
23 HON. LYNCH: What in the New York
24 law authorizes broader relief than
25 that?
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 MR. MASTRO: Your Honor, the
3 federal court, in entertaining a ripe
4 declaratory judgment action, obviously
5 has the inherent authority right to
6 protect its jurisdiction, to prevent
7 vexatious bad faith litigation, and
8 most importantly to prevent a fraud
9 from being effected.
10 HON. LYNCH: What would be
11 vexatious to go to a country where the
12 judgment might be enforceable under
13 that country's law because the New
14 York court has decided that it's not
15 enforceable under New York law? Why
16 is that vexatious litigation rather
17 than just the right to go to a forum
18 where the law allows something that
19 happens not to be allowed in New York?
20 MR. MASTRO: But your Honor, we
21 know that the aim, as spelled out in
22 the memo, is to bring these foreign
23 litigations as vexatious litigation
24 not necessarily to enforce because New
25 York and the U.S. are, in fact, the
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 jurisdictions where they could
3 potentially satisfy the judgment, they
4 would prefer to go to jurisdictions
5 where they can disrupt Chevron's
6 operations ex parte.
7 HON. POOLER: But isn't that
8 their right to go and enforce the
9 judgment?
10 MR. MASTRO: Not, your Honor,
11 under circumstances such as this where
12 knowingly procuring a judgment by
13 fraud and then are going to use a
14 vexatious litigation strategy to try
15 and shake down a settlement or an
16 extortion statement. No U.S. court
17 should tolerate that kind of behavior,
18 no U.S. court.
19 HON. POOLER: Why wouldn't the
20 Venezuelan court itself look to the
21 quality of the judgment? Do you know
22 for a fact they wouldn't?
23 MR. MASTRO: They say in *Invictus*
24 that they're going to try to find
25 those jurisdictions where they can use
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 their political connections in those
3 courts to --
4 HON. LYNCH: No, no, no, I think
5 what you quoted was that Patton Boggs
6 would use its vaunted ability to have
7 connections everywhere to find out
8 what countries take what kinds of
9 positions on this. That's what it
10 said. What you quoted to us, that's

11 what it said.
12 MR. MASTRO: They said much more
13 than that, your Honor. They said they
14 wanted to identify the path of least
15 resistance, places that wouldn't have
16 a jaundiced eye, they wouldn't look at
17 whether the judgment was procured by
18 fraud. And your Honor, to me, that
19 fundamentally violates U.S. and New
20 York policy, that we don't tolerate
21 judgments procured by fraud, we don't
22 tolerate judgments --
23 HON. LYNCH: Anywhere in the
24 world, New York is in charge of --
25 excuse me, New York is in charge of
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 deciding that we will not tolerate a
3 South African judgment being procured
4 by fraud and enforced in Russia?
5 MR. MASTRO: I think, your Honor,
6 where there has been a reservation of
7 rights, and their own counsel told you
8 and the Southern District during the
9 BIT case that there was an this was an
10 agreement that the New York
11 recognition statute would apply. I
12 think that changes the equation.
13 HON. WESLEY: Are you saying that
14 in essence that stipulation is somehow
15 a choice of law with regard to the
16 stipulation, that somehow that
17 stipulation has a broader sweep than
18 just the particular prospect of coming
19 back to New York and that that somehow
20 you've imprinted New York law onto any
21 ability to enforce the judgment
22 anywhere in the world?
23 MR. MASTRO: I believe, your
24 Honor, that the parties committed that
25 the New York recognition statute would
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1 *** UNCERTIFIED ROUGH DRAFT ***
2 cover enforceability. And the only
3 way to have that determination made
4 and therefore hopefully to give it
5 effect elsewhere around the world is
6 for that determination to be made and
7 that's a determination that Judge
8 Kaplan is prepared to make. And if
9 this temporary preliminary injunction,
10 this is a status quo injunction were
11 to be lifted, you will see, just like
12 you saw a judgment come out of Ecuador
13 in a matter of days, one hundred
14 eighty-eight single spaced judgment as
15 soon as a TR0 entered even though the
16 judge there said he still had fifty
17 thousand pages of the record to go,
18 you will see that appeal decision come
19 out in a red hot second and them
20 trying to enforce around the world.
21 We have a status quo injunction, your
22 Honor.

