SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

In the Matter of Steven R. Donziger,
an attorney and counselor-at-law:

Attorney Grievance Committee for the
First Judicial Department,

Petitioner,

Steven R. Donziger, Esq.

Respondent.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affirmation of Martin Garbus, respondent will move this Court at the Courthouse, located at 27 Madison Avenue, New York, New York 10010, on March 25, 2019 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 2221 granting reconsideration of an Order of this Court, dated January 17, 2019 ("January 17 Order"), or, in the alternative, pursuant to CPLR 5602(b) for leave to appeal the January 17 Order to the Court of Appeals, and also granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that, pursuant to CPLR 2214(b), answering papers, if any, must be served at least seven (7) days prior to the return date of this motion.

Dated: New York, New York
March 8, 2019

OFFIT KORMAN, P.A.

By: /S/
Martin Garbus

10 East 40th Street, 25th Floor
New York, NY 10016
(212) 545-1900

Attorneys for Respondent Steven Donziger

Of Counsel:

Professor Charles Nesson
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1525 Massachusetts Avenue
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TO: George A. Davidson, Esq.
Pro Bono Special Counsel
Naomi F. Goldstein, Esq.
Of Counsel
Attorney Grievance Committee for the
First Department
61 Broadway
New York, New York 10006
Attorneys for Petitioner

GARBUS AFF.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

In the Matter of Steven R. Donziger: Attorney Grievance Committee for the First Judicial Department, Petitioner, Steven R. Donziger, Respondent.	**AFFIRMATION**

MARTIN GARBUS, an attorney admitted to practice in New York, affirms under penalty of perjury as follows:

1. I am a partner in Offit Korman, P.A., attorneys for respondent Steven R. Donziger. I submit this affirmation in support of his motion for reconsideration of this Court order, dated January 17, 2019, and attached hereto as Exhibit A ("January 17 Order"). In the alternative, respondent moved for leave to appeal the January 17 Order to the Court of Appeals.

2. This motion is timely because the January 17 Order was served on respondent by regular mail on January 31, 2019.

3. Before he was suspended on an interim basis by this Court, respondent was a member of the Bar of the New York with an unblemished disciplinary history who has worked in the field of corporate accountability his entire career (with the exception of his work as a criminal justice public defender in his first years of practice). For all intents and purposes, he is now facing disbarment by force of a decision of the United States District Court for the Southern District of New York. The federal court ruled in the context of a civil RICO litigation that

respondent (and others associated with him) had bribed an Ecuadoran judge named Zambrano in order to win a judgment in Ecuador against Chevron, a large American oil company.

4. Respondent was suspended on an interim basis by this Court on the basis of the federal ruling, which this Court made subject to collateral estoppel treatment. John Horan was then appointed as referee pursuant to 22 NYCRR § 1240.9(c). On November 19, 2018, following his appointment, Referee Horan made the following findings:

a. "To argue that respondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer, is to overlook the substantial differences in the proceedings. There is an obvious asymmetry in the case before Judge Kaplan and the case now underway to sanction respondent."

b. "Respondent was faced with an equity case" after Chevron strategically withdrew its legal case "without a jury" with the court refusing to exercise discretion to convene jury in case turning almost completely on witness credibility "to invalidate a foreign judgment brought against him and others in which the District Judge, in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron."

c. "In the case before Judge Kaplan the standard of 'proof beyond reasonable doubt' was not applied to the facts presented."

A copy of Referee Horan's decision (without exhibits) is attached as Exhibit B.

5. As Referee Horan concluded based on these facts, and as this Court should conclude: "It is open to question whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence." *See* Exhibit B.

6. In light of Referee Horan's factual findings raising questions about the reliability of Judge Kaplan's findings, none of Judge Kaplan's findings should stand as unquestionable and unquestioned proof of their asserted truth. Most significantly, Judge Kaplan's finding that "Donziger and [his clients] bribed former Judge Zambrano" should not stand in this disciplinary proceeding.

