

C3fnchea Argument

1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 CHEVRON CORPORATION,

4 Plaintiff,

5 v.

11 Civ. 691

6 STEVEN DONZIGER, et al.,

7 Defendants.

8 -----x

9 March 15, 2012  
9 10:10 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN

12 District Judge

13 APPEARANCES

14 GIBSON DUNN & CRUTCHER  
15 Attorneys for Plaintiff  
15 BY: RANDY MASTRO  
16 BILL THOMSON  
16 ROBERT WEIGEL  
17 ANDREA NEUMAN  
17 ANNE CHAMPION  
18 CHRISTOPHER M. JORALEMON

19 KEKER & VAN NEXT LLP  
19 Attorneys for Defendant Donziger  
20 BY: MATTHEW WERDEGAR

21 GOMEZ LLC  
21 Attorneys for Hugo Geraldo Cammacho and  
22 Javier Piaguaje  
22 BY: JULIO C. GOMEZ  
23 and

23 SMYSER KAPLAN & VESELKA  
24 Attorneys for Hugo Geraldo Cammacho and  
24 Javier Piaguaje  
25 BY: CRAIG SMYSER  
25 LARRY R. VESELKA

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1 (In open court)

2 (Case called)

3 THE COURT: Good morning.

4 I am allowing 15 minutes for each side. The defense  
5 can divide it anyway they want. Mr. Mastro.

6 MR. MASTRO: Thank you, your Honor.

7 MR. SMYSER: Your Honor.

8 THE COURT: Who are you, sir?

9 MR. SMYSER: I'm Craig Smyser. I am appearing on  
10 behalf of Hugo Cammacho and Javier Piaguaje. I understood this  
11 was an order to show cause directed to us. I understood we  
12 would be expected to address the order to show cause initially,  
13 you would want to hear from us first.

14 THE COURT: This is not your motion.

15 MR. SMYSER: No, but I understood the Court had  
16 directed us to appear here to show cause why the temporary  
17 restraining order should not be granted.

18 THE COURT: The movant speaks first. I don't know  
19 what you do in Texas, but the movant speaks first in New York.

20 MR. MASTRO: Thank you, your Honor. Thank you for  
21 seeing us this morning so quickly.

22 Your Honor, I am going to go right to the heart of the  
23 matter for today because your Honor is very familiar with  
24 attachment law and has written some of the seminal decisions in  
25 this area like Capital Ventures by designation on the Second

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1 Circuit and Davila. A discrete issue here today is whether  
2 under CPLR 6210, this Court should grant a truly temporary,  
3 temporary restraining order "prohibiting the transfer, or  
4 attempted transfer of the defendants' assets until this Court  
5 has a chance to determine the attachment application."

6 Your Honor, the point of this is to prevent these  
7 defendants from frustrating the enforcement of a judgment that  
8 we might eventually obtain. They are principally foreign  
9 domiciliaries.

10 THE COURT: It is more narrow than that, isn't it?

11 It's to prevent them during the pendency of the motion  
12 for an order of attachment --

13 MR. MASTRO: Correct.

14 THE COURT: -- from frustrating the order of  
15 attachment that may or may not issue.

16 MR. MASTRO: Correct, your Honor. That is why --

17 THE COURT: And even if it issues, which may or may  
18 not be levied on attachable property.

19 MR. MASTRO: Correct, your Honor.

20 And I don't ask you to take my word for the fact that  
21 we are in such a situation. Once again, it comes out of the  
22 RICO defendants' own mouths, their representatives, and even  
23 their counsel in opposing this application.

24 Your Honor, the starting point for this is March 1,  
25 the Ecuadorian appellate court, at the LAPs' request, ignoring

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1 directives from a BIT tribunal to the Republic of Ecuador,  
2 including its judiciary, to take all measures to prevent  
3 enforcement, declares nevertheless that the LAPs' judgment is  
4 enforceable.

5 What happens immediately after that? March 2, this is  
6 Exhibit 1272, Pablo Fajardo, their lead counsel in Ecuador  
7 publicly quoted as saying, the judgment is "enforceable" and  
8 that the LAPs will now seek to seize "the company's ships  
9 transiting the Panama Canal as well as its assets in  
10 Venezuela."

