UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, *Plaintiffs*, v. STEVEN DONZIGER, et al., *Defendants*.	Case No. 11-CV-0691 (LAK)

POST-TRIAL MEMORANDUM OF DEFENDANTS STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER AND DONZIGER & ASSOCIATES, PLLC

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December 23, 2013

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INTRODUCTION

Having been held responsible by a court of law for one of the worst environmental disasters in history, Chevron makes a bold and unprecedented request: It wants an order from a U.S. trial judge preventing enforcement of the judgment of an *Ecuadorian* court, in favor of *Ecuadorian* citizens, based on *Ecuadorian* law, arising from environmental contamination that occurred entirely in *Ecuador*. But this Court lacks jurisdiction to even consider that request. The court of appeals has already instructed this Court not to "presum[e]" to "set[] itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems."[1] Chevron asks the Court to defy that instruction. The order it seeks would do violence to principles of international comity, disrupt our diplomatic relations with friends and allies, and invite scorn around the world. It would be an affront not only to the Republic of Ecuador but to the legal system of every other sovereign nation, each assumed incapable of deciding for itself whether to enforce the judgment. One such sovereign nation is Canada—where an appellate court ruled last week that, "[a]fter all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits."[2]

To prevent that hearing from ever taking place, Chevron has pursued a spare-no-expense campaign of retaliation and personal destruction across courtrooms and continents—a scorched-earth effort "aptly characterized as 'unique in the annals of American judicial history.'"[3] Even before the Ecuadorian judgment was released, a

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[1] *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012).

[2] *Yaiguaje v. Chevron*, 2013 ONCA 758 (Court of Appeal of Ontario, Dec. 17, 2013) (attached as Exhibit 1).

[3] *Naranjo*, 667 F.3d at 236 (quoting *In re Chevron Corp.*, 650 F.3d 276, 282 n.7 (3d Cir.

Chevron spokesman telegraphed the company's resistance to the rule of law: "We're going to fight this until hell freezes over. And then we'll fight it out on the ice."[4] The company's message, according to one of its lobbyists, is simple: "We can't let little countries screw around with big companies like this."[5]

Drawing on a bottomless war chest, Chevron has sought to shift the focus from its own wrongdoing to an ever-changing series of allegations directed at the Ecuadorian villagers, their lawyers, the environmental groups allied with them, and every branch of the Republic of Ecuador. Chevron has accused so many people of such a wide array of illegal and unethical conduct that it can be hard to keep track. And the discovery Chevron has amassed is staggering—hundreds of hours of footage from a documentary filmmaker, eighteen years' worth of litigation files, every email between the lawyers, even the personal diary of the New York lawyer, Steven Donziger, at whom Chevron takes principal aim. Indeed, a candid email exchange among some of Chevron's key strategists summarized the company's approach in two words: "demonize Donziger."[6]

But nobody should lose sight of the one thing that Chevron has chosen *not* to litigate. As the company put it, "Chevron does not intend to relitigate the environmental conditions" or "the substantive merit of scientists' expert opinions on that subject."[7] This Court has gone to great lengths to honor that wish, excluding every bit of evidence showing Chevron's culpability. Thus, throughout this extraordinary trial, the most important facts have gone uncontested: For nearly a quarter century, Chevron dumped

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2011)).

[4] DX 423.

[5] DX 375.

[6] DX 24

[7] DI 705, at 3-4.

billions of gallons of toxic waste into the rivers, wells, drinking water, and land of the Ecuadorian Amazon. And unlike the Exxon Valdez or Deepwater Horizon spills, this was no one-time accident. Knowingly flouting industry standards for years, Chevron carved hundreds of pits into the jungle floor and filled them with toxic waste. It also discharged toxic production water directly into the surface waters of the Amazon basin—at a rate of four million gallons *per day*. The contamination covers a region of rainforest roughly the size of Rhode Island and has directly affected the health, livelihood, and culture of more than 30,000 people, known as the *Afectados*—farmers and indigenous people whose lives depend on the waters Chevron polluted.

In 2011, following eighteen years of hard-fought litigation, a court in Ecuador held Chevron liable to the *Afectados* for billions of dollars in soil, groundwater, and drinking water remediation, health care costs, deaths due to cancer, and damage to the indigenous cultures. Later, based on the overwhelming scientific evidence—including evidence from Chevron's own files and court submissions—an appellate court unanimously affirmed. Now, in the midst of this trial, Ecuador's National Court of Justice has unanimously affirmed the judgment too (though it set aside the punitive damages). Whatever else Chevron has alleged, it hasn't contended that every one of these judges—the judges of a sovereign nation's appellate tribunals—are corrupt or unqualified.

Certainly, there is no reason to deem a single judge in the Southern District of New York more capable of deciding whether norms of Ecuadorian civil procedure or legal ethics have been followed. Yet that is what Chevron has asked this Court to do. Indeed, it has gone further, putting Ecuador's entire government on trial. A courtroom spectacle more anathema to international comity is hard to imagine.

All of this is bad enough. But it is made worse by the central irony hanging over this case: The reason the case was tried in Ecuador in the first place is that Chevron got what it asked for. For nearly a decade, Chevron showered praise on Ecuador's judiciary, extolling its impartiality and independence in an effort to persuade this Court to transfer the litigation to Ecuador from New York, where it was originally filed. That effort succeeded. The Court concluded the case had "*everything* to do with Ecuador and *nothing* to do with the United States."[8] After Chevron "promise[d] to satisfy any judgment issued by the Ecuadorian courts," subject only to defenses available in enforcement proceedings, this Court granted Chevron's wish: It dismissed the case, making Chevron's promise "enforceable against Chevron in . . . any future proceedings between the parties."[9]

Now Chevron has a bad case of forum shopper's remorse. But the rule of law requires that Chevron be held to its promise. Even apart from that promise, there are multiple legal defects that independently require that this case be dismissed:

First, there can no longer be any question that this Court lacks jurisdiction. No federal court has jurisdiction unless the plaintiff has standing, and RICO imposes rigorous standing limits. Intent on depriving Donziger of his constitutional right to a jury trial—and apparently lacking confidence in its own evidence—Chevron dropped all of its claims for damages on the eve of trial. But, with damages off the table, what is Chevron's injury here? The judgment has not yet been enforced, so how could its injury be concrete and non-speculative? The judgment is based on scientific evidence that has gone uncontested at trial, so how can Chevron possibly show causation? And if the injury is

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[8] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001) (*Aguinda II*) (emphasis added).

[9] *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.4 (2d Cir. 2011).

based on costs incurred, then how is it redressible by equitable relief? If these questions cannot be answered here, they will have to be answered on appeal.

Second, this Court lacks authority to grant the requested equitable relief. Principles of international comity preclude an order preemptively attacking a foreign judgment. RICO itself does not authorize private parties to seek equitable relief. Even if equitable relief were otherwise available, it is unavailable here because there are other remedies at law.

Third, even if this Court had authority to issue equitable relief, Chevron's claims would still fail. RICO does not apply extraterritorially. RICO liability cannot be premised on litigation or First Amendment activity. Chevron's "third party fraud" claim does not exist under New York law.

Chevron's case fares no better on the facts. Given the mountain of discovery at its disposal—every conceivable memo, email, and recording—one would expect Chevron to present a coherent narrative, backed by evidence. It hasn't. Chevron kicked off this case by relying on clips from the film *Crude*, taken out of context to suggest that when Mr. Donziger complained about his *fears* of corruption he was actually hatching a plot to *engage* in corruption. Even on its own terms, this theory was implausible: A human-rights lawyer lets a documentary film crew follow him around for three years, camera rolling constantly, to document his scheme to bribe judges?

Chevron next turned its focus to the allegation that the plaintiffs' lawyers ghostwrote an expert report, the Cabrera Report. But that report—prepared in a manner entirely consistent with both the letter and spirit of Ecuadorian law—was not even relied

upon by the Ecuadorian court. So it is hard to see how the report could harm Chevron, let alone justify an injunction barring enforcement of the judgment.

Finally, Chevron's most recent conspiracy theory hinges on the testimony of a man named Alberto Guerra, who—before selling his tall tale of bribery to Chevron for payments of $12,000 a month—was living on $500 a month in Ecuador. He admits he hawked his services to both sides; that he lied to "improve [his] negotiating position" with Chevron; and that he has a past as both a taker and giver of bribes. His story has changed several times, and each story is inconsistent with the next. None of the stories are corroborated by credible evidence. And the key meeting he claims took place could not have happened because immigration records prove Mr. Donziger was not in Ecuador at the time Guerra claims the meeting took place.

In exchange for his fanciful testimony, Chevron has given Guerra *hundreds of thousands* of dollars, housing, a car, a laptop, a cell phone, a personal lawyer, housing and moving expenses, and health insurance and immigration assistance for him, his wife, and his son, as well as his son's wife and children—all of whom Chevron has moved to the United States. If anyone committed bribery here, it wasn't Steven Donziger.[10]

Chevron is not naïve. It knows its case has insuperable legal and factual defects. But it expects to extract sympathetic findings that it can use elsewhere—even after this Court's orders are reversed on appeal. "If such an advisory opinion were available, any losing party in litigation anywhere … could seek to litigate the validity of the foreign

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[10] *See* 18 U.S.C. § 201(b)-(c) (federal criminal bribery prohibition covers one who "gives … anything of value to any person … with intent to influence the[ir] testimony under oath … as a witness upon a trial"); *see also* DI 1423-2 (Erwin Chemerinsky declaration that "payment of a salary to a witness, in exchange for the witness's agreement to testify … is a clear violation" of ethics rules).

judgment in this jurisdiction."[11] U.S. courts, however, have no power to issue advisory opinions. Nor may they sit as worldwide fact-finding commissions. They are supposed to decide concrete cases, according to the law. Any findings issued here would be void for lack of jurisdiction, subject to vacatur on appeal.

STATEMENT

A. For eighteen years, Ecuadorian rainforest communities seek—and ultimately win—a judgment holding Chevron responsible for dumping billions of gallons of toxic waste into the Amazon.

1. Chevron pollutes the Ecuadorian Amazon (1970s & 1980s)

From 1972 to 1990, Chevron drilled oil in an area of the Ecuadorian rainforest roughly the size of Rhode Island.[12] During that time, Chevron dug hundreds of unlined waste pits into the jungle floor and filled them with toxic drilling muds—contrary to the prevailing industry practice of pumping waste back into well cavities deep underground, where it can't harm the environment. Because the pits were unlined, the toxic chemicals Chevron dumped into them leached into the surrounding ground. And Chevron built pipes into the sides of many of its pits so the toxic contents could easily flow into nearby streams relied on by the local population for drinking water. Chevron's drilling activities also had the effect of discharging billions of gallons of toxic production water—as much as four million gallons per day—directly into the local waterways of the Amazon

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[11] *Naranjo*, 667 F.3d at 246.

[12] *See, e.g.*, PX 400; DX 1482. Although it was Texaco that owned and operated the oil fields and well sites in Ecuador, Texaco became a wholly owned subsidiary of Chevron in 2001 and, between 2001-2005 the combined company was known as ChevronTexaco. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011). This brief thus collective refers to both Texaco and Chevron as "Chevron" unless otherwise noted.

basin.[13]

Chevron does not contest any of these facts. To the contrary, Chevron has admitted that it dumped three million gallons of formation water daily into Amazon waterways, amounting to "15.834 billion . . . gallons" in total.[14] And its internal memoranda reveal that the company eschewed modern waste-management practices used in the United States in favor of cheaper, outdated, and dangerous methods—which Chevron's own investigators concluded "cannot be considered 'good practice'"—and adopted a policy of concealing spills from the public and destroying records of environmental incidents.[15] An internal memo from 1980, for example, notes that the company had studied "the cost and necessity of eliminating possible contamination of the environment by the earthen pits used in the drilling, producing, and workover operations in the Oriente Region."[16] Even though the unlined pits fell below industry standards, the memo "recommended that the pits neither be fenced, lined, or filled"—solely because of "cost."[17]

Another memo directed Chevron employees to take steps to conceal the company's misconduct. It told them to report spills and other environmental incidents only if the media or government became independently aware of the incidents: "Only major events . . . are to be reported. . . . A major event is further defined as one which

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[13] *See, e.g.*, DX 1482.

[14] DX 935, at 1; DX 1066 & DI 422-3.

[15] DX 940, at 2.

[16] DX 1064; *see also* DX 1051-63.

[17] DX 1064. It would have cost Chevron less than $5 million to improve its practices: "The total cost of eliminating the old pits and lining the new pits would be US$ 4,187,1111," while "[t]he cost of fencing the current pits would be an additional US$ 700,315." *Id.* Apparently, that was too much.

attracts the attention of press and/or regulatory authorities."[18] The memo also ordered the destruction of records: "No reports are to be kept on a routine basis and all previous reports are to be removed … and destroyed."[19] These policies remained in effect throughout the relevant period.

