IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE HUGO GERARDO CAMACHO NARANJO AND
JAVIER PIAGUAJE PAYAGUAJE,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(NO: 11-CV-0691-LAK; 11-CV-3718-LAK)

PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

On February 1, 2011, Chevron Corporation ("Chevron") filed in the United States District Court for the Southern District of New York ("District Court") a Complaint against the named plaintiffs ("Ecuadorian Plaintiffs"), and certain of their counsel and litigation consultants, involved in an action currently pending against Chevron in the Provincial Court of Justice of Sucumbíos ("Ecuadorian Court") in Lago Agrio, Ecuador. The action arises from Chevron's destruction of the Ecuadorian Amazon jungle and poisoning of its inhabitants as a result of the company's substandard exploration and drilling operations in that region between approximately 1964 and 1990 ("Lago Agrio Litigation"). Chevron's Complaint demands a declaration that any judgment ultimately issuing from the Ecuadorian Court is unenforceable anywhere in the world. To that end, Chevron sought to enjoin the Ecuadorian Plaintiffs and other defendants from asking any court throughout the world to recognize the judgment—all this before the judgment was even rendered. Chevron's Complaint also threatens its litigation adversaries with the potential for untold millions of dollars in liability in the form of a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"); the company now maintains that the eighteen-year effort to hold Chevron accountable for poisoning a huge swath of the Amazon rainforest is nothing more than an extortionate racketeering enterprise.

That Chevron's extraordinary gambit found its way, on the eve of judgment in Ecuador, into the court of the Hon. Lewis A. Kaplan is no mere happenstance. Chevron's "non-enforcement" and RICO Complaint was preceded by a year-long series of discovery actions filed in sixteen different district courts around the country under the auspices of 28 U.S.C. § 1782, purportedly in aid of the Lago Agrio Litigation. One district court judge used the soap box of a limited discovery proceeding to usurp the role of the Ecuadorian court and pass judgment on the merits of the underlying case; issued a gratuitous condemnation of the Ecuadorian Plaintiffs and everyone associated with them; and, in the process, became Chevron's single greatest ally in its eighteen-year effort to evade liability: that district court judge is Judge Kaplan.

Chevron's § 1782 action against the Ecuadorian Plaintiffs' lead U.S. counsel, Steven Donziger, presented Judge Kaplan with a narrow, rather mundane question: whether or not to allow some amount of discovery. Judge Kaplan ultimately found that Chevron was entitled to the entire contents of Mr. Donziger's eighteen-year case file on two grounds: (1) by failing to produce contemporaneously with his motion to quash (in which he objected to the subpoenas on privilege grounds, as well as to the scope of the subpoena) a privilege log covering the many thousands of documents in his file, Mr. Donziger had waived on behalf of the Ecuadorian Plaintiffs any and all privileges; and, (2) in

any event, Judge Kaplan concluded that Mr. Donziger had not really functioned as a lawyer, but rather, as "some sort of a PR guy," and thus it was highly unlikely that any of his documents would be privileged.[1] (A602; A771-72.) Notwithstanding the narrow, technical nature of these issues, Judge Kaplan proceeded to write a 54-page opinion in which he gratuitously repeated Chevron's twisted version of the facts of the underlying environmental litigation, commenting on events and circumstances well outside the purview of the limited discovery issue before him. In so doing, Judge Kaplan manifested his disdain not only for the Ecuadorian Plaintiffs and their counsel, but also for the Ecuadorian Court and the country itself: the Ecuador action was a game dreamed up by American plaintiffs' lawyers; Chevron bore no responsibility for any damage because it was actually Texaco, Chevron's predecessor, which operated in Ecuador; the claims

[1] Judge Kaplan's blithe mischaracterization of Mr. Donziger's role is early evidence that his partiality clouds his view of each and every facet of the case. As long-time counsel to the Ecuadorian Plaintiffs, Mr. Donziger performed many of the functions commonly carried out by lawyers in *any* case, including discussions with co-counsel, clients, and clients' representatives regarding litigation strategy, the writing of briefs, research and analysis of discrete legal issues, interviewing clients to adduce relevant facts, and retaining co-counsel and consultants. Other functions, such as attracting media attention to his clients' cause, lie at the very *core* of human rights lawyering. *See, e.g.*, D. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2047-48, 2076 (2008) ("[L]awyers committed to social causes have grown more strategic, proactive, and collaborative. They are less reliant on litigation, and more innovative in their use of multiple legal, political, and educational approaches."). The fact that Mr. Donziger performed more than the "traditional" lawyer functions does not warrant derisively labeling him as "some sort of PR guy" in order to overcome the presumption against taking discovery from an active lawyer.

were barred by a release; and Ecuador's state-owned oil company was responsible for any pollution that exists today. These matters were squarely committed to the jurisdiction of the Ecuadorian Court and unrelated to the question of whether Mr. Donziger's documents were privileged. These matters were even further removed from the question of whether Mr. Donziger had waived his clients' privilege by way of a purported procedural misstep of the most technical nature. Judge Kaplan was equally unabashed in making known his prejudice toward the Ecuadorian court system. At a very early juncture, he stated that if the case were pending in a country more deserving of his respect, his adjudication of Chevron's discovery demands would take on a much different tone. At the close of one soliloquy in which Judge Kaplan recited his cynical views on the merits of the Ecuadorian Plaintiffs' eighteen-year "game," Judge Kaplan signaled to Chevron's counsel his amenability to potential racketeering charges.

And so it was sealed. Several months later, Chevron perceived an imminent judgment in Ecuador. It had exhausted its direct and collateral attacks on the Lago Agrio Litigation. Thus, Chevron would bring before Judge Kaplan the racketeering and extortion charges that he had invited. And, in light of the extraordinary benefits that Judge Kaplan had conferred on Chevron in the past, the company would also ask Judge Kaplan to do something unprecedented: grant Chevron a worldwide foreign anti-suit injunction that purports to bar foreign

litigants in the court of a sister democracy from attempting to enforce anywhere in the world a not-yet-issued (let alone *final*) judgment. Just *two business days* after Chevron delivered to certain defendants its 149-page Complaint, 70-page brief, and nearly 7,000 pages of affidavits and exhibits in support of its application for a temporary restraining order ("TRO") and preliminary injunction, Judge Kaplan obliged by restraining the Ecuadorian Plaintiffs from enforcing any judgment. After affording the Ecuadorian Plaintiffs only *three more days* to respond to Chevron's admitted "avalanche" of paper, Judge Kaplan converted the TRO into a worldwide injunction. (*See* A360.) Judge Kaplan's subsequent actions in this case—marked by a series of "waiver" rulings and an expedited, bifurcated trial on Chevron's declaratory judgment claim, all of which assure that Petitioners can mount only token resistance to the Chevron juggernaut—have confirmed beyond the shadow of a doubt that recusal is necessary to maintain at least the appearance of impartiality.

The world is closely watching this landmark case. And what the world sees is an American company that fought for nine years to wrest jurisdiction from the American courts in favor of litigating the case in Ecuador, only to come running back to the United States for a preordained, home-cooked bailout when things did not go as well as planned in Ecuador. Worse yet, it sees a federal district court that is not just willing, but apparently *determined*, to overlook the fact that said

American company just spent the last eight years committing a series of outrageous abuses against the Ecuadorian courts it swore to respect as it begged to move the case there. (*See generally* A169; A363; *see also* A240.) What would America have to say if the shoe were on the other foot? What is transpiring in Judge Kaplan's court threatens the credibility of the United States federal justice system both at home and abroad; it vindicates the cynical view that the American courts guarantee due process only for those with the requisite power and influence to make them "matter."

The well-being of roughly 30,000 indigenous persons and farmers residing in the Ecuadorian Amazon region are at stake in the Lago Agrio Litigation. Owing to Chevron's game of jurisdictional musical chairs and its seemingly endless arsenal of delay tactics, these people have now waited *eighteen years* for relief from the devastation caused by Chevron's wanton "pump and dump" operation, since their claims were first filed against Chevron in the Southern District of New York in 1993.[2] If these people are now going to be compelled to litigate the enforceability of their judgment *in a jurisdiction where they did not even seek to enforce it*—and make no mistake, there is no legal basis to compel them to do so—they should at least be given a fighting chance to protect that judgment and stand

[2] That action was styled *Maria Aguinda et al. v. Texaco, Inc.*, 93-cv-7527 (S.D.N.Y.) (hereinafter, "*Aguinda*").

up to Chevron. Judge Kaplan's court does not offer them that chance; it does not offer them due process; it does not offer them the impartial tribunal to which they are entitled, and which is demanded *a fortiori* by the peculiar sensitivities of, and universal public interest in, this case. Recusal is necessary.

