No. 14-826-cv(L)

No. 14-832-cv(CON)

In the United States Court of Appeals for the Second Circuit

CHEVRON CORPORATION,
Plaintiff-Appellee,
v.

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE,
Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of New York (The Honorable Lewis A. Kaplan)

Reply in Support of Donziger Appellants' Motion for Judicial Notice

JUSTIN MARCEAU
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April 8, 2015

The intensity of Chevron's response is wholly out of proportion to our motion, which merely requests judicial notice of recent publicly available filings in the ongoing arbitration between Chevron and Ecuador. There, an international tribunal is considering all of Chevron's fraud allegations, on the basis of a considerably more developed record. As our motion explains, the filings are appropriately subject to judicial notice—*not* for the truth of their content but rather to establish "the nature and extent of [the parties'] claims and arguments in that proceeding." *Pennecom v. Merrill Lynch*, 2003 WL 21512216, at *2 (S.D.N.Y. 2003).

1. Because this appeal concerns the legal propriety of Chevron's preemptive collateral attack on the Ecuadorian judgment in New York, "the nature and extent" of the claims in other proceedings is directly relevant. This Court has previously held that Chevron's ability to "argue the same points" in any enforcement proceeding shows that "a far better remedy is available." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 245–46 (2d Cir. 2012). The arbitral filings offer this Court the best glimpse at the arguments and evidence that will be considered by an enforcement court, in Canada for example—regardless of what happens here.

Rather than address these legal points, most of Chevron's response just debates the facts of its ghostwriting and bribery allegations. Indeed, Chevron attaches 455 pages of exhibits, consisting mainly of *its own* filings in the arbitration. But all these documents just illustrate our point: A court in Canada, if enforcement

proceedings go forward there, will be able to consider all these arguments, but will be able to do so in a manner that does not threaten the international judgment-enforcement framework described by this Court in *Naranjo*. It is therefore "unclear what is to be gained by provoking a decision" in New York. *Id.* at 246. The disadvantages, meanwhile, are clear: If the decision below is upheld, such "advisory opinions" in New York will be available to "any losing party in litigation anywhere in the word." *Id.*

2. In any event, Chevron's account of the facts is highly misleading and incomplete, and fails to mention that the Republic of Ecuador has just filed a comprehensive rejoinder in the arbitration explaining why. That rejoinder is attached hereto, and the Court may take judicial notice of its filing as well. This filing demonstrates (at 117–168) how the available evidence refutes Chevron's accusation that the Lago Agrio Plaintiffs "ghostwrote" the first-instance judgment.

The linchpin of Chevron's ghostwriting accusation is the testimony of the disgraced judge Alberto Guerra. But forensic evidence now confirms what Guerra's own glaring inconsistencies (and the staggering sums he's received from Chevron) already indicated: that his story is a lie. As the Republic details, an analysis of Judge Zambrano's hard drives shows that Zambrano in fact drafted the judgment:

- "The Judgment document was created on Judge Zambrano's computer on October 11, 2010, and was saved on Judge Zambrano's computer many

times in the succeeding months" (and included "increasing percentages of the final Judgment text" over this time), "contrary to [Chevron's] claim that Judge Zambrano received the Judgment from [Pablo] Fajardo, in electronic form, immediately before its issuance." ROE Supp. Rejoinder 123, 144.

- "Judge Zambrano (or [the typist] working with Judge Zambrano) actively drafted the Judgment on Judge Zambrano's computer starting in October 2010 and throughout November and December 2010," and "conducted legal research and used translation websites" while doing so, "contrary to Guerra's claim that the [Lago Agrio] Plaintiffs provided Judge Zambrano with an electronic copy of the Judgment sometime in late January 2011." *Id.*
- "A portion of the Judgment is found in a version of 'Caso Texaco.doc' on Judge Zambrano's computer dating from sometime before January 19, 2010, contrary to [Chevron's] claim that Judge Zambrano received the Judgment from Fajardo immediately before its issuance." *Id.* at 123.
- "[N]o communications with the [Lago Agrio] Plaintiffs exist on Judge Zambrano's computers," and "none of the Plaintiffs' allegedly unfiled work product was on Judge Zambrano's computers." *Id.* at 144.
- "No email attachments containing the Judgment were opened on Judge Zambrano's computer," and "no USB flash drives were used on Judge

Zambrano's computer during the time period when the Plaintiffs allegedly gave Judge Zambrano the final Judgment." *Id.* at 123, 144.

The Republic's filing also reveals what a forensic analysis of Guerra's computer found—nothing. "No draft (or any portion thereof) of the Judgment. No orders (draft or otherwise) issued during Judge Zambrano's second tenure. No emails reflecting any communications between or among Guerra, Judge Zambrano, or the Plaintiffs, let alone any reflecting an illicit conspiracy. And no copies of any of the Plaintiffs' allegedly unfiled work product." *Id.* at 152 (bullets removed; capitalization and punctuation altered). Moreover, as the Republic explains (at 140–42), the Lago Agrio Plaintiffs' counsel sent numerous internal emails in the months and weeks before the judgment was issued demonstrating that they did not know when or how Judge Zambrano might rule.

Putting all this evidence together, there is only one conclusion: "The Plaintiffs did not ghostwrite the judgment." *Id.* at 117 (capitalization removed).

CONCLUSION

For the foregoing reasons, the Donziger Appellants respectfully request that the Court grant their motion for judicial notice.

Dated: April 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2015, I electronically filed the foregoing reply in support of the Donziger Appellants' motion for judicial notice with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: April 9, 2015

/s/ Deepak Gupta
Deepak Gupta