Twenty years later, Chevron commissioned a study that found "contamination of soil and water . . . at wells sites, production stations along road ways, flow lines and secondary pipelines."[20] It also found evidence of oil spills at 97%—158 out of 163—of the sites assessed, and numerous violations of Ecuadorian law.[21] The firm that conducted the study recommended Chevron conduct a comprehensive environmental investigation to determine the full scope of the company's liability. Chevron never did so.[22]

Chevron's "pump and dump" operations violated Ecuadorian law and left behind massive amounts of poison and pollution to ravage the communities of the Amazon.[23] Toxic—and in many cases carcinogenic—chemicals continue to infect the waters that tens of thousands of indigenous people depend on for every facet of their lives.[24]

2. Ecuadorians bring an environmental case against Chevron in this Court, and Chevron convinces the Court to dismiss the case by promising to satisfy any Ecuadorian judgment against it (1993-2002)

In 1993, the affected communities brought suit against Chevron in this Court (the *Aguinda* case), alleging that they and their families had sustained various physical

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18 DX 1052.
19 *Id.*
20 DX 1750, at 19-20; *see also* DX 946; DX 1491.
21 *Id.*
22 *Id.*
23 *See, e.g.*, DX 1482.
24 *See, e.g.*, PX 400; DX 1482.

injuries, including the development of pre-cancerous growths. The plaintiffs sought money damages, as well as medical monitoring and "extensive equitable relief to redress contamination of the water supplies and environment."[25]

Three years later, this Court granted Chevron's motion to dismiss the case on grounds of *forum non conveniens* and international comity.[26] But the Second Circuit reversed that ruling, holding that it was improper to dismiss the case on those grounds without requiring Chevron to submit to jurisdiction in Ecuador.[27]

Back in this Court, and determined to obtain dismissal, Chevron then "unambiguously agreed in writing to being sued on [the plaintiffs'] claims (or their Ecuadorian equivalent) in Ecuador, to accept service of process in Ecuador, and to waive for 60 days after the date of [the] dismissal any statute of limitations-based defenses that may have matured since the filing of the [case]."[28] Chevron "also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act," N.Y. CPLR §§ 5301-09.[29] Chevron waived all other objections to enforcement of an Ecuadorian judgment. *Id.*

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[25] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

[26] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

[27] *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159-60 (2d Cir. 1998).

[28] *Aguinda II*, 142 F. Supp. 2d at 539.

[29] *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 (2d Cir. 2011). The Recognition Act provides that a foreign judgment (1) is "not conclusive" if issued by a legal system lacking "impartial tribunals" or "procedures compatible with . . . due process," and (2) "need not be recognized" if it was "obtained by fraud" or in violation of the parties' agreement not to resolve the dispute in "that court." N.Y. C.P.L.R. § 5304(a)(1), (b)(3) & (6).

This Court again dismissed the case.[30] In doing so, the Court "adopted [Chevron's] promise to satisfy any judgment issued by the Ecuadorian courts, subject to its rights under New York's Recognition [Act]."[31] "As a result, that promise, along with [Chevron's] more general promises to submit to Ecuadorian jurisdiction, [became] enforceable against Chevron in . . . any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards." *Id.*

After the Second Circuit affirmed, Chevron issued a press release saying that it was "pleased with the ruling," which it trumpeted as "vindicat[ing] [its] long-standing position . . . that the appropriate forum for this litigation is Ecuador."[32]

3. Disregarding its promise to this Court, Chevron repeatedly tries to thwart the Ecuadorian case (2003-2010)

The *Aguinda* plaintiffs then did exactly what Chevron spent a decade telling this Court it wanted them to do: In 2003, they refiled their claims against Chevron in Lago Agrio, Ecuador. But Chevron—now outside the reach of this Court—immediately broke its promise and contested jurisdiction in Ecuador.[33] And on the first day of trial, Chevron lawyer Ricardo Reis Veiga tried to torpedo the litigation by persuading the country's Attorney General to call the trial judge and urge him to throw out the lawsuit.[34]

As it would turn out, this was only the beginning of Chevron's duplicity, abusive litigation conduct, and attempts to evade responsibility for its actions. Time and again, as the Ecuadorian case moved forward, Chevron sought to delay or corrupt the proceedings

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30 *Aguinda II*, 142 F. Supp. 2d 534, *aff'd* 303 F.3d 470 (2d Cir. 2002).
31 *Republic of Ecuador*, 638 F.3d at 389 n.4.
32 DX 954.
33 DX 1492.
34 *See, e.g.*, DX 1416 at 104:24-106:17; DX 378.

by manipulating the testing sites, clogging the courts with frivolous and repetitive filings, and shamelessly forcing the recusal of judges who were either unable to keep up with Chevron's "document dump" strategy or were falsely accused of bribery by someone on Chevron's payroll.

a. ***Testing-site manipulation.*** At the heart of the Ecuadorian case was a series of roughly 45 "judicial site inspections"—where, under the supervision of the judge, the parties' experts collected soil and water samples at the well sites and operating stations, while attorneys for both sides made public arguments.[35] Chevron went to great lengths to sabotage these inspections. It conducted secret pre-inspection testing of various sites to pre-determine "safe" sampling locations within the contemplated judicial inspection sites, hoping to conceal the true extent of the contamination.[36]

On one occasion, Chevron's experts secretly conducted pre-inspection sampling at a critical site called Guanta Station.[37] What they found worried them: Their sampling revealed unusually high levels of contamination, including high levels of arsenic, chromium, and polycyclic aromatic hydrocarbons (or PAHs, many of which are well-known carcinogens). *Id.* This was particularly worrisome to Chevron because the Guanta site was one of the last fields discovered and developed. If it was contaminated because of substandard practices, then *all* sites were likely contaminated.[38]

So Chevron requested that the Ecuadorian court cancel the Guanta inspection. But it didn't stop there: The day before the inspection was set to take place, Chevron's

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[35] *See, e.g.*, PX 400; DX 1482.
[36] DX 591, DX 676.
[37] DI 1197-2, at 63.
[38] DX 1703.

lawyers rushed to the court armed with what the company claimed was a military intelligence report calling for the suspension of the inspection to avert a threatened riot.[39] That report, it later became clear, was fake. An investigation by an Ecuadorian intelligence agency later confirmed that the report had been obtained outside of the proper military chain of command at the request of Chevron's security officer—unsupported by actual intelligence.[40] The agency further explained that it had never received or reported any threat in connection with the scheduled inspection.[41] Nevertheless, Chevron's ploy worked: Unaware at the time that the report was bogus, the Court granted Chevron's last-minute request over the objections of the plaintiffs and suspended the inspection.[42]

b. ***Chevron's "document dump" strategy.*** Chevron's gamesmanship extended beyond the systematic disruption and delay of the discovery process. It was also designed to create the appearance of supposedly unfair treatment and due-process violations. One example is Chevron's vexatious "document dump" strategy, which aimed to take advantage of a unique feature of Ecuadorian law—the statutory requirement that a judge must act on any motion within three days. Any judge who fails to do so may be recused from the case, while any who takes more than nine days must withdraw.[43]

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[39] PX 400, at 53-55; DX 1102-D; DX 958; DX 605EB; DX 605EC.

[40] DX 961.

[41] *Id.*

[42] *See, e.g.*, DX 297, 305, 307.

[43] Ecuadorian Code of Civil Procedure, art. 288 ("Judgments will be issued within twelve days, court orders within three days; decrees within two days; but if the record has over one hundred pages, the term within which the judgment should be issued will be extended by one day for each one hundred pages."); Ecuadorian Code of Civil Procedure, art. 856 ("A judge of an upper or lower court may be recused by any of the parties, and

Chevron abused this procedural rule by repeatedly filing multiple motions to delay the proceedings and force successive judges who presided over the case to withdraw due to their inability to rule upon every motion within the time required by Ecuadorian law. To give just two examples: On August 5, 2010, minutes before the court closed at 6:00 PM, Chevron filed seventeen motions in rapid-fire succession, the majority of which challenged the same ruling.[44] And on October 14, 2010, Chevron filed 39 motions within a 50-minute window, each and every one of them separately addressing different aspects of a court order issued three days earlier.[45]

Chevron's filings were also regularly accompanied by the submission of thousands of documents and many hours of video clips, most of which the company had obtained through extraordinary discovery proceedings (as discussed below, in part 6). Any court would have difficulty handling this deluge, and the Ecuadorian court was no exception: It found that Chevron's tactic was improper and that most of its massive motion submissions were irrelevant or time-barred. Yet the tactic has persisted

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must refrain from hearing a case, if: . . . (10) He does not hear the case within three times the time period provided for by law.").

[44] DX 986; *see also* DX 987; DX 981.

[45] DX 988. In addition, Chevron's scheme to disrupt and delay was furthered by a pattern of successive filings of patently improper motions. For example, Chevron appealed interim court rulings made expressly non-appealable by applicable rules of procedure. *See, e.g.*, DX 989. After the court would deny the appeal on that ground, Chevron would then appeal *that* denial, alleging multiple violations of procedure and further moving for annulment of the relevant proceedings. DX 990-91. And after the court denied Chevron's successive motions for annulment, Chevron would then challenge *these* denials through yet more improper motions, generally accusing the judge of bias and alleging further violations of due process and irreparable harm. *See, e.g.*, DX 992. Following proper court procedures, the Court would have to once again issue an order denying Chevron's latest motion as incompatible with applicable procedure. DX 989; *see also* DX 993. This endless cycle of motion-denial-appeal was a Chevron routine played out to delay resolution of the issues, to force recusal of those judges unable to keep up with the vexatious practice, to bleed the plaintiffs' resources, and to create a record of purported due process violations by the court.

throughout this sprawling litigation: As an Ecuadorian appellate court would later note in criticizing Chevron's "abusive," "overtly aggressive and hostile attitude," the many "thousands [of] documents submitted by Chevron Corporation bloated the case … so much that at this stage alone there were almost two hundred record binders (about twenty thousand pages), not counting the more than two hundred thousand papers in the first instance case."[46]

Chevron's strategy had its desired effect, however, leading to the successful recusal of Judge Ordoñez, who was unable to timely resolve one of the many inundations of multiple and repetitive filings, accompanied by enormous exhibits, regularly made by Chevron's counsel.[47]

c. ***Chevron's first concocted "bribery" allegation.*** In an effort to cause a different presiding judge's removal from the case—this time on the eve of an anticipated judgment—a long-time Chevron contractor named Diego Borja and a convicted felon named Wayne Hansen sought to entrap the judge (Judge Nuñez) in an elaborate "bribery" scheme in which he was secretly videotaped. Based on the recording, Chevron launched a public-relations campaign accusing Judge Nuñez of bribery.[48] It triumphantly declared on August 31, 2009, that it had obtained recordings "reveal[ing] a $3 million bribery scheme implicating" the judge presiding over the case.[49] Chevron said that the two men who recorded the scheme—Borja and an "American businessman," according to Chevron—were environmental remediation contractors "pursuing business opportunities

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[46] PX 430 at 2, 15.
[47] DX 995, 996.
[48] *See, e.g.*, DX 905.
[49] *See generally* DX 905; DX 30-61; DI 173.

in Ecuador" who had happened upon "serious judicial misconduct."[50] Chevron claimed that the videos showed that the two men were able to coax the judge into revealing that he would rule in favor of the Ecuadorian plaintiffs.[51]

None of that was true. To begin with, neither Borja nor Hansen were environmental remediation contractors.[52] Borja was still under contract with Chevron at the time, charged with handling litigation-related laboratory samples and moving Chevron laboratory equipment.[53] And Hansen was a convicted felon and drug-trafficker.[54] Moreover, the recordings show that Judge Nuñez never asked for and was never offered a bribe of any kind.[55] They also show that he repeatedly declined invitations to say which way he intended to rule. Indeed, the only U.S. judge who reviewed the transcripts and commented on them said that he saw no evidence of a bribe.[56]

After the tapes were released, Chevron publicly distanced itself from Borja. It represented to the Ecuadorian court that his "[w]ork [for Chevron] had already concluded" and that his "functions had nothing to do with the sampling process."[57] But that too was untrue: Borja was still working as Chevron's "Sample Manager" for the

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50 *Id.*
51 *Id.*
52 *See, e.g.*, DX 583 (Ex. 62); DX 1102T.
53 *Id.*; *see also* DX 522; DX 514; DI 152.
54 *See, e.g.*, DX 1102T.
55 *See, e.g.*, DX 905.
56 Transcript of Proceedings (Nov. 10, 2010), *In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) at 38:19-39:5.
57 DI 1197-2, at 8.