11 The very next day, March 3, Juan Pablo Saenz, another  
12 of the LAPs counsel in Ecuador, and a coconspirator in this  
13 case, Fajardo being a RICO defendant who defaulted, he publicly  
14 is quoted as saying, "We can immediately go to enforcement."  
15 "We have several teams all over the world who are ready to  
16 seize tankers, shares and production" and he talks of  
17 assignment and says the LAPs anticipate "a continuous flow of  
18 money into a trust." A trust that he says they have just  
19 "signed up yesterday" in which to assign judgment proceeds.

20 Your Honor, it doesn't stop there. Steve Donziger,  
21 the field general, RICO defendant, March 12. This is Exhibit  
22 2080 -- at 1280, Saenz 1 was 1282. Steve Donziger himself told  
23 Reuters just in the past few days, March 12, that the LAPs  
24 intend to start seizing Chevron's assets around the world. He  
25 used the phrase "within weeks."

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1 Your Honor, it doesn't end there. The defendants'  
2 counsel have left no doubt that we are in just such a situation  
3 where a TRO is necessary.

4 First of all, the status report they provided your  
5 Honor on March 7, they told the Court that "On March 1, 2012,  
6 the Ecuadorian appellate court declared the Lago Agrio judgment  
7 is final and enforceable," their words.

8 Then on March 8, Mr. Kecker and Mr. Smyser wrote this  
9 court seeking delay of these proceedings. Mr. Kecker claimed  
10 "no current emergency."

11 Mr. Smyser said, Anticipating enforcement actions the  
12 LAPs may bring, he said they will take months if not years to  
13 complete. But neither offered to forebear during this interim  
14 period from assigning, alienating, transferring, dissipating  
15 the one asset that they have that could possibly cover a likely  
16 judgment in this RICO case, the \$18 billion Lago Agrio  
17 judgment.

18 March 11, their joint opposition to the TRO, they  
19 showed their hand. They listed all the exceptions they wanted  
20 to a TRO. They wanted, and these are on pages 2 and 3 and then  
21 page 18, their points 4 through 8. They claimed they needed to  
22 be able to make "transfers of interest" in the judgment "to  
23 provide critical litigation funding."

24 And they acknowledged the imminence of enforcement  
25 actions, but claimed they will again "take months to come to

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1 fruition," but ignored pointing out what they have said  
2 repeatedly before, not only in March Saenz and Fajardo about  
3 seizing assets, that their plan is "prejudgment attachments in  
4 those proceedings, proceeding ex parte, seizing assets and  
5 seizing boats.

6 THE COURT: Let me just ask you a question. A few  
7 minutes ago you referred to a statement by Mr. Saenz referring  
8 to a flow of money into the trust.

9 MR. MASTRO: Yes.

10 THE COURT: What is the record support for that?

11 MR. MASTRO: Your Honor, it is Exhibit 1285.

12 THE COURT: Thank you. Sorry to interrupt.

13 MR. MASTRO: No problem. He repeated it in another  
14 press account, which I believe is one of our exhibits, where he  
15 told this to multiple reporters but it is on 1285.

16 THE COURT: Do you have the page reference or not?  
17 When it's convenient.

18 MR. MASTRO: Certainly, your Honor. My colleague will  
19 get it for you.

20 THE COURT: OK. Go ahead.

21 MR. MASTRO: Your Honor, everything that they asked as  
22 exemptions cried out for, they are planning to do exactly that  
23 which they shouldn't be doing during this interim period. They  
24 want to assign.

25 They want to be able to use that judgment to continue

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1 to make the kinds of assignments they have done to Burford and  
2 De Leon and others. That is exactly what they shouldn't do  
3 during this period. This is what they said. They said that  
4 the TRO should be narrowed to "permit them the assignment of  
5 contingent interests in the Ecuadorian judgment during this  
6 interim period." They want to be able to assign contingent  
7 interest in the Ecuadorian judgment. That is page 18, No. 4,  
8 of their request.