RELIEF SOUGHT BY PETITIONERS

Petitioners respectfully request the issuance of a writ of mandamus under 28 U.S.C. § 1651, ordering the Hon. Lewis A. Kaplan to recuse himself from the matters styled *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691 (LAK) and *Chevron Corp. v. Salazar et al.*, Case No. 1:11-cv-03718 (LAK), and that a new judge be assigned to preside over further proceedings in those cases.[3]

ISSUE PRESENTED BY THE PETITION

Did the Hon. Lewis A. Kaplan abuse his discretion by failing to recuse himself from the proceedings in the District Court, pursuant to 28 U.S.C. § 455(a), in light of his apparent partiality?[4]

[3] Subsequent to Judge Kaplan's denial of Petitioner's motion to recuse filed in the District Court in the case numbered 1:11-cv-00691, Judge Kaplan severed Chevron's declaratory judgment claim from its remaining eight claims, creating two dockets. (*See generally* A1671.)

[4] Petitioners note that an expedited appeal from the District Court's grant of a preliminary injunction is currently pending before the Court (*See* 11-1150-cv-L, 11-1264-CON). Petitioners intend to move to consolidate argument of that appeal with the issues presented by the instant Petition.

BACKGROUND

I. Judge Kaplan Reveals His Bias Against the Ecuadorian Plaintiffs and the Ecuadorian Courts in Miscellaneous Foreign Discovery Proceedings.

Before presiding over Chevron's judgment "non-enforcement" and RICO proceedings below, Judge Kaplan adjudicated two of the twenty total 28 U.S.C. § 1782 proceedings filed throughout the country by Chevron since December 2009. The first of these actions was filed in April 2010, seeking from the documentary filmmaker Joseph Berlinger hundreds of hours of unused outtakes from his 2009 film about the Lago Agrio Litigation entitled *Crude: The Real Price of Oil*. ("*Crude*"). (*See In re Application of Chevron Corp.*, No. M-19-111 (LAK) (S.D.N.Y.); *In re Application of Chevron Corp*, No. 10-mc-00001 (LAK) (S.D.N.Y.) (collectively, "*Berlinger*").)

Notwithstanding the narrow discovery issues before the court, which centered on the applicability of the journalist's privilege, at the very outset of the *Berlinger* § 1782 proceeding, Judge Kaplan revealed his disrespect for the courts of a small, Latin American nation like Ecuador in comparison to nations, such as the United Kingdom, apparently deemed worthy of Judge Kaplan's respect. In rejecting the Ecuadorian Plaintiffs' assertion that allowing the Ecuadorian Court a chance to weigh in on whether Chevron's collateral machinations would serve the principles of international comity animating § 1782, Judge Kaplan remarked:

"[b]elieve me, if this were the High Court in London, you can be sure I'd wait."[5] (A555.)

Subsequent to the *Berlinger* § 1782 proceeding, on August 4, 2010, Chevron presented Judge Kaplan with a second application for discovery, this time targeting attorney Steven Donziger, who has represented the Ecuadorian Plaintiffs since their case was originally filed in New York in 1993, and had been their lead U.S. counsel for several years as of the filing of Chevron's application. (A786.) By way of a subpoena containing 68 document requests that essentially required the production of every piece of paper and all electronic information in Mr. Donziger's eighteen-year case file, as well as what would become a deposition without end, Chevron aimed to decapitate the Ecuadorian Plaintiffs' legal team at a critical juncture in the case.[6] At the outset, Judge Kaplan made no secret of the fact that

[5] Judge Kaplan's pre-judgment of the Ecuadorian courts seems even more perverse when one considers that Chevron spent the better part of nine years heaping profuse praise upon that very same court system—and submitting dozens of affidavits extolling the virtues of Ecuador, most from its own lawyers—in an effort to convince the Southern District of New York, as well as this Court, to relinquish jurisdiction in favor of trying the case in Ecuador. (A171–74.) As noted by the late Hon. Vincent L. Broderick, who presided over the case during its early years in New York, "the courts of the United States are properly reluctant to assume that the courts of a sister democracy are unable to dispense justice." *Aguinda et al. v. Texaco, Inc.*, No. 93 Civ. 7527-VLB, 1994 WL 142006, *1 (S.D.N.Y. Apr. 11, 1994).

[6] Under the supervision of Judge Kaplan and his former law partner-turned-Special Master, the deposition of Mr. Donziger has turned into a likely record-breaking *fourteen-day* Chevron free-for-all, and accomplished what it was obviously intended to do: hobble the Ecuadorian Plaintiffs' legal team. When he

he frowns on the exportation of American legal expertise to empower indigent foreign plaintiffs to take on corporate interests:

> The imagination of American lawyers is just without parallel in the world. . . . [W]e used to do a lot of other things. Now we cure people and we kill them with interrogatories. **It's a sad pass. But that's where we are. And Mr. Donziger is trying to become the next**

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originally refused to entertain the Ecuadorian Plaintiffs' pleas to limit the scope of Chevron's seemingly limitless subpoenas, Judge Kaplan rejected the notion that the subpoenas "would require 'wholesale turnover' of Donziger's files related to the Lago Agrio litigation," noting that "many of the subpoena requests are effectively limited to a two-year period." (A827).) Time has proven these words to be hollow. Mr. Donziger has indeed been compelled to turn over ostensibly his entire litigation file, unbounded by Judge Kaplan's supposed temporal constraints—his compelled production and testimony is rife with the core attorney work product of the Ecuadorian Plaintiffs' U.S. legal team, including highly confidential strategy memoranda and emails between and among counsel right up until the present day and having nothing to do with any of the alleged "fraud" that served as the basis for Chevron's § 1782 in the first place. Mr. Donziger's computer hard drives—as well as those belonging to his associate—have been "imaged" by Chevron's technical consultants and his email accounts have been probed, providing to Chevron untold private information having nothing to do with the Lago Agrio Litigation at all, including bank account passwords (which Chevron lodged without seal as part of a submission to the court). (*Cf.* Declaration of James E. Tyrrell, dated June 2, 2011 (hereinafter "Tyrrell Decl."), Ex. A (ordering transfer of Mr. Donziger's hard drives to Chevron with no protocol for personal documents to protect Mr. Donziger's privacy).) As recognized by the Hon. Rosemary Pooler in connection with Petitioners' application to this Court for a stay pending their appeal of Judge Kaplan's preliminary injunction, Chevron has been able to make much hay with this discovery windfall—as would any party armed with the various strategic deliberations of its litigation adversary—but the fact is, the "mirror image" of those deliberations would undoubtedly be uncovered in the files of Chevron's lawyers if the Ecuadorian Plaintiffs were similarly allowed unfettered access to those files. (Tyrrell Decl., Ex. J, at 8.) Judge Kaplan's failure to put any constraints on Chevron's romp through its adversary's *ongoing* litigation strategy has resulted in an imbalance and an injustice that cannot be measured.

> **big thing in fixing the balance of payments deficit. *I got it from the beginning*.**

(A663 (emphasis added).)[7] Judge Kaplan further explained that the "basic facts" of the case are that "American class action lawyers" have set out to "hit Chevron as big as they can." (A601.) Notably absent from Judge Kaplan's version of the "basic facts" of the case, however, is even the slightest acknowledgement of the environmental catastrophe that lies at its very core.