"Lago Laboratory" right up to, and even after, his failed bribery allegation.[58]

What *is* true, however, is that Borja's own, unguarded statements at the time implicate *Chevron*—not Judge Nuñez—in illegal activity. Between August and October of 2009, Borja's childhood friend recorded conversations in which Borja conceded that the bribery scheme was illusory and that no bribe was offered to Judge Nuñez.[59] Borja also asserted that Chevron, among other things, "cooked" the evidence in the Ecuadorian case, used labs that were supposedly independent but actually belonged to Chevron, and generally engaged in misconduct that, if publicly revealed, would cause the courts to "close [Chevron] down."[60] Finally, Borja made it very clear that if Chevron did not look after him, he would disclose the company's misdeeds to the world.[61]

Chevron apparently took the threat seriously. Borja was plucked from Ecuador shortly after the recordings were made public and installed in an all-expense-paid villa near Chevron's headquarters.[62] Chevron provided his furnishings, car, and cell phone,

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58 *Id.*

59 *See* DX 32-61.

60 *Id.*; *see also* DX 1102R. Borja explained to his friend (Santiago Escobar) that he had incriminating evidence to prove that Chevron's own operations were potentially illegal and damaging to Chevron's defense in the Ecuadorian case: "I have the mails . . . . Did you think I was going to jump into the water without that? . . . I have correspondence that talks about things you can't even imagine, dude . . . I can't talk about them here, dude, because I'm afraid, but they're things that can make the Amazons win this just like that [snapping fingers] . . . what I have is conclusive evidence, photos of how they managed things internally. Escobar subsequently testified in proceedings in Ecuador that, according to Borja, Chevron knowingly substituted clean soil samples for those taken from the judicial inspection sites by lifting soil samples from contaminated well sites and then driving 10 to 30 kilometers away from the sites and replacing the contaminated samples with clean soil taken from areas untouched by oil production. *See, e.g.*, DX 999.

61 *Id.*

62 DX 583 (Ex. 66).

plus a job for his wife.[63] Through counsel, Chevron also pays Borja's monthly rent, characterized as "Witness Rent Payments," as well as other perks and benefits.[64] Chevron has even gone so far as to pay Borja's state and federal income taxes.[65] And although Borja performs no work for Chevron, the company gives him a $5,000 to $10,000 monthly "stipend," which is coordinated by Chevron's long-time counsel in the case.[66] Altogether, Borja received more than $2.2 million in benefits from Chevron in the first 29 months since he was relocated.[67] That money seems to be well spent: In 2010, under the supervision of Chevron's counsel, Borja signed two declarations ostensibly renouncing his previously recorded statements.[68]

As for Chevron's "American businessman," convicted felon Wayne Hansen, he too threatened to reveal information damaging to Chevron if the company did not improve his situation.[69] It is unclear whether his wish was granted, but this much is clear: The Republic of Ecuador filed a 28 U.S.C. § 1782 discovery application against Hansen in his home state of California on September 14, 2010; he never showed up, and by the next month he was living a life of leisure in Peru.[70]

Notwithstanding the utter falsity of Chevron's "bribery" charges, they nevertheless achieved their intended result: Although Judge Nuñez denied any

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[63] DX 905.
[64] DX 583 (Exs. 44, 51 & 52).
[65] DX 583 (Exs. 56-57).
[66] DX 583 (Exs. 2, 6, 10, 16, 18, 19, 26, 36, & 58); *see also* Borja Dep. Tr. (Mar. 15, 2011) at 24:22-25:9, 29:8-11, 77:20-78:3.
[67] DX 918.
[68] DX 583 (Exs. 25 & 30).
[69] DX 583 (Ex. 3).
[70] DX 583 (Ex. 54).

wrongdoing, he recused himself to eliminate any appearance of impropriety—thereby delaying final resolution of the case for another eighteen months.[71]

4. Hundreds of site inspections and expert reports—including those from Chevron's own experts—confirm Chevron violated the law (2006-10)

But despite Chevron's best efforts to distract attention away from its wrongdoing—and despite the unlimited resources at its disposal—Chevron could not combat the growing mountain of evidence showing the devastating and widespread environmental contamination caused by its drilling practices. Indeed, oil and water samples from inspections revealed unlawful amounts of at least fifteen different potentially toxic substances.[72] At least one toxic substance was found in excess of the legal limit at *every inspected site*—often far in excess of the limit.[73]

Even Chevron's *own hand-picked evidence*, limited and distorted as it was, confirmed the company's culpability. Two of its environmental auditing firms found significant toxic contamination at 91% of the wells operated solely by Chevron.[74] Half of the sites had illegal amounts of two carcinogenic PAHs, 90% had illegal amounts of the PAH pyrene, and 82% had illegal amounts of naphthalene.[75] At one well, for example, Chevron's own expert reported soil contamination several times higher than the Ecuadorian limit.[76] Even more damning, a number of these pits were certified as "completely remediated" by Chevron following a sham cleanup it conducted in the mid-

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71 *See, e.g.*, DI 152.
72 DX 1482.
73 *Id.*
74 DX 1482; *see also* DX 1117 at § 3.3.1.
75 *Id.*
76 *Id.*

1990s.[77]

Chevron also tested sediment in nearby streams and swamps, showing that the pollution had spread there as well and persisted almost two decades later.[78] Although Chevron conducted only modest sediment sampling, more than half of its samples showed unlawful amounts of contamination. *Id.* Chevron's sampling of the surface water showed even clearer evidence of pollution: It detected phenols—a soluble toxic component of crude oil—at every location tested, nearly twenty years after the drilling had stopped.[79]

5. Chevron shifts its strategy to collateral attacks in New York and The Hague (2007-2011)

Unable to overcome the mounting evidence against it, and desperate to avoid paying for its wrongdoing, Chevron shifted gears, adopting a strategy to collaterally attack the Ecuadorian litigation in any forum possible. Its opening gambit was to file an arbitration proceeding against the Republic of Ecuador before the American Arbitration Association and then offer to dismiss the arbitration in exchange for the government's "intervention" in the Ecuadorian litigation. The arbitration filing—a clear effort to strong-arm the sovereign nation of Ecuador—was ultimately stayed by this Court.[80]

Chevron also unsuccessfully lobbied Congress to cancel U.S. trade preferences extended to Ecuador under the Andean Trade Preferences Act—another blatant attempt

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77 *Id.*

78 DX 1117 at § 3.3.2.

79 *Id.* at § 3.3.3.

80 *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 469 (S.D.N.Y. 2007); *see also In re Chevron*, 633 F.3d 153, 159 (3d Cir. 2011).

to bully the Republic of Ecuador into quashing the case.[81] As one U.S. Congresswoman put it: "Rather than allowing this case to come to a conclusion, embarking on clean-up efforts, or even seeking mediation, Chevron has engaged in a lobbying effort that looks like little more than extortion . . . . Apparently, if it can't get the outcome it wants from the Ecuadorian court system, Chevron will use the U.S. government to deny trade benefits until Ecuador cries uncle."[82]

Then-Senator Barack Obama took a similar position: He stated that "the 30,000 indigenous residents of Ecuador deserve their day in court," and that Chevron should not be permitted "to interfere with a case involving Chevron that is under consideration by the Ecuadorian judiciary, particularly one involving environmental, health and human rights issues that have regional importance."[83]

Chevron then turned back to arbitration, initiating international proceedings against the Republic of Ecuador before the Permanent Court of Arbitration in The Hague. Chevron requested that a private arbitration panel under the U.S.-Ecuador Bilateral Investment Treaty order the executive branch of the Republic of Ecuador to compel the judiciary to dismiss the case.[84] The panel has not yet ruled on the request.

6. Chevron obtains unprecedented discovery in U.S. Courts

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[81] Michael Isikoff, *Chevron Lobbyists Fight Ecuador Toxic-Dumping Case*, Newsweek, July 25, 2008, *available at* http://www.newsweek.com/2008/07/25/a-16-billion-problem.html; Members of Congress Urge USTR to Ignore Chevron Petition on Ecuador Legal Case, *available at:* http://lindasanchez.house.gov/index.php/component/content/article/3-2009press-releases/490-members-of-congress-urge-ustr-to-ignore-chevron-petition-on-ecuador-legal-case.

[82] *Id.*

[83] DX 374.

[84] *See, e.g.*, DI 65-4.

Meanwhile, using a U.S. statute permitting discovery "in aid" of foreign litigation, 28 U.S.C. § 1782, Chevron sought to expose what it claimed was fraud in the relationship between the Ecuadorian plaintiffs' legal team, Steven Donziger, and an environmental expert named Richard Cabrera who was appointed by the Ecuadorian court to provide a report on the economic value of damages—one of more than 100 expert reports submitted to the court throughout the litigation.[85]

The scale of this effort—like all of Chevron's efforts to avoid compensating its victims—has been breathtaking: By 2011, the company had initiated "an extraordinary series of at least *25 requests* to obtain discovery from at least *30 different parties*" in more than a dozen federal courts across the country—an assault designed to isolate the plaintiffs' contacts with Cabrera from the context of Ecuadorian law and ultimately gain access to huge amounts of evidence that it hoped would derail the Ecuadorian case, all the while draining the plaintiffs of their resources by forcing them to simultaneously litigate these cases nationwide.[86] Yet Chevron has identified no provision of the Ecuadorian Civil Code prohibiting a party from communicating *ex parte* with a court-appointed expert, formulating a work plan for the expert, or drafting materials for that expert's adoption as his own. Distinguished Ecuadorian law professors have also attested that nothing in Ecuadorian law prevents a party from meeting with a court-appointed expert *ex parte*, planning the work the expert will perform, and drafting proposed findings for the expert.[87]

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[85] *See, e.g.,* DI 65-12; PX 400.

[86] *In re Chevron*, 633 F.3d 153, 159 (3d Cir. 2011) (emphasis added).

[87] *See* DX 415, 416; DI 1702-1. Indeed, Chevron's technical consultant met with Dr. Marcelo Muñoz—a "neutral," court-appointed expert similar to Cabrera—at a hotel for a

Still, Chevron took advantage of American courts' unfamiliarity with Ecuadorian procedure, obtaining an unprecedented volume of discovery in these proceedings. Donziger, for instance, was compelled to produce his entire eighteen-year litigation file and sit for fourteen days of deposition testimony.[88] And Chevron successfully demanded hundreds of hours of outtakes from *Crude: The Real Price of Oil*, a documentary film about the case, plus virtually every scrap of correspondence created about the case by Donziger and the other lawyers.

7. Judge Zambrano enters judgment against Chevron (February 2011)

On February 14, 2011—after eight years of litigating the case in Ecuador, a 215,000-page court record, and hundreds of inspections and expert reports detailing the extensive scope of Chevron's malfeasance—Judge Zambrano, the Ecuadorian judge presiding over the case at that point, entered judgment against Chevron in a comprehensive 188-page decision. Several aspects of this decision are worth highlighting.

First, the court addressed Chevron's concerns about expert objectivity by *granting* its request and *refusing* to take into consideration either the Cabrera Report or the submissions of the plaintiff's expert, Dr. Charles Calmbacher.[89] The court also gave reduced weight to an expert report on health effects because its author disclosed that he

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"technical planning meeting" to plan the expert report. DI 152; DX 1067. This meeting took place before Muñoz was formally appointed by the Ecuadorian court. *Id.* Dr. Muñoz also stated that his work plan was "solicited and approved" by Chevron's technical consultant. *Id.*

[88] *See, e.g.*, DI 287.

[89] PX 400, at 48-51.

had been hired by the Amazon Defense Front, an organization assisting the plaintiffs.[90]

Judge Zambrano reiterated that the judgment was not based on any of the experts' "personal assessments" or "opinions"—indeed, he had "not considered the conclusions presented by [any of] the experts in their reports"—but rather was based on only "the technical content of their reports."[91] Judge Zambrano, in other words, "form[ed] his own assessment, in accordance with the rules of sound judgment."[92]

Second, the court compensated for the experts' perceived lack of objectivity by relying repeatedly on test results by Chevron's own experts—and on Chevron's own admissions—to support the conclusion that Chevron had contaminated the environment. For example, although Chevron had argued that the "production waters" it dumped into the environment posed no environmental risk, the Ecuadorian court cited contrary sample results by Chevron's own expert, John Connor, and a statement by Chevron experts that "'even if production waters do not contain significant concentration of toxic compounds, [they] might represent a potential harm to receptive bodies and vegetation, given [their] elevated concentrations of salt.'"[93]

Third, the court also addressed Chevron's charges of misconduct by Donziger, which Chevron tried to establish by presenting carefully edited outtakes from *Crude*. Judge Zambrano condemned both Donziger's statements criticizing the Ecuadorian

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90 *Id.*

91 *Id.*; *see also id.* at 119 ("[I]t is reiterated that only those results of the analyses of the samples taken in the field by the different experts that were analyzed in the laboratory and whose results are recorded in the proceedings should be borne in mind, but not . . . the conclusions of any of the experts, for this Presidency does not share [their] criteria and is capable of reaching its own conclusions based on the results and sound judgment.").