23 HON. POOLER: We don't deal with
24 predictions here, counsel. Your time
25 is up.

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 MR. MASTRO: I understand. Thank
3 you very much, your Honors.
4 I implore your Honors just one
5 last point, if I may, please, your
6 Honor? I implore your Honors to
7 maintain the status quo injunction
8 because there will be an opportunity
9 for a full trial. But we had other
10 claims in this case as well. It was
11 severed at their request. But we had
12 also RICO and fraud claims that would
13 also have justified injunctive relief
14 here based on the massive fraud that
15 occurred here and Judge Kaplan should
16 have the opportunity to decide whether
17 injunctive relief is appropriate under
18 those claims.

19 HON. LYNCH: If we were to
20 reverse this order, speaking of
21 predictions and what's going to happen
22 in a red hot second, are you telling
23 us that you would then go back to
24 Judge Kaplan and ask to reactivate the
25 RICO claims and seek the same

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 injunction under those claims?
3 MR. MASTRO: Judge Kaplan didn't
4 decide --
5 HON. LYNCH: I know, he didn't do
6 anything with that because he severed
7 it.

8 MR. MASTRO: I don't want to make
9 predictions either.

10 HON. LYNCH: Oh, you don't want
11 to predict what you'll do. You only
12 want to predict what the Ecuadorian
13 intermediate appellate court is sure
14 to do, but you have no idea what
15 you're going to do?

16 MR. MASTRO: Your Honor, I was
17 simply trying not to have predictions
18 about what this court might do, but if
19 this court were to alter the status
20 quo vis-a-vis the dec relief action,
21 I think that we would have every right
22 to go back to Judge Kaplan and we
23 would ask your Honors to give us that
24 opportunity to maintain the status quo
25 while we did that. But we very

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 strongly believe that it was perfectly
3 appropriate under these circumstances
4 for him to enter a status quo
5 injunction and that this would

6 benefit this court would benefit in
7 just a few weeks from now having a
8 full trial record where there would be
9 a full record of the full extent of
10 the fraud here, the full extent of the
11 lack of impartiality and due process
12 in Ecuador, and that this court should
13 decide this case on that kind of a
14 full record, not alter a status quo
15 injunction.

16 HON. LYNCH: I was just wondering
17 if any instructions to Judge Kaplan
18 with respect to what the law is with
19 respect to the New York foreign
20 judgment act would leave Judge Kaplan
21 on his own with respect to what might
22 be appropriate under RICO.

23 MR. MASTRO: And clearly there's
24 the ability to give injunctive relief
25 under RICO and under common-law fraud.

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 Thank you very much, your Honor.

3 HON. POOLER: Thank you.

4 Mr. Tyrell, you've reserved

5 three minutes for rebuttal.

6 MR. TYRELL: Thank you, your

7 Honors, a few quick points.

8 Judge Lynch said doesn't anyone
9 plan for a judgment, hence the
10 invocation of the Invictus memorandum.
11 I'm rather proud of that. I suggest
12 that it's in the record, the court
13 read it it itself. It talks nothing
14 about acting like Somali pirates. It
15 talks about the kinds of opportunities
16 that are available in the world to
17 enforce judgment under the laws of
18 various states, that's all it says, no
19 matter what nefarious tone Judge
20 Kaplan placed about it.

21 Mr. Mastro stands here and says,
22 oh, my God, you're going to go ex
23 parte and try to enforce that
24 judgment. You mean like Mr. Mastro's
25 done in sixteen federal courts around

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 the state using 1782 which is allows
3 you to go ex parte?

4 The important point is the memo
5 and the plan, which was highly
6 preliminary, was to be able to use the
7 law, not the lack of law that is
8 permitted in other countries. There
9 is nothing wrong with that.