Consistent with his pre-existing disdain for the plaintiffs' bar's facilitation of foreign suits like the Lago Agrio Litigation, and for the system of justice within

[7] Predictably, Judge Kaplan shared his belief that "important" companies like Chevron must be insulated from judgment collection efforts that apparently might be acceptable if the company was deemed less vital: "[W]e are dealing here with a company of considerable otherwise importance to our economy that employs thousands all over the world, that supplies a group of commodities, gasoline, heating oil, other fuels and lubricants on which every one of us depends every single day. I don't think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and finds that there isn't any gas there because these folks have attached it in Singapore or wherever else." (A583.) To put it bluntly, the fact that Judge Kaplan would actually posit that the Ecuadorian Plaintiffs could somehow grind the likes of Chevron to a halt through a seizure of assets to liquidate their judgment speaks volumes of his Chevron-centric view of the case. Indeed, at the time Judge Kaplan announced this theory, Chevron had offered *no* evidence that the company could suffer any such effects absent an injunction prohibiting the filing of enforcement proceedings abroad. It was only in conjunction with its *reply brief* in support of a preliminary injunction—after Judge Kaplan had already made Chevron's argument for it—that the company put in any "evidence" of the requisite irreparable harm: the most conclusory of affidavits written by a *Chevron employee* baldly stating that, although Chevron allegedly only has assets in the United States, a hypothetical attachment of the assets of its *subsidiaries* could cripple the company. (*See generally* A165.)

which the case is being adjudicated, from the outset, Judge Kaplan adopted the construct that the Lago Agrio Litigation is nothing more than a "game" being played by greedy plaintiffs' lawyers: "The object of **the whole game**, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it . . . . [T]**he name of the game** is . . . to persuade Chevron to come up with some money."[8] (A609 (emphasis added).)

[8] One theme that emerged through Judge Kaplan's gratuitous commentary during the § 1782 proceedings and has carried through to the litigation below is his apparent belief that it is somehow reprehensible or even uncommon for the Ecuadorian Plaintiffs to look to advance their hypothetical settlement position vis-à-vis Chevron—a view which seems consistent with Judge Kaplan's belief that American lawyers should not be assisting foreign plaintiffs with these types of lawsuits in the first place. For example, Judge Kaplan has condemned the Ecuadorian Plaintiffs for their intention to pursue enforcement in multiple jurisdictions where Chevron has assets because to do so would allegedly "create[] **settlement pressures above and beyond anything warranted by the merits**." (A301 (emphasis added).) Yet Judge Kaplan turns a blind eye to the fact that the Ecuadorian Plaintiffs' consideration of ways to end the litigation sooner arises in the context of threats by Chevron to litigate this case "until hell freezes over and then fight it out on the ice"; the company's promise that "[w]e're not paying and we're going to fight this for years if not decades into the future"; and a vow that the Ecuadorian Plaintiffs will endure a "lifetime of litigation" if they dare pursue their claims. (*See* A216.) What are the Ecuadorian Plaintiffs to do in the face of a company that has sworn to fight them until the end of time? And, for that matter, are not Chevron's threats indeed the very definition of "**settlement pressures above and beyond anything warranted by the merits**"? To be sure, Chevron has not at all been so measured as to promise a fight until hell freezes over, *or, alternatively, until it reasonably appears that the Ecuadorian Plaintiffs should prevail on the merits*. Moreover, Chevron's RICO claim is yet another transparent coercive tool to exert downward settlement pressure and make its adversaries uncomfortable—commentators have noted as much, and even Judge Kaplan has acknowledged that once he grants Chevron its declaratory and injunctive relief against enforcement of the judgment, Chevron's intimidating RICO claim is likely

Judge Kaplan dismissed virtually every action taken by the Ecuadorian Plaintiffs as part of this supposed "game." (*See, e.g.*, A620 (in rejecting counsel for Mr. Donziger's plea for time to assert privilege over thousands of documents, responding: "Don't tell me about how long Mr. Donziger needs. **I know the game here**." (emphasis added)); A696 ("**[I]t's a giant game here. It's a giant game**. The name of the game is to string it out." (emphasis added)); A673 ("[L]awyers represent their clients and try to get the best results for them all the time but **I understand the game here**." (emphasis added).)

In light of the fact that Judge Kaplan believes the Lago Agrio Litigation to be a "game" that has sprung from the "imagination of American lawyers," it is not surprising that he openly doubts the bona fides, and, in fact, the very existence, of the Ecuadorian Plaintiffs. From the beginning, Judge Kaplan has been careful to qualify his reference to the Ecuadorian Plaintiffs with the derisive modifier, "so-called," lest he inadvertently confer any semblance of legitimacy on these people. (*See, e.g.*, A739 ("Not to be outdone, the **so-called** Lago Agrio plaintiffs, whose standing in this matter is debatable to say the least, moved to strike certain of Chevron's filings." (emphasis added)).) Mr. Donziger made it known that the

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to recede into the mist. (Tyrrell Decl., Ex. B, at 2 (describing Chevron's initiation of RICO suit as use of "'blunt instrument' that can be used to encompass a broad array of activity to create 'added leverage for settlement negotiations'"); A451 (noting in Memorandum Opinion that "[o]nce [declaratory judgment case] is decided, one way or the other, it is likely that the rest of the case will vanish").) Judge Kaplan's double standard further betrays his partiality.

Ecuadorian Plaintiffs took offense to Judge Kaplan's insistence on questioning their bona fides with "so-called" in the litigation below, (A220), but Judge Kaplan was only emboldened by this complaint, featuring this disparagement prominently in his subsequent Order, (*see* A366). Indeed, in an act of apparent spite wholly inconsistent with any notion of detached impartiality, the *first six words* of Judge Kaplan's Recusal Memorandum Opinion are "[t]he **so-called** Lago Agrio Plaintiffs."[9] (A1628.)

II. Judge Kaplan's Prejudice Toward the Ecuadorian Plaintiffs and the Ecuadorian Court Has Compelled Him to Take a Twisted Approach to the Facts of the Underlying Case—Whether or Not Those Facts Are Relevant to Any Question Before Him.

In the § 1782 proceedings, Judge Kaplan did not have before him the 215,000-page record before the Ecuadorian Court that would have enabled him to

[9] Judge Kaplan's insistence on taunting the Ecuadorian Plaintiffs with "so-called" belies his assertion that he is merely using the term in the sense of "commonly named." (A1655.) There is no valid reason to continue with this nomenclature, and any impartial judge not clouded by resentment would just discontinue the term on the simple basis that the party it is directed at finds it to be offensive—whether the court agrees with that sentiment or not. Moreover, Judge Kaplan's defense of this nomenclature is hollow for other reasons. In his Recusal Memorandum Opinion, Judge Kaplan notes that other courts and, indeed, the Ecuadorian Plaintiffs' counsel themselves, have "used the phrase from the outset." (*See* Dkt. 310 at 28, n.79-80.) This argument is completely misleading: each of Judge Kaplan's cited sources refer to the "Lago Agrio Plaintiffs," to be sure, but *not* the "*so-called* Lago Agrio Plaintiffs." As noted, the totality of the circumstances confirms that "so-called" is meant to signify Judge Kaplan's belief that this case is purely driven by the interests of lawyers under the banner of aggrieved Ecuadorians. Indeed, Judge Kaplan did not endeavor to explain his reasoning for describing the Ecuadorian Plaintiffs as "a number of indigenous peoples **said to reside** in the Amazonian rainforest." (A429 (emphasis added).)

make any semblance of an informed and balanced decision concerning the merits of the underlying case. Indeed, in vacating and remanding a lower court's grant of discovery to Chevron, the United States Court of Appeals for the Third Circuit recently cautioned against reaching conclusions about the underlying case based on the lopsided presentation offered by Chevron in support of its many § 1782 applications. *See In re Chevron Corp.*, Nos. 10-4699, 11-1099, ___ F.3d ___, 2011 WL 2023257, at *14 (3d Cir. May 25, 2011) ("Yet the circumstances supporting [Chevron's] claim of fraud *largely are allegations and allegations are not factual findings*." (emphasis added)).

Recognizing as much, a number of other § 1782 courts respected the limited nature of their authority arising under the foreign discovery statute. *See, e.g.*, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047, 2010 WL 3923092, at *11 (D. Colo. Oct. 1, 2010) ("[T]he Court *intends to avoid any analysis of the merits of the underlying litigation* . . . . that are *committed to the jurisdiction of the Ecuadorian trial court*." (emphasis added)); *Chevron Corp. v. Mark Quarles*, No. 3:10-cv-00686, Dkt.. 108 at 2-3 (M.D. Tenn. Sept. 21, 2010) ("[T]his proceeding, initiated pursuant to 28 U.S.C. § 1782, *is not an opportunity to put on a full trial* . . . . *Chevron had an opportunity to litigate this matter in the United States and strongly opposed jurisdiction in favor of litigating in the Ecuadorian courts.* While fraud on any court is a serious accusation that must be investigated, *it is not*

within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on this court." (emphasis added).)