92 *Id.*

93 *Id.* at 145.

judiciary—which Donziger made out of fear that the judiciary would be corrupted by *Chevron*, not him—as well as Chevron's attempts to trash Donziger's reputation by quoting the *Crude* outtakes out of context.[94]

Finally, the court calculated the actual damages at $8.646 billion. The court rejected the plaintiff's request for damages for excess cancer deaths and unjust enrichment—the two highest-value categories that they advocated.[95] The breakdown of the damages award was as follows: $5.396 billion for soil remediation; $1.4 billion for health care costs; $800 million for deaths due to cancer; $600 million for groundwater remediation; $200 million for damage to the ecosystem; $150 million for drinking water remediation; and $100 million for damages to indigenous culture.[96]

The court also assessed $8.646 billion in punitive damages (100% of the remedial damages) in light of Chevron's egregious procedural and substantive misconduct and the need to dissuade Chevron and others from similar misconduct in the future.[97] But the court gave Chevron the option to avoid punitive damages by issuing a public apology—"a symbolic measure of moral redress" recognized by the Inter-American Court of

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[94] The court held: "[I]nsofar as concerns the merits of [Donziger's] statements, they are rejected—especially the unwarranted statements regarding the Ecuadorian Judiciary—and the Court does not recognize anything that Mr. Donziger might say or do when he is in front of the cameras or in any other act. No pressure has effectively been exerted on this Court. In addition, the Court notes that [even if it had] the power to judge Mr. Donziger due to his disrespectful statements, it could not do so based on such limited portions, chosen and edited from hours of taping, and without giving the accused the right to defend himself or explain the context of those statements." *Id.* at 51-52.

[95] *Id.* at 184-86.

[96] *In re Chevron Corp.*, 650 F.3d at 280-81.

[97] PX 400, at 48-51.

Human Rights.[98] Chevron did not do so. Nor has it paid a dime of the judgment to the people it injured.

8. The Ecuadorian court clarifies its judgment (March 2011)

On March 4, 2011 Judge Zambrano issued a 24-page order in response to a laundry list of requests by Chevron for clarification of the judgment. Importantly, the order confirmed the judgment's exclusion of the Cabrera Report and reiterated that the court had formed its own opinions based on applying "logic" and "sound judgment" to the "technical content" of voluminous scientific data in the record—generally the laboratory analyses attached to the filed experts' reports.[99]

9. The judgment is affirmed by the appellate court (2012)

Both sides appealed. Reviewing the case *de novo*, a three-judge panel of the Provincial Court of Justice of Sucumbios affirmed the judgment in a January 2012 opinion.[100] The appellate court addressed and rejected each of the plaintiffs' grounds for appeal. It also rejected Chevron's contention that "fraud and corruption of plaintiffs, counsel and representatives" should serve as a basis to reverse the decision.[101] The court explained that its obligation was to assess the "[e]vidence . . . as a whole, pursuant to the rules of sound judicial judgment, in addition to the formal requirements prescribed by the substantive law for the existence or validity of certain acts."[102] After "evaluating the

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98 *Id.*
99 PX 429, at 8, 14, 15, 18, 21.
100 PX 430.
101 *Id.*
102 *Id.* at 10, 12.

evidence collectively," the court found that it amply supported the decision.[103]

The appellate court later clarified its decision at Chevron's request. Although the clarification mostly covered technical or procedural matters, the court confirmed that it had considered all of Chevron's charges of "irregularities in the preparation of the trial court judgment" and found them to be pure speculation, belied by the trial court record.[104] The court also noted that—with all the evidence that Chevron had been able to amass—one would expect there to be some correspondence backing up Chevron's assertions if Donziger and the plaintiffs' lawyers had in fact committed fraud and corrupted the proceedings.[105]

10. The judgment is affirmed by the Ecuadorian National Court of Justice (2013)

Chevron then appealed to the Ecuadorian National Court of Justice—Ecuador's highest court—which issued its decision just last month. The Court's opinion addressed Chevron's complaints about the Cabrera Report, explaining that "the trial court's judgment did not take into account" the report, and Chevron has "not indicate[d] which law [was] violated" by the judgment, nor has it explained how its allegations, even if true, "affect[ed] the validity of the proceeding" or "harm[ed]" Chevron in any way.[106] And if Chevron really thought misconduct had occurred, "it may always come before the Bar Association, the Judicial Council, Prosecutor General's Office, *etc.*, as applicable, in

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103 *Id.*
104 PX 431, at 3.
105 *Id.* at 4.
106 DX 8095, at 97-98.

order for them to determine the behavior of the attorneys, judges, [and] experts."[107]

But the National Court of Justice did not affirm the judgment in its entirety. Quite the contrary, the Court struck the punitive damages awarded by Judge Zambrano—thus cutting the damages award *in half*.[108] This $8.646 billion victory—like the two recent legal victories Chevron has achieved over Ecuador's state-owned oil company—severely undercuts Chevron's argument that the Ecuadorian courts are systematically biased against it. If Chevron believes its due-process rights have been violated in this case, it may seek relief for violations of constitutional rights from the Constitutional Tribunal of Ecuador.

B. Chevron Brings This Action as Yet Another Collateral, Preemptive Attack on Enforcement of the Ecuadorian Judgment.

When Chevron filed this case in early 2011—two weeks *before* the Ecuadorian judgment was entered—its RICO allegations rested primarily on the Cabrera Report. Chevron also used unfiltered and sometimes inflammatory statements by Donziger himself—taken out of context from 600 hours of *Crude* outtakes—to accuse him of applying "pressure tactics" on the Ecuadorian judiciary by organizing public protests, orchestrating a media campaign, and engaging in activism.[109]

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[107] *Id.* at 102.

[108] *Id.* at 221.

[109] DI 5. The idea of having Chevron file a RICO case was first publically mentioned in mid-2010—in a § 1782 discovery proceeding Chevron brought in this Court against the *Crude* filmmaker, Joe Berlinger, demanding all 600 hours of outtakes—when this Court asked whether "the phrases Hobbs Act, extortion, [and] RICO, have any bearing here." Hearing Transcript 9/23/10, at 24:6-22. During that same discovery proceeding, the Court also refused to wait for the Ecuadorian court to weigh in, remarking: "Believe me, if this were the High Court in London, you can be sure I'd wait." Hearing Transcript 4/30/10, at 36:5-10.

1. This Court issues a worldwide injunction

Based on that evidence, this Court granted a temporary restraining order and preliminary injunction barring enforcing of the Ecuadorian judgment across the globe. The Court based its injunction on New York's Recognition Act—the narrow exception to Chevron's earlier promise to satisfy any Ecuadorian judgment. Yet the Court did not hold an evidentiary hearing or even allow Donziger to respond to Chevron's accusations.[110] The Court explained its thinking:

> [W]e are dealing here with a company of considerable 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.[111]

2. The Second Circuit promptly reverses this Court's injunction

The injunction did not last long. The Second Circuit immediately vacated the injunction—one day after it heard oral argument.[112] In the opinion that followed, the Second Circuit held that the Recognition Act does not create "causes of action by which disappointed litigants in foreign cases can ask a New York court to restrain efforts to enforce those foreign judgments against them, or to preempt the courts of other countries from making their own decisions about the enforceability of such judgments."[113] "Chevron can present its defense to the recognition and enforcement of the Ecuadorian judgment in New York if, as and when the [Ecuadorian plaintiffs] seek to enforce their

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110 *See* DI 181.

111 Hearing Transcript 2/8/11, at 49:21-50:4.

112 *Chevron Corp. v. Naranjo*, 2011 WL 4375022 (2d Cir. Sep. 19, 2011).

113 *Naranjo*, 667 F.3d at 243.

judgment in New York."[114]

The Second Circuit also emphasized the "far graver" affront to principles of international comity that would result from a contrary interpretation: "[W]hen a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, . . . the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries"—like Canada—"who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates."[115]

3. Chevron's RICO case evolves

Since the Second Circuit's opinion, Chevron has not specified the precise relief it requests from this Court, nor has it explained how that relief could redress its alleged injury without running afoul of the Second Circuit's opinion. But Chevron *has* specified what relief it *isn't* seeking: Just before trial, Chevron dropped its damages claim—for $60 billion—in exchange for a bench trial, rather than letting a jury evaluate its evidence.

Over the last two years, Chevron has also attempted to bolster its evidence. Although its case continues to rely on the Cabrera Report, Chevron has now come forward with new evidence—not substantiated anywhere in the reams of documents the company has obtained through discovery proceedings—that it claims proves that Donziger and the Ecuadorian plaintiffs' lawyers bribed Judge Zambrano to rule in their favor. But that evidence is so flimsy it brings to mind Chevron's first failed attempt to concoct a bribery scheme. And as for the Cabrera Report: (1) Chevron still can't show

114 *Id.* at 246.
115 *Id.* at 244.

that the report violates any Ecuadorian ethical norm or procedural law, and (2) in any event, the Ecuadorian trial court *excluded* the report—an exclusion that has since been affirmed by two appellate courts.

4. Alberto Guerra: Chevron's second alleged "bribery" scheme

The keystone of Chevron's case is now the allegation that Donziger and the Ecuadorian plaintiffs bribed Judge Zambrano. That allegation relies entirely on the testimony of Alberto Guerra—a man who acknowledges that he bribed judges when he was an attorney, and that he accepted bribes when he became a judge.[116] Indeed, Guerra admits that he has accepted a bribe for as little as $200 to direct the outcome of a case.[117]

Guerra's two "bribery" stories. Although Guerra's story has constantly shifted over time, there have been essentially two main versions—each entirely at odds with the other.

Version one: In April 2012—over a year after this case was filed—Guerra approached Chevron and stated that he "had a story to tell Chevron regarding the drafting of the judgment at the trial court level."[118] At that time, Guerra's life was in dire straits. He was earning just $500 per month.[119] He had no salary and no savings, and his house needed substantial renovations.[120] His family was also in trouble: He had one son living illegally in the U.S. who had "serious problems" because of his immigration status, and

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116 Guerra Testimony 10/25, at 1216:20-1218:9.
117 *Id.* at 1218:6-9.
118 DX 1367, at 63-64.
119 *Id.* at 50-51.
120 DX 1361, at 17.

his daughter also lived in the U.S.[121] Guerra had not seen his children in years.[122] He worried about them.

When Guerra approached Chevron, the Ecuadorian newspapers had been reporting a bribery scandal where a draft verdict was delivered to a judge on a jump drive.[123] The judge printed the draft verdict, signed it, and filed it as his own. Guerra told Chevron an almost identical story, claiming that a draft verdict was delivered to Judge Zambrano for him to print, sign, and file. Guerra told Chevron that his information was "worth a million" dollars.[124] As he put it, "money talks . . . but gold screams."[125]

In this version of the story, Guerra detailed meeting Judge Zambrano in the Quito airport, "as he always did."[126] According to Guerra, Judge Zambrano had a flash drive containing a draft judgment that had been written by the Ecuadorian plaintiffs' lawyers. Judge Zambrano supposedly gave the drive to Guerra, who took it to his home in Quito, where he worked on it over the weekend on his own computer.[127] Guerra told Chevron that he worked on the verdict until 11:00 PM the first night, and that he had no contact with Judge Zambrano over the whole weekend because "there was no reason for it."[128] Guerra described working on the verdict for three days (Friday, Saturday, and Sunday) before meeting Judge Zambrano again at the airport and giving him the final version on a

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121 DX 1360, at 16.
122 Guerra Testimony 10/2, at 1222:18-1223:10.
123 Elena Testimony 11/4, at 1578:1-19, 1580:12-24; DX 1215-18.
124 DX 1360, at 32.
125 DX 1361, at 58.
126 Guerra Testimony 10/25, at 1108:14-17.
127 Guerra Testimony 10/25, at 1107:17-1108:21.
128 Guerra Testimony 10/25, at 1108:23-24, 1114:17-20; DX 1416, at 95.

flash drive.[129] Guerra told Chevron that Judge Nuñez had also helped write the verdict.[130]

Chevron wanted corroborating evidence. It paid Guerra $18,000 in cash for some documents and his home computer—the one on which he claimed to have worked on the verdict—replacing it with a brand new, state-of-the-art laptop.[131] But the draft verdict was not there.[132] Guerra then handed over his flash drives and CDs. The judgment wasn't there either.[133] This was a problem for Chevron: Guerra had promised the company that the orders he helped Judge Zambrano draft were on his computer or laptop. He had assured Chevron if an order was not on his computer, then he didn't write it: "It's a way to confirm."[134]

Chevron then flew Guerra to Chicago to meet with lawyers at the Gibson Dunn firm. The purpose was to cement his story and negotiate a financial deal. From that meeting, an entirely new story emerged.