10 Judge Wesley made a comment
11 about his experience on Christmas Eve.
12 This court in China Trade made the
13 following observation which I think is
14 pertinent. It says an injunction is
15 not appropriate merely to prevent a
16 party from seeking slight advantages
17 in the substantive or procedural law

18 to be applied in a foreign court.
19 This court has always recognized that
20 the judgment creditor has a right to
21 seek procedural advantages where he
22 goes and enforces his judgment.
23 Judge Lynch asked a question of
24 can you cite any case in which the
25 Recognition Act was used

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 affirmatively. I can tell you we've
3 researched it and I'll give you a very
4 clear answer. We can't find any at
5 all. So it would be groundbreaking
6 for this court to decide and affirm
7 Judge Kaplan that it can be used
8 affirmatively.

9 Judge Lynch also asked a
10 question of Mr. Mastro which I picked
11 up on in which he said so you're
12 really not concerned about enforcement
13 in New York; are you. Well, they
14 can't be because of the stipulation
15 and they couldn't have enforced it
16 here before that anyway.

17 HON. LYNCH: Who stipulated that
18 they weren't coming to New York?

19 MR. TYRELL: All of the
20 Ecuadorian plaintiffs.

21 HON. LYNCH: But all of them
22 haven't conveyed the stipulation that
23 Mr. Mastro suggested with respect to
24 not taking advantage of this Latin
25 American treaty.

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 MR. TYRELL: Right, we disagree
3 that the Latin -- no, they have not
4 made any such stipulation.

5 HON. LYNCH: Well, when you say
6 you disagree with whether that is
7 authorized, if you think it's not
8 authorized, why would there be any
9 problem with doing what Judge Wesley
10 suggested which is all the plaintiffs
11 stipulate that they aren't going to do
12 something that you said they couldn't
13 do anyway. I think that's a pretty
14 small concession to make.

15 MR. TYRELL: Your Honor, there is
16 nothing wrong with it. And if I had
17 the authority today when I'm
18 representing two to get the approval
19 from the people that represent the
20 forty-five, I'm willing to go and ask
21 them.

22 The point is what stipulation
23 was asked of us. The stipulation that
24 was demanded of us was not that of
25 Judge Kaplan. Judge Kaplan asked us

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 to stipulate to the permanent -- to
3 the entry of the preliminary
4 injunction for an indefinite period of
5 time, in short waiving our appellate
6 rights in order to get a fair amount
7 of time to respond to the preliminary
8 injunction here.
9 HON. LYNCH: Mr. Mastro today
10 suggested that at least this of the
11 many, many, many disputed issues
12 between the parties would perhaps
13 disappear, at least this advantage
14 that he is pressing that he says -- I
15 understand you disagree -- that in
16 Latin American countries specifically
17 this judgment could be enforced today.
18 He's asking that the plaintiffs, the
19 Lago Agrio plaintiffs stipulate that
20 they need to do something that you say
21 they can't do anyway. I don't know
22 what the other members of the panel
23 think but I'd be interested in seeing
24 whether we get a letter in some
25 reasonable period of time saying that

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 sure, they'll do that.
3 HON. WESLEY: I was going to ask,
4 is it conceivable that you could or
5 are you willing to contact the other
6 forty-five and see if they will
7 stipulate to not enforcing the
8 Ecuadorian judgment until the
9 appellate process in Ecuador has run
10 its course?
11 MR. TYRELL: I understand that
12 request and we'll get back to the
13 court with a letter.
14 HON. WESLEY: I know your red
15 light is on, but I want to ask you a
16 couple of questions.
17 You raised a personal
18 jurisdictional objection under the
19 law?
20 MR. TYRELL: Yes.
21 HON. WESLEY: And I read the
22 complaint. The complaint, although
23 doesn't necessarily track what Judge
24 Kaplan said, pretty much premises the
25 jurisdictional determination on the

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1 *** UNCERTIFIED ROUGH DRAFT ***
2 fact that the plaintiffs have appeared
3 on other occasions with regard to
4 actions in New York; is that correct?
5 MR. TYRELL: The answer is it is
6 based on two things. There were four
7 actions in New York. Three of them
8 were completely defensive. They
9 appeared, the Ecuadorian plaintiffs --
10 HON. WESLEY: I was going to get
11 to what their status was. But as to
12 plaintiffs, as to being plaintiffs --

13 MR. TYRELL: Only Aguinda, only
14 the original eighteen year ago action
15 in Aguinda was their only affirmative
16 invocation of this court.