But, giving in to his biases, Judge Kaplan would have none of the self-restraint exhibited by his peers. In stark contrast to the courts concerned about overstepping their jurisdiction, even as early as the *Berlinger* § 1782 action, Judge Kaplan had adopted a paradigm of the Lago Agrio Litigation wherein Chevron is the "target" of a baseless environmental lawsuit brought by American lawyers under the flag of "so-called" victims, suggesting utterly without need or basis his belief that the suit was *legally infirm* for at least two reasons:

> Chevron Corporation . . . is the target of a litigation brought in Ecuador by the so-called Lago Agrio plaintiffs in which the latter seek to recover over $27 billion for alleged environmental pollution by Texaco, **which was acquired by Chevron after Texaco ceased operations in Ecuador and settled environmental claims with its government.**

(A876–77 (emphasis added).) Judge Kaplan's consistently slanted summation of the Lago Agrio Litigation—which echoes Chevron's mantra that it is not the proper defendant in the Lago Agrio Litigation—belies his insistence that he has not actually reached any conclusions at all. (A1631–32.) While Judge Kaplan may *technically* not have reached any final and binding conclusions as to the merits of the parties' legal arguments advanced in connection with the Lago Agrio Litigation (and likely never will because they are outside the purview of the claims before

him), his position calls for willful blindness to the plain reality that he has, in every *meaningful* sense of the word, reached immovable "conclusions" as to the merits of the parties' underlying claims and defenses.

Judge Kaplan's gratuitous legal and factual conclusions, tainted by prejudice and at odds with the views adopted by impartial observers, threaten to corrupt his adjudication of the limited judgment recognition and enforcement inquiries permitted under § 5304 of New York's Civil Practice Laws & Rules, even assuming that those claims were properly before him and Chevron could raise them *offensively*, as it has in this action.

By way of example, Judge Kaplan has insisted from the outset that a release of liability procured by Chevron from the *Ecuadorian government*—and limited on its face to claims held by the *government*—precludes claims brought by the Ecuadorian Plaintiffs. (A244 ("[T]he release by Ecuador seems to have been intended to put an end to **any claims or litigation concerning Texaco's alleged pollution**." (emphasis added).) But aside from a total lack of support in the plain language of the relevant documents (A206–08), Judge Kaplan's views are in conflict with: (1) the history of the *Aguinda* litigation in New York, in which Chevron tried *and failed* to obtain a dismissal of that case based on its settlement with the Republic of Ecuador, *see, e.g.*, *Aguinda et al. v. Texaco, Inc.*, 93 Civ. 7527 (BDP)(LMS), at 3-5 (S.D.N.Y. Jun. 19, 1995); (2) the views of his colleague

presiding over certain aspects of Chevron's related arbitration against the Republic of Ecuador, *see Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 374 (S.D.N.Y. 2005) (Sand, J.) ("[I]t is highly unlikely that a settlement entered into while *Aguinda* was pending would have neglected to mention the third-party claims being contemporaneously made in *Aguinda* if it had been intended to release those claims or to create an obligation to indemnify against them."); and (3) the findings of the Ecuadorian Court, which, on a proper evidentiary record, concluded that the Ecuadorian government did not release—and indeed, *could not* have released—claims held by the people of Ecuador.[10] (A1720–24.)

Judge Kaplan's refusal to accept any version of the facts other than the Chevron-approved version is also borne out in his selective quotations of the

[10] Judge Kaplan similarly finds himself out on a limb for Chevron on the issue of whether the company should be held accountable for the conduct of Texaco, which Chevron purchased in 2001 while the *Aguinda* case was still pending in New York. The Ecuadorian Court devoted no less than sixteen pages of its judgment opinion analyzing the vast evidence in the record demonstrating that Chevron is accountable for the words and deeds of its corporate predecessor. (A1697–1706.) And, in fact, *this Court* has since dismissed out of hand the notion that Chevron can hide behind its specious "we are not Texaco" refrain. (*See* A1303). In stark contrast, Judge Kaplan has treated as almost *laughable* the notion that Chevron should be bound by the promises made by Texaco in the *Aguinda* case: "[t]he blithe assumption that Chevron is bound or estopped by anything that Texaco said or did therefore assumes that Chevron became its successor-in-interest by virtue of its 2001 acquisition of Texaco's shares [and] simply assumes that the LAPs are entitled to pierce Texaco's corporate veil or otherwise impute its previous positions to Chevron in these proceedings." (*See* A341.)

Crude outtakes. For example, Judge Kaplan is particularly fond of recounting the following *Crude* scene to demonstrate that Mr. Donziger purportedly engaged in litigation misconduct on behalf of the Ecuadorian Plaintiffs:

> In another scene of *Crude*, Donziger . . . . describes his use of **"pressure tactics"** to influence the judge and concedes that **"[t]his is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty.**"

(A256.) Judge Kaplan, however, truncates the portion of this quote which demonstrates that Mr. Donziger went to the courthouse that day only to combat *Chevron's* efforts to corrupt the case—not to corrupt the litigation himself: **"this is how the game is played, it's dirty. *We have to occasionally use pressure tactics to neutralize their [Chevron's] corruption."*** (A157 (emphasis added).) Moreover, in the outtakes preceding and following this scene, Mr. Donziger emphasizes his displeasure that Chevron has forced him into an unconventional battle against the company's efforts to corrupt and sabotage the Lago Agrio Litigation: "You don't have to do this in the United States. It's dirty. **I hate it.**" (A159 (emphasis added).); "**I would prefer to litigate the case**, but unfortunately the system isn't fair. **When you represent people historically marginalized** . . . you have to . . . create conflict, invite the press, make [your adversary] look bad." (A162 (emphasis added).) The context surrounding Mr. Donziger's statement did not comport with Judge Kaplan's worldview—in which Chevron wears the white

hat and the Ecuadorian Plaintiffs are forever relegated to the black one—so he opted simply to *ignore* the context.

In the courtroom, Judge Kaplan was equally unwilling to entertain the Ecuadorian Plaintiffs' and Mr. Donziger's pleas that he should not jump to conclusions about the merits of the underlying case based on Chevron's highly-edited several minutes of *Crude* outtakes.[11] Judge Kaplan refused, latching on to Mr. Donziger's frustrated comments about the need to combat Chevron unconventionally in order to prevent it from corrupting the Ecuadorian courts as a basis to deny the legitimacy of this eighteen-year case:

> You know, **if it were clear that something bona fide is going on down there . . . that might be one thing**. But . . . Mr. Donziger, in the outtakes said that the Ecuadorian judicial system has no integrity and is corrupt . . . .

[11] The filmmaker himself has said that the manner in which Chevron uses its selected *few minutes* of outtakes presents a gross distortion of the reality presented by the totality of the *600 hours* of those outtakes that Chevron actually obtained. (*See* Tyrrell Decl., Ex. C, at 2.) Further, objective commentators have recognized that Chevron's use of the *Crude* outtakes to demonize Mr. Donziger—a vilification that Judge Kaplan has embraced without scrutiny—do not at all reflect the total picture that emerges from Chevron's discovery. (*See* Tyrrell Decl., Ex. D ("[Chevron's] main support for the view that Donziger doesn't believe his own evidence is the outtake from *Crude* in which he opines: 'At the end of the day, this is all for the court just a bunch of smoke and mirrors and bullshit.' But in his diary, Donziger says that he is 'winning on the proof' . . . [,] compares an old Texaco operating site to 'one of Saddam's mass graves' . . . . [and] bemoans 'the fact that 30,000 human beings are dying.' [. . . .] Donziger's real modus operandi is calculating but not cynical . . . . The discovery materials show a man who's aware that he's putting on a performance, but who believes in what he's performing. In this respect, as in others, Donziger resembles many litigators.").)

> **[W]hat's going on in Ecuador is mud-wrestling, not bona fide litigation**.