Version two: The second version takes place on the same weekend as the first—two weeks before the verdict was issued. But that's where the similarity ends. In this version, Guerra recalls taking a multi-hour bus ride from Quito all the way to Lago Agrio. He then went to Judge Zambrano's apartment and found the draft judgment on a laptop belonging to Pablo Fajardo (the Ecuadorian plaintiffs' lawyer)—not on a jump drive. Rather than working on the verdict from home, Guerra now said that he worked for

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[129] Guerra Testimony 10/25, at 1114:21-24.
[130] *Id.* at 1114:25-1115:3.
[131] *Id.* at 1118:13-1119:17.
[132] *Id.* at 1120: 22-1121:1.
[133] *Id.* at 1121:2-9.
[134] DX 1360, at 75.

days on a stranger's laptop, in an apartment located in another city. And instead of having "no reason" to speak to Judge Zambrano for the entire weekend, in this version, Guerra left Judge Zambrano's apartment to have "breakfast, lunch and dinner" with him or Dr. Alban,[135] and maintained phone contact with Judge Zambrano each day.[136]

In return for his story, Chevron promised to get Guerra and his family out of Ecuador. That was just the start of Chevron's generosity toward him. He also received: (1) $48,000 in cash for handing over documents, his computer, and his old cell phone; (2) a new, top-shelf laptop that was "super fast"; (3) a new cell phone equipped with the latest technology; (4) a personal lawyer whose bills Chevron pays; (5) all moving expenses—including airfare and a temporary hotel—for him, his wife, his son, and his son's wife and children; (6) $12,000 to purchase household items for his new life in the U.S.; (7) ongoing payments of $10,000 per month (though he has performed no work for Chevron besides getting ready for trial); (8) a housing allowance of $2,000 a month; (9) a car with insurance; (10) health insurance covering him, his wife, and his son, as well as his son's wife and children; and (11) payment of all legal fees to finalize the immigration of his entire family.[137]

Additional inconsistencies. Even though Guerra underwent three full months of witness preparation—including numerous practice cross-examination sessions—apparently the main thing he learned was to use the word "exaggeration" when admitting

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[135] Guerra Testimony 10/25, at 1138.

[136] DX 1367, at 78:6, 90:7-11.

[137] PX 4800, at 25; DX 1361, at 50; DX 1362, at 37; Guerra Testimony 10/24, at 1052:8-1064:9.

to his lies.[138] Guerra repeatedly admitted that he was not truthful with Chevron, but he says this was for good reason: He was just trying to sweeten the deal. As he confessed: "I said many things to the gentlemen, to their representatives from Chevron. On many of those I was exaggerating. I wanted to improve my position."[139] And again: "I did tell them some exaggerated things because it was my intention or for the purpose of bettering or improving my position."[140] And again: "I told Chevron several things. Some them were true, others were exaggerations."[141]

In Guerra's attempts to please his benefactor and make his account consistent with known facts, he has repeatedly changed fundamental aspects of his story—aspects that no honest witness would have trouble keeping straight. In addition to changing the "how" and "where" of his story (as discussed above), he has changed the very facts of the "deal" with the Ecuadorian plaintiffs' lawyers that he alleges took place.

Guerra first said that the Ecuadorian plaintiffs promised him $300,000 for helping write the verdict.[142] That was a lie. He made it up to "improve [his] negotiating position" with Chevron.[143] At trial, he admitted this:

> Q. Do you recall telling Chevron's representatives that the plaintiffs' group for the Lago Agrio plaintiffs had offered to pay you $300,000 for your assistance in the case?
>
> A. There was an exaggeration from my part towards Chevron's people in order to secure a better position for myself.

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[138] Guerra Testimony 10/25, at 1049:10-14.
[139] *Id.* at 1124:24-1125:2.
[140] *Id.* at 1160:19-21.
[141] DX 1367, at 168.
[142] DX 1360, at 29.
[143] DX 1367, at 155.

Q. But it was not true, is that correct?

A. It was not true.[144]

So Guerra created a new story at trial. This time, he said that his promised compensation was actually to come from Judge Zambrano—as a percentage of his bribe money.[145]

Claimed corroboration #1: The Chevron orders. Guerra told Chevron that he could provide copies of 39 to 41 orders that he claims he ghostwrote. "I am responsible for the court orders," he said; "I have all of this in my computer."[146]

But in fact Guerra provided drafts of just nine orders—each of which was uploaded to his hard-drive on the same day (July 23, 2010), months *after* the orders were issued. Chevron's own expert, Spencer Lynch, testified that the metadata from this is consistent with the orders being drafted on another computer and then uploaded, all at once, onto Guerra's hard-drive.[147] Given that Judge Zambrano admitted giving Guerra access to his office and letting him prepare draft orders in other cases using past orders as templates—and given that several of the draft orders on Guerra's computer have near or less than 50% commonality with the actual opinion issued—these facts do not prove a bribery scheme between the Ecuadorian plaintiffs and Judge Zambrano. They show only that Guerra knows how to save materials from Judge Zambrano's computer to a flash drive and then upload them to his computer.

Claimed corroboration #2: The "Memory Aid." Chevron also points to a

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144 Guerra Testimony 10/25, at 1197:7-16.
145 *Id.* at 1198:9-1199:2.
146 DX 1360, at 53-54.
147 Lynch Testimony 10/21, at 579-581.

document called the "Memory Aid"—which Guerra supposedly used in working on the verdict—to corroborate his story. This document netted Guerra another $10,000 from Chevron.

Guerra has told three separate stories about the Memory Aid. In the first, Fajardo emailed the document to Guerra while Guerra was working on the draft verdict at his home in Quito.[148] But when Chevron looked, there was no email from Fajardo in Guerra's email archive. Fajardo's contact information did not even appear in Guerra's email contacts.[149]

In the second story, Fajardo emailed the Memory Aid to Guerra while Guerra was working on the verdict on Fajardo's laptop, in Judge Zambrano's apartment in Lago Agrio. Since Judge Zambrano did not have Internet access at his apartment, Guerra described having to leave the apartment and walk to an Internet café to receive the email.[150] But this story still did not explain how Guerra came into possession of the document in the first place; there was no email from Fajardo on Guerra's Hotmail account. The story also fails to explain how Guerra ended up with a hard copy of the Memory Aid, for there was no printer in Judge Zambrano's apartment.[151] Even more curious, almost two years later, the document was supposedly found "stuck" to the back of other materials shipped from Ecuador to the United States, though by all appearances the document does not have a fleck of dirt on it, a crease, or even a wrinkle.

The third version of the Memory Aid story was not unveiled until Guerra testified

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148 DX 1360, at 93-94.
149 Guerra Testimony 10/25, at 1122:1-6; PX 1732.
150 *Id.* at 1137:9-1138:8.
151 Guerra Testimony 10/24, at 1104:16-18.

at trial. In this version, Fajardo drove to Judge Zambrano's apartment in Lago Agrio and hand-delivered the Memory Aid.[152] Guerra could remember nothing more about it.

Claimed corroboration #3: The meeting that never took place. Guerra contends that in late 2009 he met Donziger at the Honey Honey restaurant, and the two reached an agreement for Guerra to be paid $1,000 per month for influencing the Chevron case.[153] Guerra asserts that this was the *only* time he personally reached an agreement with Donziger and the plaintiff's team.

The importance of this story to Chevron's case is simple: If the plaintiffs' lawyers in fact entered into a deal with Guerra in 2009 to influence the case, then that shows their willingness to act corruptly, making it far more likely that they bribed Judge Zambrano a year later. But if Guerra's story is false, then the inference cuts the other way: That would show *his* willingness to act corruptively—and sell a fabricated story for a six-figure payoff—making anything he says about this case impossible to credit.

Guerra's story begins with his attempt to solicit a bribe from Chevron in the fall of 2009. Guerra could not recall the exact day, but testified that he would defer to the Chevron lawyer's record of the event because he believed the lawyer, Ivan Alberto Racines, "probably has it more clearly."[154]

Racines and his boss, Adolfo Callejas Ribadeneira, both executed affidavits in 2009 describing Racines's phone call with Guerra as occurring between October 8 and 16, 2009.[155] A follow-up phone call took place "a few days later," which would be

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[152] Guerra Testimony 10/25, at 1134:20-24; 1138:23-1139:8.
[153] *Id.* at 1185:17-20.
[154] Guerra Testimony 10/25, at 1178:3-7.
[155] DX 1354; DX 99.

approximately October 10 to 18.[156] Then, Guerra and Racines met for dinner at the El Chacal restaurant one or two months later.[157] At that point—between approximately November 10 and December 18—Chevron supposedly turned down Guerra's offer. Guerra testified that, some days after that, he reported Chevron's refusal to Judge Zambrano who ordered him to contact the plaintiffs' team instead.[158] "Shortly thereafter," Guerra arranged a meeting with Fajardo, followed by a meeting with Donziger "a week or two afterwards."[159] That series of dates puts the Honey Honey restaurant meeting as most likely occurring between December 1 and December 15, 2009.

Guerra's testimony repeats a remarkably similar timeline. Guerra testified that he reached a deal with Fajardo "a month, a month and a half" after Judge Zambrano was assigned to the Chevron case on October 21, 2009.[160] That timeline puts the Honey Honey restaurant meeting between November 28 and December 12, 2009.

But Donziger was outside of Ecuador for this entire period—from November 14, 2009 to January 5, 2010.[161] Donziger's mother died from cancer on December 7, 2009, and he was in hospice with her when this "bribery" meeting allegedly occurred.[162]

Moreover, Guerra promised Chevron that he had "notes of meetings" as well as

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156 DX 1354.
157 *Id.*
158 Guerra Testimony 10/23, at 918:10-21.
159 *Id.* at 919:6-8, 921:25-922:5.
160 Guerra Testimony 10/25, at 1185:7-11; 11/18 Stipulation Regarding Judges in the Lago Agrio Litigation.
161 PX 1509.
162 Donziger Testimony 11/19 at p. 2650:4-16.

calendar entries confirming his meeting with Donziger and Fajardo.[163] But when he turned over his calendar and day planners to Chevron, there were no entries showing any meeting between Guerra and Donziger, Fajardo, or anyone on the plaintiffs' team.

Claimed corroboration #4: The deposit slips. Guerra says that in the 2009 meeting with Donziger, an agreement was reached for the plaintiffs' lawyers to pay Guerra $1,000 per month. He says proof of this can be found in deposit slips for his bank account. Remarkably, Chevron did not send any of its agents or lawyers to obtain Guerra's these deposit slips. Nor did Chevron obtain an affidavit from the bank concerning their existence or authenticity. Instead, Chevron told Guerra to produce the records himself. He came up with four slips, one purporting to show a deposit by Ximena Centeno.[164] This deposit slip is blurry and largely illegible. Centeno's national ID number—publicly available on the Internet—is in handwriting substantially similar to Guerra's.[165]

And the dates on these deposit slips—November 4, 2009, December 1, 2009, December 24, 2009, and February 8, 2010,[166]—refute the hypothesis offered by this Court in closing argument in an attempt to reconcile the conflict between Guerra's story and Donziger's known absence from Ecuador in late 2009. The Court posited that perhaps the timeline asserted by Guerra and the Chevron lawyers is incorrect, and the Honey Honey restaurant meeting actually occurred *after* January 5, 2010, when Donziger

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163 DX 1360, at 113, 117; DX 1361, at 63.
164 PX-1713.
165 *See* Ms. Littlepage's Closing Argument Slides.
166 PX-1713, pp. 1, 2, 4 & 5.

was back in Ecuador.[167] But three of the very deposit slips offered by Chevron and Guerra as *corroborating* evidence that a deal to pay him $1,000 per month was reached during this meeting come *before* January 5, 2010.

Guerra and Chevron's evidence of the meeting, in other words, is internally and irreconcilably inconsistent. There is no way to credit their sworn testimony without conceding that the deposit slips are forged. And there is no way to rely on the slips as corroborating evidence without changing beyond recognition the story they are intended to corroborate.

Judge Zambrano's deposit of $300 into Guerra's account. According to Guerra, each month Judge Zambrano would pay him "$1,000, $1,500, $2,000 depending on the volume," to compensate him for helping write orders.[168] As corroboration, he offered a single deposit slip showing a single $300 payment Judge Zambrano made to Guerra's account. But this deposit does not fit the payment scheme Guerra described; it is much less than any payment he says he would receive from Judge Zambrano. And, again, the timing does not work. Judge Zambrano admits he loaned Guerra $300 in June 2011.[169] As Judge Zambrano described, "Alberto Guerra would always tell me that he was facing a very delicate financial situation and he asked me as a favor if I could loan him around $300. I had no problem with that. He gave me the account number and I deposited it."[170] That is months after the *Aguinda* verdict was issued.

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[167] Trial Transcript 11/26, at 2894.
[168] DX 1360, at 8, 78.
[169] Zambrano Testimony 11/6, at 1813:25-1814:11.
[170] *Id.* at 1813:25-1814:11.