9 THE COURT: Even if I were to grant the order of  
10 attachment, and even if the order of attachment succeeded in  
11 reaching any obligation of Chevron to pay the judgment, they  
12 would remain free, would they not, to assign interest in the  
13 judgment subordinate to the order of attachment. Isn't that  
14 correct.

15 MR. MASTRO: Your Honor, that is absolutely correct.  
16 It would be like the equivalent of a second mortgage. They  
17 could assign second positions. But the principal position, the  
18 primary position would be covered by the attachment.

19 Your Honor, they do the same thing in their request  
20 for narrowing No. 6, about wanting to be able to contract off  
21 of that judgment for purposes of litigation.

22 They did the same thing in request No. 7, that they  
23 want assurances that litigation funders will have the "first  
24 priority" if there are such arrangements.

25 And, finally, in No. 8, similarly, they want

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1 assurances that any contractual rights by any persons that have  
2 anything to do with this judgment, that they will be effective.

3 Your Honor, you need to look no further for the need  
4 for this TRO than what they have said publicly, the RICO  
5 defendants since March 1, what their own counsel have said to  
6 this Court they are up to and intend to do.

7 Your Honor, I think I have said enough about their  
8 admissions publicly that not only make a TRO warranted, but  
9 necessary here. I point out, your Honor, the one thing they  
10 didn't say in their papers, the one thing they didn't say, and  
11 I'm sure your Honor will ask them, as your Honor has in the  
12 past, aren't you willing to forebear, do nothing to disturb the  
13 asset during this period?

14 Aren't you willing to assure the Court and the parties  
15 that the status quo would be maintained, and there wouldn't be  
16 any attempt to use the assets, to dissipate the asset, to  
17 assign the asset, to transfer the asset, to seek, to collect  
18 money on the asset to try seizures and prejudgment attachments  
19 on the asset until your Honor has a chance to decide.

20 They say nothing about it. In fact, they say the  
21 opposite. They say they want to be able to do all of that  
22 during this interim period. That ends the inquiry.

23 Your Honor, I will simply say this, the more things  
24 change the more they stay the same.

25 We made an attachment application on full notice,

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1 fully briefed. There is no lack of opportunity for them to  
2 have had their due process. They haven't put forward in this  
3 entire case one shred of evidence, one party declaration on  
4 personal knowledge, one iota of contradiction of our proof in  
5 support of our RICO fraud, unjust enrichment and other claims;  
6 not one shred, no one shred contradicting the Cabrera fraud,  
7 ghost writing; not one shred of proof contradicting the  
8 judgment ghost writing fraud and our other RICO fraud and  
9 unjust enrichment claims.

10 And they haven't put in a shred of evidence to  
11 contradict the compelling evidence in the four affidavits we  
12 have now put in confirming our damages for purposes of this  
13 attachment application.

14 The only thing they hang their hat on now, your Honor,  
15 is the fig leaf, the fig leaf that there has been entry of a  
16 judgment in Ecuador. It has been affirmed. The Ecuadorian  
17 courts tell us now it's enforceable, that should be the end of  
18 the story, you shouldn't even consider the fraud evidence. You  
19 shouldn't even be considering this attachment.

20 That is not the end of story, your Honor.

21 THE COURT: If you want to save some time for your  
22 rebuttal, you want to wrap it up.

23 MR. MASTRO: Certainly, your Honor.

24 I want to say before Mr. Smyser gets up here in fact  
25 the Ecuadoran courts refused to reach the fraud question. In

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1 fact, even after the plaintiffs, having won, sought  
2 clarification to try to get that court to say something on the  
3 issue, that court on appeal said that the court "stays out of  
4 these accusations, preserving the parties' rights to continue  
5 the course of the actions that they have filed in the United  
6 States." That is docket entry 417.2.

7 So this issue is squarely before the Court.  
8 Attachment is warranted, but so critically for today's  
9 purposes, a TRO is absolutely necessary to preserve this asset  
10 until the court has a chance to decide the attachment issue.

11 The Saenz quote that I gave to your Honor, it is  
12 Exhibit 1285, page 6. "We have to play with the timing to  
13 allow the existence of a direct flow of money into the trust.  
14 We signed the trust yesterday so the legal mechanism already  
15 exists."