7. In this proceeding, the finding made by Judge Kaplan that respondent bribed Judge Zambrano to win judgment against Chevron is put forward as incontrovertible proof warranting suspension and disbarment. This most damaging finding was made by Judge Kaplan based on his crediting a single witness, Alberto Guerra, and was the only one of Judge Kaplan's multiple findings for which Alberto Guerra's testimony was "critical" (as described by Judge Kaplan himself in his cost order). Exhibit C at 13.

8. This finding is itself evidence of a corruption of judicial process by Chevron's army of lawyers insofar as it appears to rest on nothing but the credibility of their paid witness. Even Judge Kaplan no longer stands behind the credibility of Alberto Guerra. When respondent, in context of the cost proceedings, brought post-trial forensic analysis of Zambrano's hard drives definitively demonstrating that Guerra's "bribe" story was false in every relevant respect, Judge Kaplan brushed off concern for Guerra's credibility and pointed at other aspects of his judgment for Chevron. He dismissed concern for Guerra's credibility[1] without either consideration on the merits or concern for the downstream preclusive collateral estoppel that this Court has been

[1] Specically, Judge Kaplan remarked: "Donziger overlooks the fact that the testimony of Guerra was far from indispensable to the [RICO] judgment rendered in this case. ...[T]this Court would have reached precisely the same result in this [RICO] case even without the testimony of Alberto Guerra." Exhibit C at 12.

asked to apply in order to silence respondent and prevent him from mounting a meaningful defense of his license.[2]

9. The question on the table is whether this Court's estoppel order of January 17, 2019, should be reconsidered, or alternatively whether respondent should be allowed forthwith to appeal. This Court's order is clear, simple and definitive. Estoppel, particularly on the judicial bribery issue, constitutes a continuing unwarranted slander on respondent's professional reputation and status. It denies to respondent any opportunity in any court of New York to contest a factual finding of criminal conduct made by a single federal judge without a jury in a civil process initiated and dominated by the corporate defendant, from who respondent had won judgment. Respondent has a due process right to be heard. He should not be treated as convicted of judicial bribery based on a discredited and abandoned finding. Respondent's claim to an opportunity to contest his asserted professional misconduct in a court of New York implicates the due process, New York State sovereignty, the honor of the bar of New York, and the concept of a privilege in practicing law on behalf of indigenous people that exceeds a mere property interest and draws strength from the liberty interests of respondent's former clients.

Dated: March 8, 2019

/s/

Martin Garbus

[2] Much of the evidence making Guerra incredible was not adduced until after Judge Kaplan made his finding now subject to the collateral estoppel order. Referee Horan must be allowed to hear such other evidence in the course of formulating a sanctions recommendation. Collateral estoppel does not mean "turn a blind eye." It means forbidding relitigation of the same issue over and over.

EXHIBIT A

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on January 17, 2019.

Present - Hon. John W. Sweeny, Jr., Justice Presiding,
Dianne T. Renwick
Rosalyn H. Richter
Sallie Manzanet-Daniels
Marcy L. Kahn, Justices.

In the Matter of Steven R. Donziger,
(admitted as Steven Robert Donziger)
a suspended attorney:

Attorney Grievance Committee,
for the First Judicial Department,
Petitioner,

Steven R. Donziger
(OCA Atty. Reg. No.2856052),
Respondent.