(A597–99.)[12] The total impropriety of Judge Kaplan's refusal to give *any* credence to the process being played out in Ecuador has not gone unrecognized by other courts around the country. In *reversing* the Eastern District of Pennsylvania's grant to Chevron of § 1782 discovery from one of the Ecuadorian Plaintiffs' former lawyers, the Third Circuit profoundly cautioned:

> [T]he circumstances supporting [Chevron's] claim of fraud largely are allegations and allegations are not factual findings. Furthermore, the Chevron applicants

[12] Judge Kaplan's unwarranted reliance on Mr. Donziger's stray comments captured in the *Crude* outtakes has carried forward to the proceedings below. In justifying his preliminary injunction, Judge Kaplan relied heavily on statements made by Mr. Donziger to conclude that a judgment from the Ecuadorian courts would likely not be worthy of recognition in the U.S. (*See, e.g.*, A237 (noting in Opinion that "a great deal of the evidence of possible misconduct by Mr. Donziger and others, as well as important evidence regarding the unfairness and inadequacies of the Ecuadorian system and proceedings, consists of video recordings of the words of Donziger").) It is inexplicable how Judge Kaplan can justify treating as *authoritative* Mr. Donziger's sweeping generalizations about the Ecuadorian judiciary, yet in every other respect consider Mr. Donziger to be untrustworthy and undeserving of a modicum of respect. Moreover, Judge Kaplan is well aware that, in the *Crude* outtakes, Mr. Donziger characterizes the Hon. Jed S. Rakoff, who once presided over the *Aguinda* case in the Southern District of New York, as "corrupt," "totally biased against us," and "a dishonest judge." (A1639.) Presumably, Judge Kaplan does not take *that* frustrated commentary at face value and assume that Judge Rakoff is "corrupt"—nor should he. It is clear that Mr. Donziger is a man who speaks in hyperbole, particularly when the camera is rolling and he has a bone to pick. Judge Kaplan is simply too well-respected and an experienced jurist *not* to understand this; Judge Kaplan's reliance on Mr. Donziger as his "expert" on the Ecuadorian courts is clearly indefensible, a convenient means to his desired end.

> are asking that American courts make a finding that the attorneys in a civil case in Ecuador can control the Ecuadorian criminal justice system. **Though it is obvious that the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system. American courts, though justifiably proud of our system, should understand that other countries may organize their judicial systems as they see fit**.

See In re Chevron Corp., Nos. 10-4699, 11-1099, ___ F.3d ___, 2011 WL 2023257, at *14 (3d Cir. May 25, 2011) (emphasis added).

Judge Kaplan was equally dismissive of the notion that he might actually change his mind about the "bona fides" of the Ecuadorian Plaintiffs' case with the benefit of the 215,000-page evidentiary record before the Ecuadorian Court, again reciting as gospel Chevron's version of facts, with the benefit of *only* Chevron's facts in his record, irrelevant to the collateral discovery proceeding before him at the time:

> [T]ruth of the matter is that Petroecuador [Ecuador's state-owned oil company] was in this up to their eyeballs at the time Texaco made the deal to pull out 18 years ago and a deal was made between Ecuador and Texaco . . . . We're out, and we're going to do this, you're going to do that **and it's all over. And then you come along with Mr. Donziger . . . . I understand all that. Believe me I do.**

(A662–63 (emphasis added).)[13]

Moreover, the behavior of Judge Kaplan's hand-picked Special Master and former law partner, Max Gitter, who has presided over Mr. Donziger's fourteen-day (and still not terminated) § 1782 deposition, has mirrored that of the judge who appointed him. Indeed, Mr. Gitter more closely resembles a "special prosecutor" than a "special master." At times, Mr. Donziger found himself fielding questions from a veritable tag-team consisting of Chevron's counsel and the supposedly neutral Special Master. (*See, e.g.*, A729 ("THE SPECIAL MASTER: Excuse me, I want to ask some questions now. Are you finished with this clip? MR. VINEGRAD: Go ahead, Mr. Gitter. THE SPECIAL MASTER: Are you finished with this clip? MR. VINEGRAD: Not quite. THE SPECIAL MASTER: You finish first. MR. VINEGRAD: Please, you are the Special Master. You ask the

[13] In stark contrast to the many minutes of uninterrupted, unquestioned oral argument afforded to Chevron's counsel, (*see, e.g.*, A636–43), Judge Kaplan seemed to derive much pleasure from bullying counsel for the Ecuadorian Plaintiffs, (*see, e.g.*, A621 ("THE COURT: Look, so far as we know, whatever the breadth of the subpoena, the likelihood that there is actually an attorney-client communication under any of this **I think is about the same as the likelihood that the Ecuadorian Air Force is going to take over New Jersey. Let's get real.**" (emphasis added)); A662 ("MR. MAAZEL: Every single complaint we heard from Mr. Mastro that we heard today is before the Court there. They have a forum. They made their complaints. THE COURT: **Let's start with the proposition [that] that's a loser.** What's your next point?" (emphasis added)); A624–25 (cutting off Mr. Maazel: "You know, the focus on the trees in lieu of the forest is just staggering to me"); A626 (cutting off Mr. Maazel: "All right. **We've had enough meatloaf this morning**" (emphasis added)).)

questions. THE SPECIAL MASTER: That is okay. I want you to finish first.").)[14] Even more disturbing, in hindsight, it is now clear that the Special Master was privy to Chevron's legal strategy; he was made aware that Chevron would be filing a RICO action and permitted questions that would only be of relevance to that forthcoming action, in flagrant disregard of the restrictions of § 1782. (*See, e.g.*, A742 (commenting on the relevance of a line of questioning about litigation funding: THE SPECIAL MASTER: "Actually, as I believe you will find out in the not that distant future, there was real relevance to this. Go on."));[15] (A742 (commenting on the relevance of a line of questioning about whether one of the Ecuadorian Plaintiffs' lawyers attended Mr. Donziger's wedding: THE SPECIAL MASTER: "[H]ear me out, Mr. Kaplan — there will be a filing in my judgment at some point that will show you the relevance that I was satisfied about . . . . Mr. Mastro, am I correct about that?").) Twelve days after the Special Master's cryptic predictions, Chevron's RICO Complaint was on file before Judge Kaplan.

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[14] The Special Master also repeatedly manipulated Mr. Donziger's answers to make them more favorable to Chevron. On several occasions, after Mr. Donziger responded to questions requiring clarification, the Special Master struck all qualifying language—many times *sua sponte*—altering the response, and modifying the record to appear that there were responses of only "yes" or "no" in place of properly qualified responses given by Donziger. (*See, e.g.*, A717; A718; A719; A722; A723; A726.)

[15] The litigation funders referenced in this line of questioning were ultimately identified as "unnamed co-conspirators" in the action below. (A12.)

That Chevron would resort to filing a RICO action to intimidate and financially cripple its litigation adversaries, and that the matter would find its way to Judge Kaplan, should have come as a surprise to no one. Months earlier, Judge Kaplan had all but invited Chevron to file it:

> THE COURT: The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it . . . . [P]ut a lot of pressure on the courts to feed them a record in part false for the purpose of getting a big judgment or threatening a big judgment, which conceivably might be enforceable in the U.S. or in Britain or some other such place, in order to persuade Chevron to come up with some money. **Now, do the phrases Hobbs Act, extortion, RICO, have any bearing here?**

(A609 (emphasis added).)

Chevron has taken full advantage of the windfall it has found in Judge Kaplan. That is why Chevron attempted to disqualify virtually every law firm that has represented the Ecuadorian Plaintiffs in Judge Kaplan's court, even firms that had not appeared in that court. (A862.) That is why Chevron directed its claims for declaratory and injunctive relief to Judge Kaplan *before a judgment even was rendered in Ecuador, and before anyone ever sought to enforce any judgment anywhere*. That is why some variation on "look at what Judge Kaplan said about it" is the centerpiece mantra in virtually every brief that Chevron files in its ongoing, nationwide § 1782 proceedings. (*See, e.g.*, A1591.) That is why

Chevron recently served upon Joseph Kohn, the Ecuadorian Plaintiffs' former counsel, a subpoena issued not out of the Eastern District of Pennsylvania, where Mr. Kohn is located and in which court Chevron pursued its earlier § 1782 proceeding against him,[16] but out of Judge Kaplan's court instead. (*See generally* Tyrrell Decl., Exs. E, F.) And that is why ostensibly every brief that Chevron files in Judge Kaplan's court features a "waiver" argument, which, in other courts, would likely fall on deaf ears. To the extent it allows Judge Kaplan to avoid consideration of the Petitioners' meritorious arguments, "waiver" is successfully invoked at an *alarming* rate in Judge Kaplan's court.