16 That is the exact quote.

17 Thank you, your Honor.

18 THE COURT: Thank you.

19 Mr. Smyser.

20 MR. SMYSER: Your Honor, I am here to take care of  
21 Javier Piaguaje and Hugo Cammacho two of the 30,000 inhabitants  
22 of the Oriente region affected by the years of environmental  
23 waste left behind.

24 Your Honor, Chevron filed this request for a temporary  
25 restraining order to attach my client's assets claiming, just

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1 as Mr. Mastro has right here, that they are responsible for  
2 sham litigation. That my clients are engaged in fraud, and  
3 have received unjust enrichment from Chevron.

4 These claims are not just bogus, not just without  
5 merit, they are contemptuous and borne of a deep injustice by  
6 an outlaw company.

7 THE COURT: Mr. Smyser, there is no jury here. I have  
8 heard this interminably for over a year, and it would serve you  
9 better to address the legal issue before me.

10 MR. SMYSER: Thank you, your Honor. I appreciate the  
11 opportunity also to respond to the repeated claims that my  
12 clients are engaged in fraud and that they are engaged in sham  
13 litigation and have been unjustly enriched.

14 I would suggest only that if Chevron and its minions  
15 spent a week in the shoes of my clients, living the lives  
16 they've lived, they would understand how bogus the claim is  
17 that they have been unjustly enriched by anything Chevron has  
18 done.

19 Your Honor, let me address the legal failings in  
20 Chevrons request for a TRO. As an initial matter, the Court  
21 lacks jurisdiction over my clients. My clients do not have  
22 sufficient contacts with this forum to satisfy the limits the  
23 law places on jurisdiction over nonresident aliens.

24 We have consistently maintained that these legal  
25 limits do not permit action here against them. We continue to

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1 insist on that position.

2 Secondly, Chevron has not and cannot, nor has it  
3 today, demonstrated imminent harm. No enforcement or  
4 recognition action has been initiated anywhere on earth. If  
5 and when such proceedings are initiated I'm quite sure --

6 THE COURT: Suppose that you tomorrow assigned the  
7 entire judgment to a Kazakhstan company that was purely located  
8 in Kazakhstan?

9 Where do they go if they get a judgment in this case?

10 MR. SMYSER: Your Honor, there are two questions in  
11 your question. First, are my clients capable of assigning the  
12 judgment? As Mr. Mastro just pointed out, the trial court's  
13 judgment requires that the money Chevron pays be deposited in a  
14 trust. That trust is to be used to remediate that --

15 THE COURT: Mr. Smyser, if you were right about that,  
16 that is to say, that your clients are incapable of assigning  
17 anything, then why are you here? Why do you care?

18 MR. SMYSER: Your Honor, I care that both Chevron and  
19 the Court not go into error on this point. That is what I care  
20 about.

21 THE COURT: I had another case yesterday where  
22 conceivably I could have committed an error. I didn't see you  
23 here yesterday.

24 MR. SMYSER: Your Honor, my clients are in your court  
25 at the Court's direction and are responding to the allegations

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1 that Chevron has made and the injunction the Court is  
2 considering.

3 THE COURT: You are telling me, sir, that your clients  
4 are legally incapable of assigning this judgment. Now, of  
5 course the judgment isn't the only property that an order of  
6 attachment could reach.

7 It is not even clear it could reach that at this  
8 juncture. But you are focused on the judgment and you are  
9 telling me your clients don't have the legal capacity to assign  
10 it, and therefore you've come up from Texas to say, Judge,  
11 please don't order my clients not to assign that which they  
12 couldn't assign anyway. I don't understand that. Possibly you  
13 could help me understand it.

14 MR. SMYSER: Your Honor, my point is if the Court  
15 reads the judgment, the judgment provides that the money  
16 damages are paid to a trust.

17 That's my point. That's what the trial court judgment  
18 said. And the Court has an agreed-on translation here in which  
19 that is what the Court says.

20 Now I'm not an expert in Ecuadorian law, but I  
21 understand the Court can read the judgment, Chevron can read  
22 the judgment.