M-5782

An order of this Court having been entered on July 10, 2018, finding respondent (who, as Steven Robert Donziger, was admitted to practice as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on November 24, 1997) guilty of professional misconduct based on the doctrine of collateral estoppel, referring the matter for a sanction hearing, and suspending respondent from the practice of law in the State of New York, effective immediately, and until further order of this Court (M-5635),

And an order of this Court having been entered on August 16, 2018, granting respondent's motion for a post-suspension hearing pursuant to 22 NYCRR 1240.9(c)(M-3911),

And the Attorney Grievance Committee for the First Judicial Department, by Jorge Dopico, its Chief Attorney (George A. Davidson, pro bono special counsel, Naomi F. Goldstein, of counsel), having moved this Court on November 26, 2018, for an order (1) declaring that the Referee's responsibilities in this matter do not extend to reexamining this Court's ruling on

collateral estoppel; and (2) staying the post-suspension hearing scheduled for December 4-5, pending the Court's ruling on this motion,

And an interim stay of the post-suspension hearing pending the determination of this motion having been granted by a Justice of this Court by order entered November 26, 2018,

And respondent, by his attorney, having submitted a Memorandum of Law in opposition, and the Committee, having submitted a reply,

Now, upon reading and filing the papers with respect to the motion, and the amicus curiae brief filed by Charles Nesson, Esq. (See order, M-6435, entered simultaneously herewith), and due deliberation having been had thereon, it is unanimously,

Ordered that the motion is granted to the extent of declaring that the Referee may not reexamine this Court's determination, based on the doctrine of collateral estoppel, that respondent committed professional misconduct (M-5635), and that the post-suspension hearing is limited to whether the professional misconduct respondent committed warranted his interim suspension pursuant to 22 NYCRR 1240.9(a).

ENTER:

CLERK

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT
STATE OF NEW YORK

I, SUSANNA ROJAS, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on 1/17/2019 and that the same is a correct transcript thereof, and of the whole of said original.
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 1/24/2019

CLERK

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON : FIRST JUDICIAL DEPARTMENT

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In the Matter of Steven R. Donziger,
(admitted as Steven Robert Donziger),
an attorney and counselor-at-law:

Attorney Grievance Committee
For the First Judicial Department,

Petitioner,

Steven R. Donziger, Esq.,
(OCA Atty. Reg. No. 2856052),

Respondent.

----------X

DECISION ON PROCEDURE FOR THE POST-SUSPENSION HEARING UNDER 22 NYCRR 1240.9(c)

In its August 16, 2018 order granting respondent's request for a Post-Suspension hearing, but reaffirming its Order of July 10, 2018, suspending respondent upon a finding that there was "uncontroverted evidence that respondent engaged in serious professional misconduct immediately threatening the public interest," the court appointed the undersigned to hold "the (22 NYCRR) 1240.9 hearing and to report his finding to the Committee."

With the consent of the Attorney Grievance Committee (AGC) and the Referee, the parties have proposed procedures with respect to the Post-Suspension Hearing allowed by 22 NYCRR 1240.9 (c), and requested by respondent.

Respondent Donziger has, by one of his counsel, Martin Garbus, made a proposal in two parts: first he requests the opportunity "... to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings." If respondent is "...successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the ... Committee would present evidence against him, and he would

have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own."

As an "alternative" respondent argues that due process allow him the "... opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him." See letter dated October 19, 2018, submitted by Martin Garbus, and made a part of the record, Exhibit A.

The AGC has presented a proposal which argues that in this case the doctrine of collateral estoppel should preclude any hearing at which the findings of Judge Kaplan, as affirmed by the Second Circuit, are contested. It argues that in this case the Post-Suspension Hearing becomes merged with the Sanctions hearing as the Appellate Division has already found that suspension is warranted pending a sanctions hearing, and a separate Post-Suspension Hearing is not required to serve due process, respondent having already had due process before Judge Kaplan. See letter dated October 22, 2018, by George A. Davidson, Pro Bono Special Counsel, and Naomi F. Goldstein, Of Counsel to the Attorney Grievance Committee, also made a part of the record. The AGC also submitted a memorandum of law as to what evidence is admissible at a Section 1240.9(c) hearing, both documents are attached as Exhibit B.