III. Judge Kaplan Brings His Partiality to Bear on Matters of Far More Gravity than a Limited Discovery Proceeding.

The proceedings below got off to an inauspicious, but entirely predictable, start. At the initial, February 8, 2011, hearing on the District Court's Order to Show Cause why a TRO and preliminary injunction should not issue in favor of Chevron, Judge Kaplan rejected Mr. Donziger's letter request for a "short adjournment" to allow him to retain counsel, despite the fact that the hearing was

[16] As noted above, the Third Circuit recently reversed the district court's order permitting discovery directed to Mr. Kohn in that § 1782 proceeding, offering the district court judge and courts elsewhere in the United States a measured rebuke of any penchant to accept as gospel Chevron's allegations and to marginalize the Ecuadorian judicial system. *See In re Chevron Corp.*, Nos. 10-4699, 11-1099, ___ F.3d ___, 2011 WL 2023257, at *14 (3d Cir. May 25, 2011) (emphasis added).

scheduled just "one week after the filing of the 148-page complaint[,]" just two business days from the filing of Chevron's 7,000-page TRO application, and "only one business day after [Mr. Donziger] returned from a trip to Ecuador." (A734.) Alluding to the severe treatment he had endured in his § 1782 action, Mr. Donziger's letter explained that he had had trouble securing counsel willing to appear before Judge Kaplan on his behalf. (A734–35.) When Mr. Donziger stated in court on February 8, 2011 that he declined to respond to Chevron's presentation at the hearing without the benefit of counsel, Judge Kaplan dismissed this notion, curiously noting "[j]ust so the record is clear, Mr. Donziger is an attorney admitted to practice in the State of New York," (A575), as if that justified the preclusion of his right to engage counsel. Thereafter, the Ecuadorian Plaintiffs requested, and Judge Kaplan denied, a brief adjournment of the inordinately short return date to respond to Chevron's massive filing, which Chevron obviously had the benefit of months to prepare.[17] (A164.)

[17] Although Judge Kaplan's March 7, 2011 order denying leave to file supplemental materials in connection with the motion for a preliminary injunction stated that "[a]ll papers in opposition to the preliminary injunction motion were to have been filed on or before February 11, 2011," and declined to consider further evidence submitted by the Ecuadorian Plaintiffs after that date, Chevron appears to have been exempted from that closure of the record. (A363.) In his April 6, 2011 order denying a stay pending appeal, Judge Kaplan buttressed his exercise of personal jurisdiction over the Ecuadorian Plaintiffs based upon evidence submitted by Chevron on April 1, 2011. (A439 n.8 ("There is evidence of the LAPs' amenability to suit in New York that was not before the Court when the preliminary injunction motion was decided.").)

Indeed, the consistent theme running through the various proceedings before Judge Kaplan is his determination to avoid considering the merits of the Ecuadorian Plaintiffs' and Mr. Donziger's arguments by somehow concluding that their arguments have been waived. While procedural waiver is a rare and generally disfavored result, Judge Kaplan has created for the Ecuadorian Plaintiffs and their counsel what might aptly be described as a "waiver minefield." The trend began in the *Donziger* § 1782 proceeding, where, as noted, Judge Kaplan opined that Mr. Donziger's failure to submit a privilege log concurrently with his timely-filed motion to quash resulted in a wholesale waiver of privilege over the Ecuadorian Plaintiffs' eighteen-year case file. (A771.) Although the Second Circuit upheld Judge Kaplan's decision on appeal, it did so on the understanding that "**the severity of the consequences** imposed by the District Court in this case **are justified almost entirely** by the urgency of petitioners' need for the discovery in light of impending **criminal** proceedings in Ecuador." *Lago Agrio Plaintiffs v. Chevron Corp.*, Nos. 10-4341-cv, 10-4405-cv(CON), 2010 WL 5151325, at *2 (2d Cir. Dec. 15, 2010 (emphases added). Indeed, this Court recommended that, if the urgency related to the criminal proceedings were to dissipate (which it did), Judge Kaplan should "stay the enforcement of the subpoenas *sua sponte* to permit a more probing (and time-consuming) review of the parties' various arguments with respect to privilege and relevance." *Id.* In fact, the purported imminence of the

Ecuadorian judgment and the criminal proceeding was overstated, if not entirely fabricated: judgment was not rendered in Ecuador until February 14, 2011, and the criminal proceeding did not take place until May 2011. (A1457; A1608; A1616; A1620.) Nonetheless, Judge Kaplan failed to extend the Ecuadorian Plaintiffs the courtesy contemplated by this Court; the Ecuadorian Plaintiffs never received a more searching analysis of their privilege claims.

In the proceedings below, waiver rulings against the Ecuadorian Plaintiffs have become the norm, and they have allowed Chevron to stampede its way toward victory with minimal resistance. To wit, Judge Kaplan has held that: (1) the Ecuadorian Plaintiffs waived their right to object to the *scope* of a preliminary injunction that had not yet been issued[18] (A491); (2) Mr. Donziger waived his right to submit *any* opposition to entry of a preliminary injunction based on his inability to find a lawyer to file papers[19] (A341–52); (3) the Ecuadorian Plaintiffs waived

[18] This ruling was effectively overturned by the Second Circuit, which granted the Petitioner's application for a stay pending appeal by modifying the injunction to allow the Ecuadorian Plaintiffs and their counsel to *prepare* for enforcement proceedings. (A429.) The injunction as issued by Judge Kaplan prohibited the Ecuadorian Plaintiffs' counsel even from communicating with their clients on the issue of enforcement. (A360 (ordering Plaintiffs may not, *inter alia*, "advanc[e] in any way" enforcement proceedings).)

[19] For the reasons previously described, Mr. Donziger was not able to retain counsel willing to appear before Judge Kaplan until February 17, and at the February 18 hearing on the preliminary injunction, his new lawyers pleaded with Judge Kaplan to allow them to file a brief on his behalf. (A1104.) Judge Kaplan was unmoved: "Whatever it is, he had until the date I gave him to file papers. He

their right to raise the "unclean hands" defense in opposition to the preliminary injunction, even as to evidence of Chevron's unclean hands obtained only two days before filing it with the court[20] (A353; A363–65); and (4) the Ecuadorian Plaintiffs, indigenous persons and farmers residing in the Ecuadorian Amazon, waived their right to challenge personal jurisdiction, notwithstanding a reservation of rights letter from their Ecuadorian counsel[21] (A322–24.) In short, the

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didn't, it's over . . . . If for whatever reason Donziger just elected or failed to submit papers, well, that's what happens." (A1103.)

[20] This particular waiver ruling violated the well-settled principle that the equitable defense of unclean hands should be considered wherever and whenever it is raised, and indeed should be considered *sua sponte*. *See, e.g.*, *Frank Adam Elec. Co. v. Westinghouse*, 146 F.2d 165, 167 (8th Cir. 1945); *Gaudiosi v. Mellon*, 269 F.2d 873, 881 (3d Cir. 1959). By invoking waiver yet again, the Judge Kaplan avoided dealing with the indisputable evidence of Chevron's misconduct—evidence that would give an impartial tribunal *extreme* pause before granting Chevron any form of equitable relief.

[21] True to form, Judge Kaplan even suggested—albeit half-heartedly—that Petitioners may have waived the right to question the impartiality of certain of his statements and actions. (A1641.) In particular, Judge Kaplan suggested that because no one moved for recusal in the § 1782 proceedings, whatever happened in those proceedings should not contribute to the basis for recusal here (Judge Kaplan went on to substantively address some of these grounds, in any event). (A1641.) But if Judge Kaplan's view were correct, no party would be permitted to move for recusal of a judge in a new case based on partiality evidenced in a prior case, even if that partiality would not even have *warranted* recusal in the prior case in light of its scope and subject matter. Furthermore, this Court has found "good cause" for perceived delay where "the appearance of partiality stem[med] from a cumulative series of events over a number of months" that alerted the movant to the need to file a recusal motion. *United States v. Amico*, 486 F.3d 764, 768-774 (2d Cir. 2007) (noting that a premature motion for recusal "would have had little substance and would have risked antagonizing the judge"). Here, Petitioners

combination of Judge Kaplan's hyper-accelerated deadlines and his limitless appetite for technical waiver have proven devastating for the Petitioners and Mr. Donziger.