5. The Cabrera Report

This leaves the Cabrera Report, the document on which Chevron initially focused its case. There are at least two insurmountable problems with Chevron's reliance on it. The first is that Chevron has never been able to show that the report's preparation violates a single Ecuadorian law or procedural rule. That is not surprising: As distinguished Ecuadorian law professors have attested, nothing in Ecuadorian law prevents a party from communicating *ex parte* with a court-appointed expert, planning the work the expert will perform, and drafting proposed findings for the expert to adopt as his own (only if he sees fit).[171] Indeed, Chevron itself had *ex parte* communications and worked closely with its experts, many of whom it referred to as "independent" because they were appointed by the court, which is what that word signifies in Ecuadorian law and practice.[172]

Second, the Ecuadorian court expressly *refused* to rely on the Cabrera report in finding Chevron liable. Instead, the court relied largely on the scientific evidence of contamination proffered by Chevron's own experts.[173] The court's judgment has since been upheld by two levels of appellate review, including the Ecuadorian National Court of Justice. That Court reiterated that "the trial court's judgment did not take into account" the Cabrera Report, and that Chevron could not show "which law [was] violated" by the judgment, nor explain how the report's preparation "affect[ed] the validity of the

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171 *See, e.g.*, DX 415.

172 DX1102, at 10-11; DX 1750, at 46-53; *see also* DX 871; DX 873; DX 1067; DX 1416.

173 DX 1750, at 46-47.

proceeding" or otherwise "harm[ed]" Chevron.[174]

ARGUMENT

On the eve of trial in this case, Chevron made a critical strategic decision: It decided to drop all of its claims for damages against all of the defendants, on the condition that doing so would deprive them of their constitutional right to a jury trial. This Court agreed to deny the defendants a jury trial. *See Chevron Corp. v. Donziger*, 2013 WL 5526287 (S.D.N.Y. Oct. 7, 2013). But Chevron has been cagey about what relief it now seeks, stating only that "[t]he precise nature of the appropriate equitable relief will depend on the record developed at trial, and on developments in Defendants' ongoing … enforcement campaign," and suggesting that the Court's order might take the form of a worldwide anti-enforcement injunction, disgorgement, or a constructive trust. Proposed Pretrial Order at 19. The defendants thus had to defend themselves in a six-week bench trial without even knowing what exactly it is that Chevron is seeking.

Now that the trial is over, it is apparent that Chevron has no legal basis for the relief it seeks (whatever its precise form) and, indeed, that this Court does not even have jurisdiction over the case. First, Chevron lacks standing to seek equitable relief because it has not proven a concrete injury that was caused by the defendants' actions and that could be remedied by this Court. Second, this Court lacks authority to grant the equitable relief sought in any event. Finally, even if this Court had authority to grant the relief sought, Chevron has not proven its case on the merits.

I. Because Chevron Lacks Standing, this Court Lacks Jurisdiction.

Because Chevron has failed to demonstrate that it has standing under Article III of

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[174] DX 8095, at 97-98.

the Constitution, this case must be dismissed for lack of subject-matter jurisdiction. Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006). The burden is on Chevron to prove all three of the necessary elements: First, it must have "suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and alterations omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* Third, it must be "likely, as opposed to merely speculative," that the injury will be "redressed by a favorable decision." *Id.* These "are not mere pleading requirements"; each must be proven with "the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. "[A] plaintiff must demonstrate standing for each claim and form of relief sought." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011).

Moreover, "RICO standing is a more rigorous matter than standing under Article III." *Denney*, 443 F.3d at 266. RICO creates a cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). That means that the plaintiff must prove that there was a violation by the defendant that resulted in injury to the plaintiff's business or property *and* that the violation was both the but-for cause and proximate cause of the plaintiff's injury. *See Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 268 (1992).

Chevron has flunked these threshold requirements. It has failed even to allege, let

alone prove, a single non-speculative injury that could be addressed by the equitable relief it seeks. Because it lacks constitutional standing, Chevron also fails to meet the stricter standing requirements under RICO.

A. Chevron has failed to prove any cognizable injury.

Throughout this case, Chevron has described injuries that can be remedied only by monetary damages—which it no longer seeks—or has made vague references to speculative injuries not cognizable under the Constitution or RICO. *See* Complaint at ¶¶376-77. In its proposed pretrial order, for example, Chevron described in detail the financial losses it faced and the monetary damages that would address those losses. Yet when it came to equitable relief, Chevron refused to provide specifics, saying only that "the precise nature of the appropriate equitable relief will depend on the record developed at trial"—with no mention of cognizable injuries that could be remedied by injunctive relief. Pl. Proposed Pretrial Order at 19. And even after Chevron dropped its damages claim before trial, it still did not put forth any coherent theory of injuries that would be remedied through injunctive relief.

Chevron has not alleged a single concrete injury that could be remedied by the relief it seeks. To the extent it complains of possible future injuries—like the possible future enforcement of the judgment in another country—Chevron cannot show that those injuries are "concrete and particularized" and "actual or imminent" rather than "conjectural or hypothetical." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 175 (2d. Cir. 2006) (quoting *Lujan*, 504 U.S. at 560). Nor has Chevron shown "a real and immediate threat of repeated injury," as required for a plaintiff seeking only injunctive relief. *City of Los Angeles v. Lyons*, 561 U.S. 95, 105 (1983). True, Chevron has alleged

that the defendants plan to attempt to enforce the judgment in a variety of countries, but it is far from certain they will succeed. Any injury from the potential enforcement of the judgment is thus "conjectural or hypothetical"—not "imminent" or "immediate."

The Supreme Court's recent decision in *Clapper v. Amnesty International USA* bolsters the point. 133 S.Ct. 1138, 1147 (2012). There, the Court held that the plaintiffs lacked standing because they couldn't show that the government would use the challenged law against them in the future. The Court held that the "threatened injury must be *certainly impending* to constitute injury in fact," and that "allegations of possible future injury are not sufficient." *Id.* (internal quotation marks omitted) (emphasis in original).

So too here. Chevron has not shown that enforcement of the judgment is "certainly impending," only that it is possible it will be enforced *someday*, assuming an enforcement court *rejects* their arguments asserted in defense. But this Court does not sit to issue "advisory opinion[s]" on the enforceability of foreign judgments in other foreign countries. *Naranjo*, 667 F.3d at 246; *see also Basic v. Fitzroy Eng'g, Ltd.*, 949 F. Supp. 2d 1333, 1337-38 (N.D. Ill. 1996), *aff'd* 132 F.3d 36 (7th Cir. 1997) (explaining that "a court declaration based on contingencies," such as whether the judgment will be enforced in the U.S., would be improper because "the Constitution does not allow a federal district court to issue advisory opinions based on fears of future judgments and speculation"). If it did, "any losing party in litigation anywhere in the world with assets in New York could seek to litigate the validity of the foreign judgment in this jurisdiction." *Id.* Moreover, Chevron will be able to fully assert its rights in any future enforcement proceedings—regardless of the outcome of this case—which further counsels against

standing. *Id.*

Chevron's injury claims also fail to meet RICO's requirement of "damage to business and property," for it has not shown an "*actual*, quantifiable injury," *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 227 (2d. Cir. 2008). Although it has made broad statements about the costs of the Ecuadorian litigation and the allegedly fraudulent statements by the defendants, Chevron has not alleged any actual damages or identified specific monetary losses. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d. Cir. 1994) ("The general rule of fraud damages is that the defrauded plaintiff may recover out-of-pocket losses caused by the fraud."); *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc) ("A showing of injury requires proof of concrete financial loss.") (internal quotation marks omitted).

Even if Chevron could somehow prove a cognizable injury, it would still lack standing because its claims would be unripe. In *First Nationwide Bank*, the Second Circuit held that RICO essentially establishes an enhanced ripeness requirement: "[A] cause of action does not accrue under RICO until the amount of damages becomes clear and definite." 27 F.3d at 768. In that case, the RICO claim was unripe because the loss the plaintiff would suffer as a result of the fraud had yet to be determined. *Id.; see also First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 219 F. Supp. 2d 576, 578 (S.D.N.Y. 2002), *aff'd*, *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004) ("[A] creditor claiming that its ability to collect its debt has been impaired or frustrated by a RICO violation lacks standing to sue under RICO for the amount of the debt as long as the extent of the loss remains uncertain, as for example where collection efforts continue."). Chevron has not proved anything close to "clear and definite"

damages; it has not even set forth how it was injured. This Court acknowledged the prematurity of any claim based on economic losses when it dismissed Chevron's unjust-enrichment claim. *See Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 259 (S.D.N.Y. 2012) ("As the Donziger Defendants have not recovered on the Judgment to date, the unjust enrichment claim is premature at best."). Now that damages are off the table, the same goes for Chevron's RICO claims.

B. Chevron has failed to prove that defendants' alleged conduct—as opposed third parties' actions—caused its alleged injury.

For both constitutional and RICO standing, Chevron must show that the defendants' alleged RICO violations were the cause of its injuries—and "not only … a 'but for' cause of [its] injury, but … the proximate cause as well." *Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 268 (1992). Chevron has not done so here.

To the extent Chevron is asserting injuries stemming from prior litigation, it has not shown but-for causation because it would have faced litigation regardless of the allegedly illegal acts. Far from being baseless, the Ecuadorian plaintiffs' claims against Chevron were in response to serious harm to their community and environment. Even crediting Chevron's allegations of improper conduct by defendants, in the absence of such conduct, Chevron would still have had to defend itself against lawsuits in Ecuador and the U.S. growing out of its activities in Ecuador, and it is entirely possible—indeed, likely—that an unfavorable judgment would have still been entered against Chevron, given the overwhelming evidence of its bad acts.

Chevron has also failed to show that the defendants' RICO violations were the proximate cause of its injuries. The Supreme Court has held that RICO's requirement that a private party be injured "by reason of" a statutory violation is a "demand for some

direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268 (emphasis added). More recently, the Court reaffirmed this "direct relation" test in *Anza v. Ideal Steel Corporation*, 547 U.S. 451, 461 (2006) (describing the proper inquiry as "whether the alleged violation led directly to the plaintiff's injuries").[175]

Chevron has not met its burden. In so far as it argues that its injuries flow from the Ecuadoran judgment, it has not shown a direct relation because the judge's decision "could have resulted from factors other than [the] alleged acts of fraud." *Id.* at 457. Even if there were a campaign to improperly influence the judge or if fraudulent evidence were relied on in reaching the decision, the judge's decision to credit certain pieces of evidence over others or to incorporate certain language in his opinion is an intervening factor that breaks the chain of causation. That would make this case similar to *UFCW Local 1776 v. Eli Lilly & Co.*, where the plaintiffs argued that they had standing to sue the defendants under RICO because physicians relying on the defendants' misrepresentations overprescribed certain drugs, causing the plaintiff insurance companies to incur extra costs. 620 F.3d 121, 135-36 (2d. Cir. 2010). The Second Circuit rejected that theory of

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[175] Amicus Professor Blakey theorizes that RICO's heightened proximate-cause standard should be applied only to claims for damages, not injunctive relief. Amicus Br. 14-16. But this suggestion has no support in the case law, and he does not offer any. Instead, he offers his belief that the proximate-cause standard should apply only when the policy considerations animating *Holmes* are implicated. But neither the Supreme Court nor the Second Circuit has limited *Holmes* in this way. In *McBrearty v. Vanguard Group, Inc.*, for instance, the Second Circuit rejected the plaintiff's argument that it had standing based on "the 'underlying premises' of the proximate cause requirement set forth by the Supreme Court in *Holmes*." 353 Fed. Appx. 640, 642 (2d. Cir. 2009). These policy rationales, the court held, "cannot . . . provide a basis for overruling our clear prior precedents." *Id.* Similarly, the Supreme Court in *Anza* used the proximate-causation standard "notwithstanding the lack of any appreciable risk of duplicative recoveries"—one of the three rationales discussed in *Holmes*. 547 U.S. at 459.

proximate causation because the causal chain was "interrupted by the independent actions of prescribing physicians," and the pharmaceutical company was "not . . . the *only* source of information on which doctors based prescribing decisions." *Id*. (emphasis in original). In this way, providing a judge with fraudulent information cannot be the proximate cause of his decision because it is based on many variables, which severs causation. Moreover, any future enforcement of the judgment will have another intervening decision—that of the judge in the country where enforcement is sought. That decision will be far removed from the defendants' alleged RICO violations, and can hardly be said to be proximately caused by the defendants' actions in Ecuador.

