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February 8, 2011

BY HAND

The Honorable Lewis A. Kaplan
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, N.Y. 10007-1312

Chevron Corp. v. Donziger, et al, 11 CV 061

Dear Judge Kaplan:

I write with respect to the above-referenced matter to address issues of considerable urgency. First, without taking any position on whether proper service has been effected on me, I am obliged to inform the Court I have not been able to obtain counsel prior to the return date for the Order to Show Cause, which has been set only one week after the filing of the 148-page complaint with hundreds of pages of exhibits and only one business day after I returned from a trip to Ecuador. I also feel compelled to note that my inability to obtain counsel on short notice stems at least in part from fear that, based upon Your Honor's treatment of me in another action brought by plaintiff, such counsel would be precluded from providing me effective representation in this matter. For that reason, I respectfully request a short adjournment of the return on the Order to Show Cause until I have retained counsel.

Second, I understand that plaintiff Chevron Corp. has asserted that this action is a related case to a miscellaneous proceeding pending before Your Honor in which Chevron has been taking discovery of me as counsel to the Ecuadorian plaintiffs pursuant to 28 U.S.C. §1782. I further understand that, pursuant to Rule 15 of the Rules for the Division of Business Among District Judges, the matter has been sent to this Court for determination as to whether Your Honor will accept the case as "related" or reject the designation and send it back to the Clerk for random assignment. I understand that Your Honor indeed has accepted assignment of this case.

There are a number of reasons why I believe that the matter is not related to the miscellaneous proceeding. Most particularly because the overlap of issues is minimal and the 1782 proceedings are all but complete. In fact, even if it were "related", the overwhelming appearance of impropriety that would attach to this Court accepting this case outweighs any benefit to be gained from so called efficiencies. As more fully addressed below, given statements this Court has

made on the record that evince having reached conclusions as to numerous of the ultimate issues in this case, this Court ought not to preside. Among those statements is an assertion by the Court which would appear to have urged plaintiff to bring this very action: As the Court said at an argument on September 23, 2010, ". . .now, do the phrases Hobbs Act, extortion, RICO, have any bearing here?" Transcript at 24:21-22. For the Court now to accept assignment of a case against me on claims that the Court all but proposed raises questions at the very least about an appearance of impropriety.

However, there is an over-riding reason why I believe this Court cannot preside over the matter. That is that plaintiff contemplates Your Honor being a witness in the case. At Complaint ¶198, plaintiff alleges as follows:

- The criminal charges against two of Chevron's attorneys are a direct result of the collusion between the RICO Defendants and their co-conspirators and the Republic of Ecuador. . . Indeed, as Judge Kaplan of the Southern District of New York noted, evidence shows that Donziger and his colleagues have 'attempt[ed] to procure criminal prosecutions for the purpose of extracting settlement [from Chevron],' and that the prosecutions 'appear[ ] to have been instigated by Donziger and others working with him for the base purposes of coercing Chevron to settle and undermining a significant element of its defense in Ecuador, the release it obtained from the [Republic of Ecuador]'.

Additional assertions of fact concerning conclusions of this Court as to facts at issue are also made:

- At Complaint ¶275, plaintiff alleges a finding by Your Honor that "the outtakes 'contain substantial evidence that Donziger and others'" engaged in various actions concerning the Cabrera report.

- At Complaint ¶276, plaintiff alleges that Your Honor found that "'there is more than a little evidence' that the activities of the RICO Defendants 'come within the crime-fraud exception'".

- At Complaint ¶279, plaintiff alleges a finding by Your Honor that assertions concerning the content of the *Crude* outtakes were "worrisome in considering [the RICO Defendants'] present claims".

These allegations are put forth in support of a claim that I, and other Defendants, have engaged in wrongdoing – as Your Honor appears already to have determined.

I in no way concede that any of Chevron's allegations are relevant or that any particular evidence should be admitted at trial. But the fact that plaintiff itself asserts in its complaint that Your Honor is a witness should be sufficient to lead to a conclusion that the Court ought not to preside over the matter. Certainly, the specter of the Court deciding whether its own testimony, or evidence as to conclusions the Court has made, is admissible must be avoided.

Moreover, while I do not intend this as a substitute for a recusal motion, which in any event I hope will not be necessary, I do wish to bring to the Court's attention that certain statements the Court has made in connection with the facts underlying this matter suggest at a minimum that the Court has reached certain conclusions as to my conduct and that of other defendants. Indeed, the Court has shown antagonism towards me and the *Aguinda* litigation on at least the following occasions:

- THE COURT: "Mr. Maazel, I eventually read the stuff you people have all submitted. And the truth of the matter is is that Petroecuador was in this up to their eyeballs at the time Texaco made the deal to pullout 18 years ago and a deal was made between Ecuador and Texaco, and it was like all other settlements, presumably; nobody admits anything, but whatever, and here's the deal. We're out, 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 and the, I guess the Ecuadorian legislature amends the constitution to revive a claim or to create some new claim. I understand all that. Believe me I do. The imagination of American lawyers is just without parallel in the world.*** It is our one absolutely overwhelming comparative advantage against the rest of the world, apart from medicine. You know, we 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 big thing in fixing the balance of payments deficit. I got it from the beginning.***" Transcript 09/23/10 at 77:20 – 78:14.

- THE COURT: "Look, we all understand what the basic facts are, right? The basic facts are that ***this lawsuit is put together and financed by Donziger*** and the Kohn firm,

American class action lawyers. They start out in the U.S. ***to hit Chevron as big as they can***." *Id.* at 15:25 – 16:4.

- 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. . . . So ***the name of the game*** is, arguably, to put 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?***". *Id.* at 24:6-22.

- THE COURT: "***I know the game here.***" *Id.* at 35:19.

- THE COURT: "***[I]t's a giant game here. It's a giant game.*** The name of the game is to string it out." Transcript 11/22/10 at 26:19-21.

(all emphasis added)

Given that plaintiff alleges facts that make Your Honor a witness, and the statements of the Court which suggest that it has already made a determination of certain facts that are very much at issue, including and in particular whether I have committed RICO predicate acts, which the Court evidently has concluded I have, without having heard any evidence from the defense, this Court should return the case to the Clerk for random assignment.

Thank you for your consideration in this matter.

Respectfully submitted,

Steven R. Donziger

cc: Randy Mastro, Esq.
The Honorable Loretta Preska, Chief Judge