In addition to the ever-present specter of waiver, Judge Kaplan's rulings also have been marked by an apparent desire to frustrate the Ecuadorian Plaintiffs' appellate efforts. This practice originated in the Donziger § 1782 proceeding. Judge Kaplan found procedural waiver, but indicated that he *might* be willing to entertain the Ecuadorian Plaintiffs' assertions of privilege if a log were submitted in the future. (A771.) While that decision was on appeal, Judge Kaplan indulged in a 54-page opinion expanding upon his original order, in which he "held open the possibility of adjudicating the merits of his privilege claims with respect to the

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moved for recusal just over two months after the commencement of Chevron's racketeering action and before any discovery was undertaken. While Judge Kaplan's prejudices should have compelled him to pass on this case *sua sponte* and at the very outset, Petitioners briefly hoped that Judge Kaplan would take an even-handed and critical approach to a case which now places on the line eighteen years of litigation and the personal and professional lives of numerous individuals, notwithstanding his conduct in prior proceedings where only discovery was at stake. That hope has since been dashed, and the Ecuadorian Plaintiffs sought recusal as soon as it became clear that the Court was incapable of conducting a fair trial. In any event, this application presents too many important issues to summarily deny it by yet another finding of "waiver." *See, e.g*, *In re Gaming Lottery Secs. Litig*., No. 96 CIV. 5567(RPP), 2001 WL 1020905, at *5 (S.D.N.Y. Sept. 5, 2001) ("Although the motion for disqualification was not filed 'at the earliest possible moment' . . . the motion will not be denied as untimely but will be decided on its merits to ensure that confidence in the integrity of the Southern District is not tarnished.").

documents demanded . . . [and] made clear that this Court ultimately stands ready to resolve whatever privilege claims may be made." (A988.) This Court seized on that language in denying the Ecuadorian Plaintiffs' motion for a stay of production pending appeal: "COUNSEL: Well, first, in the October 20 opinion which we appealed the judge said there was waiver and he would not take it into account. JUDGE LIVINGSTON: **But the November 4th opinion seems to take a different view**. COUNSEL: Yes, it does to some extent." (A1373.) But upon their return to his court, Judge Kaplan reminded the parties that he had never actually *promised* to consider privilege: "Nor can [Donziger] justify that failure by reference to the Court's indication, in the Summary Order, that it *might* relieve him of the waiver if a proper privilege log was submitted by October 29, 2010. . . . [I]t most certainly never said that submission of a privilege log *would* relieve Donziger and his clients of the waiver." (A838–39 (emphasis in original).) Judge Kaplan also stated that the Ecuadorian Plaintiffs—and the Second Circuit—were wrong to think that his 54-page opinion had modified the summary order, finding this interpretation of the opinion to be "baseless." (A841–42.) Mr. Donziger was forced to turn over his entire litigation file, and the Second Circuit was ultimately presented with a merits appeal from an order that had already done its damage.

Judge Kaplan has toyed with the Ecuadorian Plaintiffs in a similar fashion in the proceedings below. As an initial matter Judge Kaplan refused to rule promptly

on the Ecuadorian Plaintiffs application for a stay, with the clear purpose of frustrating their ability to make that application to this Court once Judge Kaplan inevitably denied it. Notwithstanding the fact that the Ecuadorian Plaintiffs never asked to stay the injunction entirely, but rather, only asked to modify it and stay further proceedings pending appeal, Judge Kaplan proceeded to issue an opinion blasting the Ecuadorian Plaintiffs for having the temerity to ask for a stay of the injunction—relief they had not even sought. (A417–26; *see* A429.) When the Ecuadorian Plaintiffs pointed out in a letter to the court that Judge Kaplan had not ruled on *either* of the two requests for relief actually raised in their motion, Judge Kaplan quipped that this complaint was "barely worthy of comment," and that he would rule on the stay motion "as soon as the Court is ready to decide it." (A1413.)

But perhaps most troubling of all is Judge Kaplan's refusal to address definitively the Ecuadorian Plaintiffs' concerns that bifurcation of the proceedings below—for the purpose of handing Chevron its declaratory judgment in an expedited manner—would surely result in a violation of the Ecuadorian Plaintiffs' Seventh Amendment rights. Judge Kaplan deftly sidestepped the Seventh Amendment issue by finding that he "will not now decide whether defendants would have a right to a jury trial on [Chevron's declaratory judgment claim under New York's recognition of Foreign Money Judgments Act]," incredibly suggesting

that perhaps a jury may wind up deciding, *inter alia*, Chevron's claim that the Ecuadorian courts do not provide due process. (A458.) Judge Kaplan also justified punting the Seventh Amendment issue by speculating that Chevron would drop its RICO and fraud claims once it obtained its declaratory judgment, thus eliminating the jury counts altogether. (A455–59.) By denying that a Seventh Amendment issue exists, yet opting, cryptically, to "retain[] complete flexibility to ensure that the matter is handled appropriately and that any Seventh Amendment rights are preserved," Judge Kaplan foreclosed the possibility that his decision to reject the Ecuadorian Plaintiffs' Seventh Amendment arguments might receive timely appellate review. (A460.) Indeed, in the same Order, Judge Kaplan announced that he is in a race with the Second Circuit, acknowledging that he is motivated to speed towards a final verdict in favor of Chevron by the possibility that this Court might vacate his injunction on appeal. (A442.)

Judge Kaplan's most recent effort to frustrate the Ecuadorian Plaintiffs' appellate rights came just days ago. The Ecuadorian Plaintiffs and Mr. Donziger had pleaded with Judge Kaplan on numerous occasions that, if he insisted on expediting resolution of Chevron's declaratory judgment claim, *severance* under Fed. R. Civ. P. 21 would be favorable to bifurcation because it would result in a final judgment appealable as a matter of right. (*See, e.g.*, A406 n.13 ("Proceeding under 21 would appear preferable to the alternative from the perspective of *both*

parties, insofar as it would result in the attainment of a final, appealable judgment on the severed claim(s).").) In his memorandum opinion granting Chevron's motion to bifurcate, Judge Kaplan refused to order severance, indicating, inexplicably, that "[t]here is no reason to choose now." (A460.) In strikingly similar fashion to his issuance of a 54-page opinion subsequent to the Ecuadorian Plaintiffs' appeal in the Donziger § 1782, in which Judge Kaplan endeavored to make his previous order impervious to appellate review, on May 31, 2011, Judge Kaplan *sua sponte* decided to issue an order *severing* Chevron's declaratory judgment claim instead of merely bifurcating it—a total reversal from his earlier view that there was no need to decide this issue.[22] (A1671.) There is only one explanation for this seemingly arbitrary action: Judge Kaplan has read the parties' submissions to this Court relative to the Ecuadorian Plaintiffs' motion to expedite their appeal, and believes that the prospect of immediate appeal from his inevitable entry of declaratory judgment in favor of Chevron later this year will tend to

[22] Judge Kaplan issued his *sua sponte* Order of severance on the same date he largely denied Mr. Donziger's motion to intervene on the declaratory judgment claim (count 9 of Chevron's RICO Complaint), but for granting Mr. Donziger the right to cross-examine witnesses on testimony touching upon Mr. Donziger's own conduct and to assert evidentiary privileges pertinent to Mr. Donziger. To temper appellate review of that decision, Judge Kaplan indicated that he "stands ready to consider changes to [his] order, should circumstances warrant, as the matter proceeds." (A1689.)

dampen this Court's interest in affording relief on an appeal from a preliminary injunction. (Tyrrell Decl., Exs. G, at 20; H, at 7-8.)

REASONS WHY THE WRIT SHOULD ISSUE

As an initial matter, a Writ of Mandamus is an appropriate means to compel recusal. This Court has stated that "we can think of few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966). "The very special . . . charge of partiality in the administration of justice . . . should receive final adjudication at first opportunity, if only in the interest of public confidence in the courts." *Id.*

Petitioners seek recusal pursuant to 28 U.S.C. § 455(a), which provides that a judge "*shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). The purpose of this provision "is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865, 108 S. Ct. 2194, 2205 (1988). Thus, "[w]hether a judge actually has a bias, or actually knows of grounds requiring recusal is irrelevant - section 455(a) sets an objective standard that does not require scienter." *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002). Recusal is warranted if his "impartiality might reasonably be questioned by the average

person on the street who knows all the relevant facts of a case." *In re Kan. Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996). Indeed, this "'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties.'" *In re Boston's Children First*, 244 F.3d 164, 171 (1st Cir. 2001) (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)).

"[I]f the question of whether § 455(a) requires disqualification is a close one, *the balance tips in favor of recusal*." *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir.1995) (emphasis added). But this is not a close case; there can be no doubt that Judge Kaplan's impartiality *will* be reasonably questioned by the average person who knows the relevant facts.