23 Let me, your Honor, if I might, continue with why I  
24 believe this injunction should not be granted.

25 Chevron cannot and has not demonstrated imminent harm.

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1 When Chevron persuaded the Court to enter its injunction first  
2 more than a year ago, Chevron cited the sky was falling, harm  
3 was imminent.

4 Mr. Mastro stood up and said the sword of Damocles is  
5 on our head. It is touching our forehead. And a year later it  
6 must still be there.

7 He said we were entering a world where gas stations  
8 would be without fuel. None of this has happened.

9 Moreover, Chevron in the last year announced profits  
10 of \$79 billion, fourth quarter alone of \$19 billion, both of  
11 which exceed the entire amount of the judgment. Chevron cannot  
12 demonstrate imminent irreparable harm.

13 THE COURT: The question on irreparable harm is not  
14 how much money Chevron is worth. It is whether your clients  
15 will be in a position to satisfy a judgment against them here,  
16 should that come to pass, if they have assigned any of their  
17 property, including whatever interest they might have in the  
18 judgment in Ecuador.

19 That is the question, isn't it?

20 MR. SMYSER: Well, your Honor, that might be the  
21 question on the attachment. The question here on the TRO,  
22 there is a disjunct between what they are seeking in the TRO  
23 and what the attachment is about.

24 THE COURT: No.

25 The question is, the TRO is simply whether I should  
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1 direct your clients to transfer none of their property long  
2 enough for me to deal with the motion for an order of  
3 attachment. And New York law specifically contemplates exactly  
4 such a TRO.

5 MR. SMYSER: Assume for the moment, your Honor, that  
6 my clients have the ability to transfer the judgment. The  
7 attachment which Chevron seeks, the ultimate relief that  
8 underlies this TRO is that they be garnished themselves. It  
9 wouldn't matter, right, that Chevron be garnished. It wouldn't  
10 matter if my clients had assigned all of their interest in the  
11 judgment. If the Court enters the motion for attachment  
12 garnishing Chevron, Chevron doesn't pay a dime.

13 There is no harm to Chevron. Chevron has failed to  
14 show a likelihood of success on the only basis for attachment  
15 against my clients.

16 Count six or unjust enrichment. My clients have  
17 received nothing from Chevron. A prerequisite of unjust  
18 enrichment is that Chevron itself must have enriched my  
19 clients. That has not happened. As we pointed out in our  
20 papers, this Court has more than 15 opinions in which it has  
21 written that in order to state a claim for unjust enrichment  
22 under New York law, plaintiff, Chevron, must show enrichment at  
23 plaintiff's expense.

24 To date my clients have received nothing but contempt  
25 and the back of Chevron's hand, both of which they will

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1 willingly return.

2 There is no quasi in rem or in rem jurisdiction to  
3 justify attachment. There is no assets here for my clients in  
4 New York.

5 One of the purposes of the attachment TRO is to  
6 prevent them from taking assets outside of New York. Since  
7 they have no assets here, there is nothing here to be  
8 transferred. There is no in rem or quasi in rem jurisdiction  
9 to justify attachment.

10 Eighth, and crucially, your Honor, to be entitled to a  
11 temporary restraining order, which is a form of equitable  
12 relief, Chevron must come to court with clean hands. Chevron's  
13 hands are as dirty as they come.

14 Let me just give you two instances. Chevron  
15 improperly manipulated the judicial inspection process. Recent  
16 discovery in another matter forced Chevron to disclose the  
17 secret judicial playbook. In the judicial playbook Chevron set  
18 out how its operatives were going to manipulate the judicial  
19 site inspections. First, before the site inspections occurred,  
20 Chevron operatives took samples at the site to determine where  
21 a sample was free from pollution, where that could be found.  
22 Then, when the inspector arrived, Chevron would direct the  
23 inspection to the predetermined clean site.

24 Next, Chevron maintained two sampling labs, one for  
25 public and judicial consumption, to which it would send

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1 predetermined clean samples, and a second lab to which it would  
2 send dirty or questionable samples.