17 HON. WESLEY: They intervened in
18 the arbitration but the arbitration
19 has been resolved, the mandate's been
20 issued, there's no more proceeding in
21 that; is that the case?

22 MR. TYRELL: That's correct. An
23 they had continued to try to not lose
24 their privileges in the Donziger 1782
25 action. That's why they stepped in.

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1 *** UNCERTIFIED ROUGH DRAFT ***

2 They said we shouldn't forfeit
3 eighteen years of our attorney-client
4 communications. They did it
5 defensively.

6 HON. WESLEY: I understand
7 the 1782 objection. I'm also
8 interested in just a couple of other
9 things. It seems clear that although
10 in New York -- and maybe it's foolish
11 to say that an individual couldn't do
12 business in New York. I would
13 strongly suspect the New York Court of
14 Appeals would tell us that. But in
15 doing this, in your view, were your
16 clients doing business in New York?

17 MR. TYRELL: Absolutely not, your
18 Honor. And the only analysis of it --
19 for either purposes of general or
20 specific jurisdiction.

21 And if I may respond to you in
22 two ways, the only thing that Judge
23 Kaplan hangs his hat on is to say that
24 all of the actions of Mr. Donziger who
25 happens to maintain his home and an

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2 office in his home in New York, that
3 that is transacting business by my two
4 clients in New York, there isn't a
5 single suggestion that they aimed any
6 communication here, there isn't even
7 anything in the record to suggest that
8 my two, as distinct from the
9 Ecuadorian lawyer, ever spoke
10 personally with Mr. Donziger.

11 HON. WESLEY: Well, transacting
12 business when -- when hiring a lawyer
13 to represent you someplace else and
14 then the lawyer having a dispute with
15 you about a fee, that's the Fishbar
16 case, that's an appellate decision
17 just a couple of years ago, that's 303
18 and all there has to be a substantial
19 nexus in the activities because the
20 transaction of business and the
21 dispute. Here it seems to me that
22 Kaplan has said that because Mr.
23 Donziger sought out financing to
24 further the lawsuit in Ecuador, that

25 that was transacting business on
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2 behalf of your clients.
3 What's your view on that?
4 MR. TYRELL: We disagree strongly
5 with that.
6 First of all, there's no
7 suggestion that my two clients knew
8 anything about what Mr. Donziger was
9 doing. There's no connection
10 whatsoever. My clients basically are
11 indigenous people living in the jungle
12 in Ecuador. They have never probably
13 -- they have never authorized Mr.
14 Donziger to go seek funding for them.
15 There's no evidence to that
16 whatsoever. And you're focusing on
17 the first prong. Of course on the
18 second prong, if it was specific
19 jurisdiction, the case would have to
20 arise out of it. Here the issue, of
21 course, can't.
22 HON. WESLEY: Well, there has to
23 be a substantial nexus between the
24 activity and the claim asserted.
25 MR. TYRELL: And the claim here
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2 is that the Ecuadorian court system is
3 corrupt and that the judgment was
4 obtained by fraud. That wasn't done
5 in New York. The Ecuadorian court
6 system is or is not corrupt. That has
7 nothing to do with New York.
8 HON. WESLEY: Fair enough. Thank
9 you.
10 MR. TYRELL: Thank you very much.
11 HON. POOLER: Thank you, counsel.
12 Thank you all very much. We'll
13 reserve judgment on the mandamus
14 motion.
15 MR. TYRELL: Your Honor, if I may
16 break my rule, we intended but I
17 forgot to, to renew our request for
18 the stay of the proceedings in the
19 district court in light of the
20 argument.
21 HON. POOLER: Thank you.
22 We'll let the room clear out and
23 we'll turn to our next matter.
24 (TIME NOTED: 11:17 a.m.)
25
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