Claims of harm to Chevron's "reputation and goodwill" have a similarly tenuous causal connection to any RICO violations by the defendants. Chevron alleges that there was a conspiracy to misrepresent facts about the case that then resulted in false statements to the press, Congress, and U.S. regulators. But Chevron did not prove at trial how those supposedly fraudulent representations eventually resulted in harm to its reputation and goodwill, and the causal connection is speculative. *Anza*, 547 U.S. at 459 (noting the "speculative nature of the proceedings that would follow if [the plaintiff] were permitted to maintain its claim"); *see also UFCW Local 1776*, 620 F.3d at 135 (stating that generalized proof of causation in RICO cases is "impossible"). The alleged injury in *Anza* was a loss in sales due to the fraudulent activity of the plaintiff's competitor, which allowed the competitor to offer lower prices. The Court held that there was no proximate cause between the fraud and the injury, partly because it would be impossible to ascertain the extent to which the loss in sales was due to the fraud and not other factors. *Id*. Same here. There is simply no way to determine the extent to which any loss in reputation

suffered by Chevron was caused by the defendants' alleged fraud rather than their legitimate actions, Chevron's own drilling practices in Ecuador (the impropriety of which Chevron does not contest here), or other factors completely unrelated to this case. *See* Complaint ¶357 (concluding that "the RICO Defendants' false and misleading statements have caused Chevron substantial damages"—without explaining how the statements were causally connected to the alleged injury).

C. Chevron has failed to demonstrate how any injuries would be redressed by equitable relief in its favor.

Standing's third requirement is that the remedies sought must be capable of redressing the alleged injury. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 179 (2000). Most of the injuries described by Chevron have already occurred, such as the costs of litigation in Ecuador and the harm to its reputation. Because Chevron now seeks only equitable relief, these past injuries could not possibly be remedied by a decision from this Court, no matter how favorable the factual findings. *See City of Los Angeles v. Lyons*, 561 U.S. 95, 105 (1983) (no standing where plaintiff was seeking only injunctive relief and could show only that he had been injured in the past, not that he was likely to be injured again in the future); *Shain v. Ellison*, 356 F.3d 211, 215 (2d. Cir. 2004) (no standing to seek injunctive relief where plaintiff "failed to demonstrate a likelihood of future harm").

Moreover, this Court must have the authority to grant equitable relief that would remedy the injury Chevron alleges. But as the Second Circuit has already held, this Court cannot prevent the Ecuadoran judgment from being enforced abroad, and an injunction requiring the defendants to refrain from seeking enforcement, or a declaration that the judgment was obtained by fraud, would raise serious constitutional and international-law

issues. *See Naranjo*, 667 F.3d at 242-44. As discussed below, Chevron's alleged injuries cannot be redressed by this Court because (1) principles of international comity preclude the equitable relief sought; (2) Chevron's promise to satisfy the judgment of an Ecuadorian court, subject only to defenses it may assert in enforcement proceedings, is binding, (3) RICO does not authorize courts to grant *any* equitable relief in private civil actions, and (4) even if it did, Chevron is not entitled to equitable relief here because it can raise its fraud allegations in enforcement courts and thus has suffered no irreparable injury. *See Newdow v. Roberts*, 603 F.3d 1002, 1010–11 (D.C. Cir. 2010) (plaintiffs could not establish redressability where "[i]t [was] impossible for th[e] court to grant [their requested] relief").

II. The Court Lacks the Authority to Grant The Relief Requested.

A. Principles of international comity preclude equitable relief.

Chevron's proposed pretrial order suggests that the company may once again seek a broad worldwide injunction that would stop anyone from attempting to enforce the Ecuadorian judgment—in any court, anywhere. *See* Pl. Proposed Pretrial Order at 19. As the Second Circuit explained when it reversed just such an injunction in *Naranjo*, 667 F.3d at 244, such broad relief would raise concerns about international comity—"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). This guiding principle means that "United States courts ordinarily . . . defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States." *Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d. Cir. 1997). In addition to failing to defer to the proceedings in

Ecuador, the equitable relief sought by Chevron would "preclude the courts of every other nation from ever considering the effect of that foreign judgment," *Naranjo*, 667 F.3d at 244, which raises "far graver" international comity concerns than merely refusing to enforce a judgment in the United States but leaving open its enforcement abroad. *Id.* This Court has itself noted that the broad scope of RICO "heightens" these "concerns about international comity and foreign enforcement." *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 366 (S.D.N.Y. 2005) (Kaplan, J.).

While it can sometimes be appropriate to not defer to a foreign act if "strong public policies of the forum are vitiated by the foreign act," *Pravin Banker Assocs.,*109 F.3d at 854, a fair enforcement proceeding in a country—like Canada—with indisputably adequate due process is not an act that would vitiate public policies in New York, regardless of this Court's opinion of the Ecuadorian judgment itself. Thus, granting the judgment that Chevron requests would be "disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates." *Naranjo*, 667 F.3d at 244.

The Second Circuit has held that "[c]omity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated." *Cunard S.S. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452, 457 (2d. Cir. 1985). U.S. courts are not the only courts of "competent jurisdiction," and thus this Court should defer to foreign courts' judgments about whether

the Ecuadorian judgment should be enforced in their countries. The fact that a New York court may find the Ecuadorian judgment to be unenforceable for public policy reasons does not mean that a court in Rio de Janeiro or Munich would reach the same conclusion.

An order of this Court enjoining enforcement of the Ecuadorian judgment would be based on U.S. law and would therefore improperly force other nations to follow U.S. law on enforceability. As Judge Lynch's opinion for the Second Circuit previously explained in this case, a decision under New York law about enforceability under a New York statute does not "authorize a court sitting in New York to address the rules applicable in other countries, or to enjoin the plaintiffs from even presenting the issue to the courts of other countries for adjudication under their own laws." *Naranjo*, 667 F.3d at 244. Other countries may have different, equally legitimate systems of deciding which judgments to enforce, and under principles of international comity, those systems are entitled to respect. Such a broad injunction would undermine the integrity of the entire international system of foreign judgment enforcement. By assuming that other countries' courts lack the competence to make a fair decision about whether the judgment should be enforced, this Court would be "set[ting] itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems." *Id*. This is contrary to the basic principles of sovereignty upon which the enforcement of foreign judgments regime is based.

Such a decision is fundamentally different from the *forum non conveniens* analysis, which is appropriate under principles of international comity because it analyzes whether a *domestic court* has jurisdiction, rather than passing judgment on the acts of a foreign state. The analysis asks "whether an adequate alternative forum exists," in order

to determine whether the plaintiff's chosen forum for the suit is proper. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d. Cir. 2002). While this necessarily involves an assessment of the judicial system in the alternative forum, that assessment only informs the decision as to whether the courts in the plaintiff's chosen forum should exercise jurisdiction over the case. *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947) (listing factors about a forum that should be considered in the *forum non conveniens* analysis). Thus, the ultimate *forum non conveniens* inquiry is whether the plaintiff can sue where he or she wants, not whether the courts of another country are allowed to hear the case.

B. Chevron's judicially ratified promise to abide by the judgment of the Ecuadorian courts is enforceable, and categorically precludes the relief it seeks here.

The *Aguinda* litigation was filed in this Court twenty years ago. At the time, Chevron begged for dismissal, extoling the virtues of the Ecuadorian judiciary and emphasizing the appropriateness of litigating the case in Ecuador. This Court was convinced by Chevron's arguments then, and dismissed on the grounds of *forum non conveniens* and international comity. *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996). But the Second Circuit reversed, holding that dismissal was improper unless Chevron agreed to submit to jurisdiction in Ecuador. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159-60 (2d Cir. 1998). To obtain dismissal, Chevron then "unambiguously agreed in writing to being sued on [the plaintiffs'] claims (or their Ecuadorian equivalent) in Ecuador." *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y 2001) (hereinafter *Aguinda II*). Sure that it would prevail in Ecuador, Chevron "also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity *only*

in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act." *Id.* (emphasis added).

When Chevron lost in Ecuador, it asked this court for an injunction against enforcement, but as the Second Circuit held, "[t]he Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor." *Naranjo*, 667 F.3d at 240. In *Aguinda II*, Chevron bound itself to satisfy the Ecuadorian judgment unless the Recognition Act relieved it of its obligation—which it cannot do prospectively. Chevron is judicially estopped from taking the position now—inconsistent with its successful position in *Aguinda II*—that it retains additional avenues *in this same Court* to preemptively oppose enforcement. *Cf. Pavlov v. Bank of New York Co., Inc.*, 135 F. Supp. 2d 426, 435 & n.52 (S.D.N.Y. 2001) (Kaplan, J.) (outlining judicial estoppel and noting that a party that obtained a *forum non conveniens* dismissal by urging the adequacy of a foreign judicial system "quite likely would be estopped" to oppose enforcement by arguing that the foreign forum was corrupt), *vacated on other grounds*, 25 F. App'x 70 (2d Cir. 2002).

Chevron has dropped all but its equitable RICO claims, exposing the fact that this action is nothing more than an attempt to have RICO supply the remedy Chevron cannot obtain under the Recognition Act. Chevron must not be allowed, simply by tacking on the word 'RICO,' to escape its promise to the *Aguinda II* court that it would contest an Ecuadorian judgment only under the terms of the Recognition Act. The doctrine of judicial estoppel, and indeed the rule of law, demands that this Court ensure "Chevron … remains accountable for the promise upon which [the Second Circuit] and the district court relied in dismissing Plaintiffs' action." *Republic of Ecuador*, 638 F.3d at 384 n.3.

To hold otherwise would make a mockery of those earlier decisions and invite "boomerang" lawsuits like this one—exacerbating an "ominous trend for corporate accountability and international civil procedure." Cortelyou Kenney, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 Cal. L. Rev. 857, 861 (2009).

C. RICO does not authorize equitable relief in private civil actions—period.

Chevon's request for relief also fails because it has no basis in substantive domestic law. RICO's civil-remedies provision grants district courts "jurisdiction to prevent and restrain violations" of RICO by issuing the full range of "appropriate orders" available to courts of equity. 18 U.S.C. § 1964(a). But it limits *who* can seek such equitable relief: Whereas "[t]he Attorney General may institute proceedings under this section"—and the court may issue temporary relief in them "as it shall deem proper"—private parties are not similarly empowered; they "may sue therefor in any appropriate United States district court and shall recover threefold the damages . . . sustain[ed]," plus attorney's fees and costs. *Id.* § 1964(b), (c). Thus, as RICO's text and structure makes clear, the statute does not authorize equitable relief in private civil actions. The analysis should end there.

But if this Court needs further confirmation, there is no shortage. The Supreme Court has explained that RICO's civil-remedies provision was "limited to injunctive actions by the United States," and that a proposed "amendment that would have allowed private injunctive actions" was *withdrawn* because it was "greeted with some hostility." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 487 (1985). Squarely confronting the issue, the Ninth Circuit has held that equitable relief is "not available to a private party in

a civil RICO action." *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). And the Second Circuit has twice signaled that, were it to address the question, it would conclude the same. *See Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 490 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985) (stating that RICO "was not intended to provide private parties injunctive relief"); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing "serious doubt" about the "propriety of private party injunctive relief" under RICO). So too have other circuits. *See, e.g.*, *Wheeling-Pittsburgh Steel Corp. v. Mitsu Corp.*, 221 F.3d 924, 927 n.2 (6th Cir. 2000) ("[O]nly treble damages, attorneys' fees and costs are afforded to private parties under RICO."); *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 726 (4th Cir. 1999) (expressing "substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief," which is "especially acute in light of the fact that Congress has declined to authorize injunctive remedies for private parties"); *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988) ("Congress indeed had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy.").

It is true that one opinion of the Seventh Circuit and one judge of this Court have reached a different conclusion, but both of those opinions were vacated by higher courts and are therefore not good law. *See Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003); *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 242 (S.D.N.Y. 2002), *rev'd on other grounds*, 322 F.3d 130 (2d Cir. 2003). And the Solicitor General filed a brief in the Supreme Court in *Scheidler* expressing the United States' view that RICO does not authorize private parties

"to seek equitable remedies." Br. of United States, 2005 WL 2138277, at *19-*27.

It is also true that the Second Circuit has suggested that the equitable remedy of "disgorgement of ill-gotten gains"—if brought in a *government* action where the ''gains [were] ill-gotten relatively recently"—might "serve the goal of 'preventing and restraining' future violations." *United States v. Carson*, 52 F.3d 1173, 1181-82 (2d Cir. 2005). But disgorgement "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." *United States v. Phillip Morris USA, Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005), *cert. denied*. 546 U.S. 960 (2005). So even if RICO permitted private parties to seek equitable relief "to prevent and restrain'' violations of the statute—as it does the government—it would not permit them to seek disgorgement, which neither prevents nor restrains RICO violations. *Id.* The appropriate remedy in that case would be damages—a remedy that Chevron is no longer seeking.

D. Chevron is not entitled to equitable relief because it can raise its fraud allegations in enforcement courts and has suffered no irreparable injury.

Finally, Chevron fails to satisfy the basic limits on federal courts' authority to grant equitable relief. An injunction is "appropriate only when there is an inadequate remedy at law *and* irreparable harm will result if the relief is not granted." *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005) (emphasis added). These longstanding requirements do not disappear here because Chevron has sought preemptive relief from the enforcement of a foreign judgment. If anything, principles of international comity demand a heightened application of the requirements.