3 Finally, Chevron engaged two operatives in a nefarious  
4 scheme to attempt to entrap one of the judges in Ecuador in a  
5 bribery. When caught in the act, Chevron first maintained the  
6 operatives worked on their own, but it has subsequently been  
7 forced to admit that it has paid one of the operatives and his  
8 wife more than \$2 million in witness accommodation payments,  
9 including \$1 million in legal fees.

10 Finally, your Honor, in the paper filed last night by  
11 Chevron there are two points. One, Chevron has not pled  
12 vicarious liability for RICO conduct.

13 They allege in the paper they filed last night that my  
14 clients are vicariously responsible for the RICO conduct.  
15 Absent that pleading, there is no pleading to support that, the  
16 TRO on that count must be denied. The only reference to  
17 vicarious liability in Chevron's amended complaint is a  
18 footnote suggesting vicarious liability for tortious conduct.

19 Under well-settled Second Circuit law, RICO is a  
20 statutory cause, statutory civil action claim. A RICO claim is  
21 not a tort. Vicarious liability will not lie for violations of  
22 a RICO statute.

23 It is also a perversion of RICO to say that my  
24 clients, Ecuadorians, one of whom is an inhabitant of a tribe  
25 called the Secoya and the other a campesino were engaged in a

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1 racketeering scheme.

2 THE COURT: Did you intend to leave any time for  
3 Mr. Werdegar?

4 MR. SMYSER: I will leave the time for Mr. Werdegar.  
5 Thank you, your Honor.

6 THE COURT: Thank you.  
7 Mr. Werdegar.

8 MR. WERDEGAR: Good morning, your Honor. I know time  
9 is brief. I just want to make a few follow-up points with  
10 respect to my client Mr. Donziger.

11 TROs are one of the most drastic tools that your Honor  
12 has available and are supposed to be used with very great  
13 caution. And in this case, the TRO that Chevron has asked for,  
14 which the Court is contemplating in this hearing, is one that  
15 would have the effect of preventing Mr. Donziger on its face  
16 from paying for his own litigation in this case and from  
17 seeking funding to continue the litigation in Ecuador.  
18 Transferring any of his assets on the face of the order would  
19 be prohibited, and that could be read as preventing him from  
20 maintaining his family life.

21 There is no immediate and actual harm that would  
22 justify this kind of an order, your Honor.

23 And to cite one of Chevron's own exhibits, Exhibit  
24 1255, they have put a lot of weight on hearsay statements by  
25 Ecuadorian counsel. One statement that they haven't mentioned

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1 to your Honor is in 1255 where Pablo Fajardo is quoted as  
2 saying "the execution of the judgment is not immediate," and  
3 that the payment of compensation could be made within five  
4 years through foreign lawsuits. That is in their Exhibit 1255.

5 So what is pending, what is threatening at most is the  
6 commencement of enforcement actions that will then take their  
7 time through the course of whatever foreign court it is brought  
8 in, but could be months, years, nothing that is going to happen  
9 in the next few weeks before this court has a chance to  
10 consider the full merits of Chevron's attachment motion.

11 THE COURT: The point of the issue is assignments of  
12 interest in the judgment.

13  
14 MR. WERDEGAR: Your Honor, I think that's right. The  
15 only imminent irreparable harm that Chevron has focused on in  
16 its papers and in its motion is the fact that enforcement  
17 proceedings are about to commence Ecuador; and there is a  
18 disconnect between what they are seeking and the showing of  
19 imminent and irreparable harm that they have made.

20 They have not established any imminent harm of the  
21 judgment being assigned. And as Mr. Smyser pointed out, under  
22 what they are seeking and under CPLR 6210, the remedy of a TRO  
23 is available as to the garnishee, which in this case, according  
24 to Chevron, is itself. So the TRO would have to be to prevent  
25 Chevron from transferring the assets that are subject to the

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1 attachment order.

2 Now, your Honor, with respect to, quickly, the  
3 likelihood of success on the merits. We have a fully briefed  
4 pending motion to dismiss before this court that lays out why  
5 none of the claims that Chevron has asserted against  
6 Mr. Donziger are adequately pled. And because they are not  
7 adequately pled there can't possibly be a likelihood of success  
8 on the merits.