Having reviewed the record in this case, the decision of District Judge Kaplan, the affirmance of the Second Circuit, the per curiam decision of the Appellate Division, and the submissions of the parties and their citations of law, it is not clear to me that there is an easy answer to the position of respondent. However, as Referee, it is my responsibility to rule on the application of collateral estoppel, and on any other procedural or evidentiary matter before me.

In re Abady, 22 A.D3d 71. To argue that respondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer, is to overlook the substantial differences in the proceedings. There is an obvious asymmetry in the case before Judge Kaplan and the case now underway to sanction respondent notwithstanding similarity or even identity of factual issues.

In particular, in the U.S. District Court, respondent was faced with an equity case without a jury to invalidate a foreign judgment brought against him and others in which the District Judge, in so many words, but in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron. It is doubtful that if an indictment in the same terms had been brought by the United States Attorney, respondent would have elected to have a trial by a single judge and would have waived his right to a trial by jury. Furthermore, in the case before Judge Kaplan the standard of "beyond a reasonable doubt" was not applied to the facts presented. Judge Kaplan applied the civil standard of a preponderance of the evidence as the law requires. Other material differences can be noted, such as the lack of notice to respondent that his status as a lawyer was in jeopardy before Judge Kaplan, or for that matter, notice that he was, in substance, facing potential criminal charges regarding the judgment at issue. For reasons not readily apparent, on appeal to the Second Circuit respondent did not appear to contest the sufficiency of the evidence supporting any of the factual findings of the District Court. Instead, respondent raised jurisdictional defenses to no avail.

Finally, it is open to question, at least initially in this Post-Suspension hearing whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence.

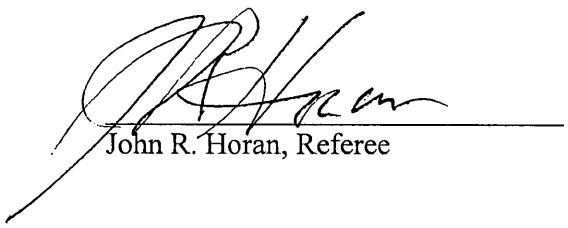
However, I am inclined to allow respondent latitude in his defense to the Charges against him in this proceeding, and to reserve my decision as to whether collateral estoppel should be applied in these circumstances. This leads me to accept both the second part of respondent's First Proposal, *i.e.*, that part stated as "Alternatively, due process requires..." (Garbus letter, page 3) and the Second Proposal, as stated in the Garbus letter. It is not my intention to allow respondent to re-try the case against him before Judge Kaplan, but rather to allow him a hearing to address some or all of those findings in a way that is reasonably fair and practical. Counsel states that he needs two days for this, "approximately." There can be no discernible harm to the "public interest" by this approach. The time to be allowed will be flexible and not restrictive, but not expandable without good cause.

The intention is to have an actual "hearing" pursuant to 22 NYCRR 1240.9(c), where respondent can address the Charges against him as he sees fit, even to the point of disagreeing with, or providing context to the facts in the first instance found by the District Court, and affirmed as found by the Second Circuit, on the ground that a strict application of the collateral estoppel doctrine, in the circumstances before me, may place respondent in an unfair position, and one he likely could not have foreseen as he set out in the Southern District Court to defend the judgment he obtained in Ecuador.

All parties will meet as re-scheduled on December 4; the DDC will be assumed to continue its position that no further hearing is required post-suspension, in this case. The respondent will be prepared to proceed with his evidence, following the guidelines of this

decision. As agreed, the hearing will continue to December 5, and future hearings including the Sanction hearing will be scheduled at the convenience of the parties.

Dated: New York, New York
November 8, 2018



John R. Horan, Referee

EXHIBIT C

proceedings? Held in abeyance until when? And what possible relevance might these speculative possibilities, if any there are, have to the taxation of costs in this case? All of that is unexplained.