As an initial matter, when a judge's apparent partiality emanates from an "extrajudicial source"—i.e., not from the evidence that she must consider as part of her adjudication—this can be an especially compelling factor favoring recusal. *Liteky v. United States*, 510 U.S. 540, 555 (1994). In this case, without question, Judge Kaplan's (1) disdain for the Ecuadorian court system, and (2) disapproval of the role of the American plaintiffs' bar in enabling would-be foreign tort plaintiffs to bring suit against American companies, pre-date his involvement in these related matters. There is simply no other credible explanation for these attitudes. *See, e.g., Peacock Records, Inc. v. Checker Records, Inc.* 430 F.2d 85, 89 (7th Cir.

1970). It was one thing for Judge Kaplan to adjudicate a *discovery proceeding* under the burden of such biases. It is entirely another for him now to adjudicate a case that may result in the effective nullification of eighteen years worth of litigation acutely affecting the lives of 30,000 impoverished people—particularly where the viability of the Ecuadorian court system is *the* central issue to be resolved in connection with Chevron's declaratory judgment claim.

Moreover, although an extrajudicial source of prejudice is a compelling *factor* favoring recusal, it is by no means a *requirement*. *Liteky*, 510 U.S. at 555; *see also Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009) (noting that the Supreme Court has "reject[ed] strict application of the extrajudicial source doctrine"). "The most critical factor is not the *source* of the judge's prejudicial knowledge or bias, but rather the judge's 'inability to render fair judgment.'" *In re Sam M. Antar*, 71 F.3d 97, 101-02 (3d Cir. 1995) (*quoting Liteky*, 510 U.S. at 551) (emphasis added). Thus, even where the source of a judicial officer's bias or partiality is based *solely* on information learned during the course of judicial proceedings, recusal is warranted where the record "display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555; *see also LoCascio v. United States*, 473 F.3d 493, 495-96 (2d Cir. 2007).

The grounds for recusal here are too numerous and diverse to ignore, and although some admittedly might not support recusal when viewed in isolation, § 455(a), concerned as it is with the forest rather than the trees, requires that the Court view the totality of the circumstances. For example, in *Sentis Group, Inc. v. Shell Oil Co.*, the Eighth Circuit held that the district judge had exhibited "a sufficiently high degree of antagonism to require reassignment" under a § 455(a) analysis where a confluence of factors were present, namely: the court's "apparent distrust of [the petitioner] as manifested early in the litigation"; the court's adoption of the adversary's version of the facts without any scrutiny and seemingly without any interest in receiving the petitioner's competing views; and the court's antagonism toward and impatience with the petitioner in court. 559 F.3d at 904-05.

The confluence of factors present in this case is strikingly similar to that which existed in the *Sentis Group* case, and is *more* substantial in both gravity and scope. Judge Kaplan's distrust of the Ecuadorian Plaintiffs and their lawyer, Mr. Donziger, was manifest from the beginning. He expressed his displeasure that "American class action lawyers" had conjured up a foreign litigation to "hit" Chevron big. He perceived the Ecuadorian Plaintiffs' lawsuit as a "game" all along; he "got it from the beginning" that the "so-called" Ecuadorian Plaintiffs were ostensibly a front for American lawyers/charlatans on a mission to extract

money from a large American corporation of "considerable . . . importance to our economy." (A583.) With that worldview as a starting point, Judge Kaplan devoured, without *any* perceptible scrutiny, every mischaracterization and half-truth that Chevron put before him in a lopsided presentation of evidence occurring in a collateral discovery proceeding that never should have touched the merits of the Lago Agrio Litigation to begin with. Judge Kaplan concluded on Chevron's record that the Lago Agrio Litigation is not a "bona fide litigation," but rather, a "mud-wrestling" match unworthy of the respect and comity ordinarily afforded the courts of sister democracies. Indeed, in deciding that the Lago Agrio Litigation is not a "bona fide litigation" in the context of the § 1782 proceedings, Judge Kaplan in fact *already decided* the very declaratory judgment claim now before him. With his suspicions sufficiently legitimized by Chevron's skewed and sensational presentation, Judge Kaplan now has no interest in hearing the other side of the story; he is rooted deeply and unalterably in his position. He has taken great pains to assure that neither Mr. Donziger nor the Ecuadorian Plaintiffs would have the opportunity to introduce any gray into his black-and-white construct by confronting him with the other side of this eighteen-year story, wielding "waiver" as a weapon. That the largely gratuitous "fact" sections in Judge Kaplan's opinions read like a Chevron brief rather than a recitation of the evidence by a detached tribunal is a fact that speaks for itself. *See, e.g.*, *United States v. Grinnell*

Corp., 384 U.S. 563, 583 (1966) (suggesting that recusal is appropriate where the judge has "manifeste[d] a closed mind on the merits of the case").

And one cannot deny that Judge Kaplan's disdain for Mr. Donziger—whether or not initially defensible in light of a handful of admittedly flippant comments captured on video—now infects Judge Kaplan's view of every argument that Mr. Donziger and his clients, the Ecuadorian Plaintiffs, attempt to advance; in Judge Kaplan's view, it is all a "game." As this Court has noted: "[E]ven when a judge's initial adverse reaction to a lawyer may have stemmed from reasons that were legitimate or at least understandable, it is undeniable that if such an antipathy has crystallized to a point where the attorney can do no right, the judge will have acquired 'a bent of mind that may prevent or impede impartiality of judgment.'" *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966) (internal quotations omitted). That reasoning could not be more applicable than it is here.[23] The Petitioners cannot get a fair trial when the court, at Chevron's urging, speculates in every instance that a seemingly innocent action is in fact animated by some

[23] Judge Kaplan's disdain for Mr. Donziger has not gone unnoticed by the public. (*See, e.g.*, A873 ("Steven Donziger, the former journalist and Harvard Law grad who spearheaded the litigation—and *seems to have drawn the distaste of Judge Kaplan*—reportedly has stepped back from the case") (emphasis added).) Unbiased legal commentators also have observed that other courts have been so troubled by what has gone on in Judge Kaplan's courtroom that they felt compelled to express their concern in the context of opinions issued in related matters. (*See, generally* Tyrrell Decl., Ex. I.)

devious plot on the part of Mr. Donziger and the Ecuadorian Plaintiffs.[24] It is clear that Mr. Donziger and the Ecuadorian Plaintiffs can do no right.

Petitioners recognize the gravity of this application, and do not relish being forced to recognize the partiality of a formidable jurist such as Judge Kaplan. But even the most accomplished jurist may, at one time or another, engage in conduct that requires recusal in order to preserve the integrity of the court. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97-98 (3d Cir. 1992) (reaching the "agonizing" conclusion that recusal of a "distinguished member of the federal judiciary" of otherwise "outstanding jurisprudential and judicial temperament" was necessary based on paragraph in opinion evincing partiality.)

Chevron has asked a federal district court to condemn the entire judicial system of a democratic Latin American ally and trading partner, and the very country in which Chevron begged to adjudicate the environmental tort claims from which this controversy springs. Accepting the accuracy of Chevron's not-so-bold prediction that its declaratory judgment claim will culminate not in a trial but in

[24] By way of example, rather than adopt the plausible explanation that the Ecuadorian Plaintiffs might *genuinely* struggle to respond to a 149-page Complaint and 7,000-page motion for a TRO and preliminary injunction in a matter of a *few days*, Judge Kaplan adopted the view that the Ecuadorian Plaintiffs purposefully withheld arguments to inject delay and obtain a tactical advantage of some sort. (A353; A364.)

summary judgment favoring Chevron,[25] all told, Judge Kaplan will have afforded the Petitioners approximately *eight months* to avoid the unraveling of *eight years* of litigation in Ecuador, which was preceded by nine years in New York. There is an opportunity here for this Court to reinforce the perception of the American judicial system as global beacon of fairness and impartiality, not a place where the powerful and influential can retreat for guaranteed shelter after they have reaped all the benefits of risk-taking in other parts of the world. If Chevron is indeed entitled to a bailout, Chevron must earn it on an even playing field. And if an American court is going to insert itself into a foreign dispute and stand in judgment of the courts of a sister democracy, at the very least, its own neutrality ought to be unquestionable. This controversy must be purged of the black cloud of partiality which hangs over it.

CONCLUSION

For the reasons provided above, this Court should issue a Writ of Mandamus to the District Court directing the Hon. Lewis A. Kaplan to recuse himself from the matters styled *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691 (LAK) and *Chevron Corp. v. Salazar et al.*, Case No. 1:11-cv-03718 (LAK), and that a new judge be assigned to preside over any further proceedings in those cases.

[25] (*See* A1433.)

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Respectfully submitted,

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