9 With respect to RICO in particular, because that is a  
10 focus of their motion, Chevron at this time lacks standing to  
11 bring that claim on two grounds.

12 First, it has not established and cannot establish  
13 that Mr. Donziger has proximately caused any of the harm that  
14 it is alleging. At this point in time, two courts in Ecuador  
15 have upheld the Ecuadorian judgment despite Chevron's best  
16 efforts to present all the same claims they are presenting  
17 here. Those courts constitute an intervening independent actor  
18 that precludes a finding of proximate cause we believe.

19 And then secondly, Chevron's harm remains speculative  
20 and uncertain. It hasn't paid a penny on the judgment, no  
21 enforcement actions have been done, and until the harm, if  
22 there is harm, from the judgment, that's found to be true,  
23 until that harm is known, its claim is unripe, and it lacks  
24 standing under RICO law.

25 Thank you, your Honor.

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1 THE COURT: All right. Thank you.

2 Mr. Mastro.

3 MR. MASTRO: Yes, your Honor.

4 THE COURT: I would like you to address the point  
5 about 6210 and the availability of a TRO to prevent transfer of  
6 assets by a garnishee.

7 MR. MASTRO: Yes.

8 Your Honor, it goes to the heart of what 6210  
9 provides, that it is about preventing the transfer during this  
10 interim period.

11 THE COURT: I understand that. But you are asking for  
12 a TRO against these Ecuadorians and against the Donziger  
13 defendants.

14 How are they garnishees?

15 MR. MASTRO: Your Honor, ultimately under the judgment  
16 Chevron is a party that has the obligations under the judgment  
17 and would be a garnishee. What they are doing, what they have  
18 been doing --

19 THE COURT: You are saying Chevron would be the  
20 garnishee with respect to the order of attachment?

21 MR. MASTRO: Correct, your Honor. Correct.

22 But, your Honor, what they are doing is they are  
23 taking that asset, a judgment that purports to impose an  
24 obligation to Chevron to make a payment to them, and they are  
25 assigning it, assigning it to parties overseas.

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Argument

1 They are doing exactly that which you shouldn't be  
2 doing. They are taking their principal asset, which is this  
3 judgment or claim, and they are saying we want to -- they have  
4 assigned it. They want to be able to assign it.

5 They're doing worse than that, your Honor. What  
6 they're doing is not simply saying we have assigned, and we  
7 want to continue to assign, and the record is replete with  
8 their assignments already, Docket 354, Docket 1122, Docket  
9 1107. There are different assignment agreements already for  
10 portions of their potential judgment and their judgment.

11 What they are also saying now, your Honor, is we want  
12 to be able to assign it, maybe assign it in its entirety. They  
13 have even created a trust for that, where those issues then may  
14 well be decided elsewhere, decided overseas. And they have  
15 also said we want to be able to seek enforcement. And they say  
16 to you, it will take months, if not longer.

17 THE COURT: But that has nothing to do with it, does  
18 it. Because what you are trying to do is to, for the next  
19 week, two, three, four, whatever it takes, to restrain them  
20 from transferring interest in the judgment pending an order of  
21 attachment. And even if I granted that and for that matter  
22 even if you attached the judgment, nothing there would stop  
23 them from trying to enforce the judgment. Right?

24 MR. MASTRO: But, your Honor --

25 THE COURT: Isn't that right?

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Argument

1 MR. MASTRO: Your Honor --

2 THE COURT: Please answer me.

3 MR. MASTRO: Your Honor, that is correct. Although it  
4 may be a contempt of whatever order your Honor issues or  
5 whatever attachment your Honor might ultimately impose.

6 THE COURT: How?

7 MR. MASTRO: For the following reason, your Honor.

8 Let me just explain why pursuing an enforcement  
9 proceeding and seeking, as they have repeatedly said they  
10 would, seizures of company tankers and assets as prejudgment  
11 attachments in those proceedings, even on an ex parte basis, is  
12 in essence taking the judgment and using it to have already  
13 seized overseas Chevron assets, a kind of compulsion or what  
14 they claim are Chevron assets, even though they are those of  
15 Chevron affiliates, and preventing those from being within the  
16 jurisdiction of whatever attachment order your Honor issues,  
17 because those assets will then have been seized overseas.