The judgment of this Court is final and enforceable. It stands, regardless of whether courts or other "bodies" outside the United States recognize or enforce the Ecuadorian judgment or comment on testimony of Guerra either before this Court or before any other body.

Second. Although the foregoing is more than sufficient to dispose of Donziger's argument, it bears mention that Donziger overlooks the fact that the testimony of Guerra was far from indispensable to the judgment rendered in this case. As the Court's opinion makes clear, this Court would have reached precisely the same result in this case even without the testimony of Alberto Guerra.

The Court found that Donziger and his co-conspirators, among other misdeeds, (1) blackmailed Judge Yanez to abandon the judicial inspections and to appoint Cabrera as the global expert, (2) corrupted Cabrera, (3) wrote Cabrera's report, (4) falsely passed off Cabrera's report as the work of an independent and impartial expert, and (5) ghost-wrote former Judge Zambrano's purported decision which demonstrably relied on the fraudulent Cabrera report notwithstanding its disclaimer.[40] The first four of those findings were made entirely without regard to Guerra's testimony. And Guerra's testimony was not essential to the fifth. Moreover, the Court held that this

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reportedly has rejected his suit. *Id. Lago Agrio: Argentine Court Refuses to Enforce Ecuadoran Judgment*, (available at https://lettersblogatory.com/2017/11/02/lago-agrio-argentine-court-refuses-to-enforce-ecuadoran-judgment/#more-25606 (last visited Dec. 5, 2017); *see also id. Lago Agrio: The Argentine and Brazilian Developments, In English* (available at https://lettersblogatory.com/2017/11/08/lago-agrio-the-argentine-and-brazilian-developments-in-english/ (last visited Dec. 5, 2017).

40 *Chevron Corp. v. Donziger,* 974 F. Supp. 2d at 482-502, 558-64.

fraudulent behavior warranted equitable relief with respect to the Ecuadorian judgment. It did so without necessary regard to whether Donziger and the LAPs bribed former Judge Zambrano, the only point on which Guerra's testimony was critical.[41]

There is no valid reason to delay the taxation of costs on the theory that someday, somewhere, some other body may comment on Guerra's credibility in a manner more to Donziger's liking.

C. Change of Venue

Donziger argued that the Clerk should defer taxation of costs based on an assertion that the chair of this Court's Grievance Committee has made a complaint against him to state disciplinary authorities.[42] This, he asserted, would justify transfer of this case to another court. Deferral of the costs issue was warranted, he said, because he would "be taking up this issue with the district court and if necessary with an appellate court with the ultimate aim of having all post-trial issues moved to a different and non-conflicted venue for resolution."[43]

Donziger has provided no evidence, whether by affidavit or by filing a copy of the supposed letter, that any such complaint was made. Assuming, however, that such a complaint was made, it would be immaterial here. There is no basis for the assertion that the law requires or even

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41 *Id.* at 564-66.

42 The basis for the argument apparently is a claim by Donziger that he has received a copy of such a letter. He has not submitted an affidavit to that effect nor a copy of any such letter. As there is nothing in the record to support Donziger's assertion, we refer to it as "alleged."

43 DI 1925, at 7.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

In the Matter of Steven R. Donziger,
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Petitioner,

Steven R. Donziger, Esq.

Respondent.

Index No.: 003839/2014

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SUZY KIM, being duly sworn, deposes and states:

I am not a party to this action, am over 18 years old and reside in New York, New York. On March 8, 2019, I served a true and correct copy of the enclosed Notice of Motion with Affirmation of Martin Garbus via Regular U.S. Mail upon the following parties:

George A. Davidson, Esq.
Naomi F. Goldstein, Esq.
Attorney Grievance Committee for the First Department
61 Broadway
New York, New York 10006

Suzy Kim

Sworn to before me this
8th day of March, 2019

Notary Public

JENNIFER A. CARMICHAEL
Notary Public, State of New York
No. 01CA6184672
Qualified in Kings County
Commission Expires April 7, 2020