18 They will have dissipated or in one sense reduced the  
19 size of the judgment, which is their asset that they are  
20 seeking to enforce. So there is the potential for them, even  
21 during this interim period, if they proceed with ex parte  
22 attachment and seizures of vessels, to in essence reduce,  
23 dissipate, or alienate large parts of assets that are otherwise  
24 within the judgment that your Honor will determine.

25 THE COURT: So your position would be that the order  
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1 of attachment, were I to grant it and so forth, would prevent  
2 them from obtaining prejudgment remedies elsewhere?

3 MR. MASTRO: Your Honor, yes, for following reason.

4 It's because the judgment, which is the asset that  
5 your Honor would be issuing the order of attachment regarding,  
6 if they were then able in this interim period to use that  
7 judgment to actually seize Chevron assets and force in essence  
8 a kind of payment during this interim period, because they  
9 would have seized it overseas --

10 THE COURT: Presumably it would bring it within the  
11 jurisdiction of some foreign court --

12 MR. MASTRO: Correct.

13 THE COURT: -- and the resolution by a foreign court  
14 of the rights and the property. And among the things  
15 presumably Chevron would be free to do would be to argue that,  
16 by virtue of the order of attachment, you have regardless, of  
17 the Ecuadorian judgment, a prior interest in the assets, right?

18 MR. MASTRO: Your Honor, that's certainly an argument  
19 we will make. But I think one of the very purposes of the  
20 attachment under these circumstances is that they not be in a  
21 position to do that. The attachment, which your Honor, we  
22 hope, will issue, will in essence be an attachment that doesn't  
23 obligation us during this interim period to have to pay on that  
24 judgment. But they would have tied-up assets overseas, and be  
25 forcing us to litigate about assets that are in fact subject to

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1 the attachment. That's why a TRO is particularly appropriate  
2 under these circumstances.

3 It is also the case that the property itself in an  
4 attachment situation, as your Honor well knows, is  
5 constructively in the possession of the U.S. marshal. What  
6 they seek to do in the interim period, if they were to try to  
7 go ex parte and get seizures, is to take part of that and have  
8 it tied up overseas for litigation overseas. Also, what they  
9 try --

10 THE COURT: I think it's time for you to wrap it up  
11 Mr. Mastro.

12 MR. MASTRO: OK. Also, your Honor, if they assign the  
13 judgment in this interim period, what they are trying to do is  
14 put that particular asset in the hands of others, and therefore  
15 make it potentially a situation that would pervert the ability  
16 of this Court to decide the attachment, to have that asset put  
17 into constructive trust.

18 So, your Honor, we very much believe that a TRO is  
19 absolutely necessary to prevent them from doing exactly what  
20 they say they are going to do, which is assign and attempt to  
21 seize in this interim period.

22 Thank you, your Honor.

23 THE COURT: Thank you. All right.

24 I am taking it under advisement.

25 MR. MASTRO: Thank you, your Honor.

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1 MR. VESELKA: Your Honor, may we can ask one question.

2 THE COURT: Who are you first?

3 MR. VESELKA: I'm Larry Veselka. I am mr. Smyser's  
4 partner.

5 THE COURT: Be seated please.

6 MR. VESELKA: I think, as the Court knows, you have a  
7 response to the attachment due Tuesday and on Monday is our  
8 response to the motion for summary judgment in this case. We  
9 have requested with the Court a short two-week adjournment of  
10 the response to the summary judgment so we can focus on issues  
11 with regard to the attachment. The motion for summary judgment  
12 has some 245 paragraphs to the 56.1 statement.

13 THE COURT: I read your letter.

14 MR. VESELKA: Right. We were going to ask if the  
15 Court was ready to rule on that.

16 THE COURT: You will get a ruling when I'm ready to  
17 rule.

18 MR. VESELKA: Thank you, your Honor.

19 (Adjourned)

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