Chevron may raise the same fraud defenses it seeks to litigate here any time the

judgment's enforcement is sought. Unless each enforcement forum is also biased or incompetent, it is hard to see how Chevron has no adequate alternative remedy or how it will suffer irreparable harm without this court's injunction. Moreover, Chevron has had, and continues to have, available remedies in Ecuador by which the judgment could be modified or vacated, including appeal to the Constitutional Tribunal. Chevron has had moderate success in Ecuador so far—the halving of its liability—and there has been no showing that the avenues for appellate review are inadequate. *Id. Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990) (internal quotation marks omitted). "[I]t is fundamental that equity will not grant relief if the complaining party has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action to open, vacate, modify, or otherwise obtain relief against, the judgment." *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990).

Additionally, and even if all alternative fora and remedies were inadequate, any "injury" Chevron *might* suffer could be remedied by money damages. *See Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) ("[I]t has always been true that irreparable injury means injury for which a monetary award cannot be adequate compensation."). Chevron's failure to articulate its injury makes an analysis of the irreparability of that injury difficult (a failure for which the defendants cannot be faulted). If the injury is only that Chevron might have to expend legal fees defending enforcement actions, then that injury, when ripe and proved, could surely be compensated by the payment of money damages. If the injury is that Chevron may have to pay on the judgment, that payment would be a monetary award that can be repaired in kind. Critically, how such a payment would be injurious is unclear—an enforcement court

would only order payment, presumably, if it found Chevron's fraud allegations unavailing.

But neither Chevron's cynicism about its prospects in enforcement courts nor its desire to litigate before this Court justify equitable relief now. In failing to show irreparable harm or inadequate alternative remedies, Chevron's true motive is clear. This preemptive RICO lawsuit is just another example of Chevron's long practice of tactical forum shopping. Courts in this Circuit have admonished parties for similar gamesmanship. *See Dow Jones & Co., Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 426 (S.D.N.Y. 2002), *aff'd* 346 F.3d 357 (2d Cir. 2003) (holding that the Declaratory Judgment Act cannot be used to "preemptively defeat" actions and allow the alleged wrongdoer to select the forum). By seeking an advisory opinion from this Court, Chevron seeks to "perver[t]" this court's equity jurisdiction. *Id.*

III. Chevron's Claims Lack Merit.

A. Chevron impermissibly seeks to apply RICO extraterritorially.

Even if this Court had both jurisdiction and authority to grant the relief Chevron seeks, its claims would fail on their own terms. Its RICO claims fail because "[t]he RICO statute is silent as to any extraterritorial application," *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996), and "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). Thus, "[t]he slim contacts with the United States alleged by [Chevron] are insufficient to support extraterritorial application of the RICO statute." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

Even accepting this Court's holding that "[a]ssuming that the amended complaint

alleges a domestic pattern of racketeering activity, applying the statute to that pattern would not be extraterritorial," *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012), Chevron cannot prevail. The Court's earlier assumption has not held: Chevron has not proven a domestic pattern of racketeering activity—or a domestic enterprise—but rather, at most, a pattern of *foreign* activity, focused around and directed at an *Ecuadorian* enterprise. *Cf. id.* at 253 n.132. *Morrison* therefore bars Chevron's RICO claims, regardless of whether the extraterritoriality analysis focuses on the situs of the "enterprise" or the "pattern of racketeering activity." *Contra id.* at 241-46 (noting disagreement as to whether RICO requires a domestic enterprise or a domestic pattern of racketeering). To find for Chevron at this stage would thus flout *Morrison* and *Norex* by impermissibly granting RICO extraterritorial application.

1. The only relevant enterprise—*the Afectados'* search for justice—is indisputably Ecuadorian.

Chevron has based its case almost entirely on events in Ecuador. The RICO predicate act of extortion is supposed to have occurred because the *Ecuadorian* plaintiffs in an *Ecuadorian* lawsuit over harms *in Ecuador* offered to settle with Chevron under *Ecuadorian* law. Although Chevron has tried to magnify Mr. Donziger's role in the case to such an extent that it would shift the center of gravity of the *Aguinda* litigation to America, the facts simply tell a different story. As the Executive Coordinator of the *Union de Afectados* testified, "Steven Donziger works for the *Afectados*; . . . the Asamblea does not work for him." Witness Statement of Humberto Piaguaje ¶ 41, DX1900. The litigation was conceived and controlled from Ecuador. All meaningful decisions about both the direction of the litigation and the possibility of settlement were made in Ecuador, by Ecuadorians. *See, e.g.*, *id.* at ¶¶ 23, 25-34. Similarly, the quantitative

bulk of the enterprise was in Ecuador and consisted of Ecuadorians. The plaintiffs live in Ecuador, and seek redress for injuries there. Their litigation activities, which are at the heart of the alleged extortion, primarily took place in Ecuador—at Chevron's insistence.

Simply put, the enterprise Chevron has proven is an *Ecuadorian* one, whether weighed on brains or brawn. The Second Circuit has suggested that RICO reaches only domestic enterprises. *See Cedeño v. Castillo*, 457 F. App'x 35, 37 (2d Cir. 2012). That conclusion is consistent with the notion that a "major purpose of the RICO statute was to protect legitimate enterprises by attacking and removing those who had infiltrated them for unlawful purposes." *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994). After *Morrison*, one must read RICO's purpose as the protection of legitimate *domestic* enterprises. *See Norex*, 631 F.3d at 31-33 (*Morrison* forbids application of RICO to enterprise focused on Russia despite "numerous acts in the United States in furtherance of its scheme"); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010), *aff'd sub nom. Cedeño v. Castillo*, 457 F. App'x 35 (2d Cir. 2012) (RICO does not apply when the alleged enterprise is foreign, despite alleged domestic money-laundering and movement of funds from domestic banks). Because RICO simply does not reach Ecuadorian enterprises, the Court must find for the RICO defendants.

2. Even if Chevron could prove a pattern of racketeering activity, that pattern centers on Ecuador.

The pattern of racketeering which Chevron has tried—and failed—to prove turns almost exclusively on conduct in Ecuador. Chevron's allegations about Richard Cabrera—an Ecuadorian—involve mostly conduct in Ecuador. Similarly, Chevron's allegation that the *Ecuadorian* plaintiffs bribed an *Ecuadorian* judge *in Ecuador* concern almost exclusively extraterritorial conduct.

Chevron's allegation that counsel for the *Aguinda* plaintiffs ghostwrote Judge Zambrano's judgment equally involves only alleged *Ecuadorian* racketeering. There is simply no credible evidence that any ghostwriting involved any non-Ecuadorian—if it occurred at all. Despite Chevron's best efforts to tie the Cabrera Report and the alleged corruption of Judge Zambrano to the United States by harping on a few peripheral acts (such as wire transfers) and supporting actors (such as Mr. Donziger and Stratus), the alleged pattern of racketeering—the crux of the RICO offense—remains immovably situated in Ecuador. Chevron cannot expand RICO's reach extraterritorially by relying on domestic acts that, although they may have facilitated the alleged pattern of racketeering, in no sense constituted RICO predicate acts, much less directly caused Chevron harm. *See Norex*, 631 F.3d at 31-33; *Cedeño*, 733 F. Supp. 2d at 474; *see also Cedeño*, 457 F. App'x at 37-38.

Because the facts squarely locate the pattern of racketeering activity—if it existed at all—in Ecuador, *Morrison* bars Chevron's claim even under the pattern-of-racketeering-activity test approved by this Court in its ruling on the motion to dismiss. At that point, "it remain[ed] to be seen whether critical acts upon which Chevron relies are domestic or would be predicate acts only by virtue of impermissible extraterritorial application of RICO." *Chevron*, 871 F. Supp. 2d at 253 n.132. Now, post-trial, nothing remains to be seen: Chevron relies almost entirely on foreign acts. In light of *Morrison*, Chevron therefore has no claim under RICO.

B. The actions about which Chevron complains are immunized by the First Amendment, the *Noerr-Pennington* doctrine, and the common-law litigation privilege.

At bottom, this case is an attempt to retaliate against a group of Ecuadorian

villagers and their lawyers for having asserted their case against Chevron in courts, the halls of government, through political protests, and in the press. The actions about which Chevron complains thus constitute activity that is protected either by the First Amendment or by immunity doctrines that serve the same interests—the freedom to speak and petition government—wherever they occur. Chevron cannot premise liability under RICO or the common law based on such protected activity.

First, the *Noerr-Pennington* doctrine forecloses Chevron's case. The doctrine, which arose in the antitrust context as a means of reconciling the statute's broad reach with the First Amendment's petition clause, immunizes petitioning activity of all kinds. It applies with full force to RICO actions and requires the Court to give the statute a construction that avoids burdening petitioning activities—such as lawsuits, protests, or speech to the press. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 932 (9th Cir. 2006) (holding defendant immune from RICO liability concerning pre-litigation demand letters). The only federal circuit to address the question has held that the immunity applies to litigation brought in both domestic and foreign courts—in that case, foreign litigation over an oil concession in Libya. *See Cresswell*

States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1364 (5th Cir. 1983); *see also Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 61 (2d Cir. 1983) (declining to decide the question).

To be sure, the *Noerr-Pennington* defense is subject to a strict "sham" exception that requires the plaintiff to prove that the litigation in question is "objectively baseless" and carried out for an improper purpose—such as to interfere directly with a competitor's business through the use of the judicial *process* itself, as opposed to the *outcome* of that

process. *See Primetime 24 Joint Venture v. Nat'l Broad., Co., Inc*., 219 F.3d 92, 100-01 (2d Cir. 2000) (discussing sham exception in antitrust context). But "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc*., 508 U.S. 49, 60 (1993). "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham" *Id.* at 69 n.5. Here, Chevron has disclaimed any attempt to prove that the successful lawsuit in Ecuador was a sham. *See* DI 705, at 3-4.

Second, for similar reasons, RICO itself does not provide a vehicle for collateral attacks on core litigation activity. *See Goldberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 1998 WL 321446 (S.D.N.Y. June 18, 1998) *aff'd sub nom. Goldberg v. Merrill Lynch*, 181 F.3d 82 (2d Cir. 1999); *Speigel v. Continental Illinois Nat'l Bank*, 609 F.Supp. 1083 (N.D. Ill. 1985), *aff'd*, 790 F.2d 638 (7th Cir. 1986). "Congress could not have intended" to "sweep up" such core litigation activity under RICO because doing so "would chill an attorney's efforts and duty to represent his or her client in the course of a pending litigation... [and] would, as it did here, give birth to collateral suits." *Id.*

Third, the common-law litigation privilege under New York similarly protects "[s]tatements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding." *Bisogno v. Borsa*, 101 A.D.3d 780, 781 (N.Y. 2d Dep't 2012).

C. Chevron's third-party fraud theory does not exist under New York law.

In addition to its RICO claims, Chevron has been permitted by this Court to continue to press a "third-party fraud" claim under New York common law. Chevron's theory is that Mr. Donziger made statements that were not directed at Chevron but rather at a variety of others—including U.S. and Ecuadorian courts, other law firms, and the media—and these statements somehow indirectly injured Chevron. As a matter of law, however, this theory is a non-starter. "Such allegations of third-party reliance … are insufficient to make out a common law fraud claim under New York law." *City of New York v. Smokes-Spirits.com, Inc*., 541 F.3d 425, 454 (2d Cir. 2008); *accord Cement and Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) ("[A] plaintiff does not establish the reliance element of fraud … by showing only that a third party relied on defendant's false statements."). Indeed, this Court has already acknowledged that the Second Circuit has "held that injury as a result of reliance by third parties is not actionable in New York." DI 468, at 41.

Despite this binding authority, this Court previously allowed the third-party fraud claim to go forward, criticizing the Second Circuit's decisions as "inconsistent" with late-nineteenth-century cases from the New York Court of Appeals. *Id.* (citing *Rice v. Manley*, 66 N.Y. 82, 87 (1876); *Bruff v. Mali*, 36 N.Y. 200, 205-206 (1867)). But this Court is bound by the Second Circuit's recent precedents. *See Euro Trust Trading S.A. v. Uralsib Ins. Group*, 2009 WL 5103217, at *1 (S.D.N.Y. 2009) ("Even on issues of state law, the [district court] is bound by Second Circuit precedent."); *In re Eurospark Indus., Inc.*, 288 B.R. 177, 182 (Bankr. E.D.N.Y. 2003) ("[I]f a higher federal court within the same circuit has ruled on the relevant state law issues, that ruling is binding on a lower

federal court."); 17A James Wm. Moore, et al., *Moore's Federal Practice*, § 124.22[4] (3d ed.) ("[W]hen a higher federal court has ruled on a particular point of state law, a lower court must ordinarily follow that decision in the absence of an intervening authoritative state decision.").

D. Chevron has failed to prove its RICO claims.

Even if this Court had any legal authority to grant the equitable relief that Chevron seeks, this Court cannot grant that relief because Chevron has simply failed to prove its case on the merits. Despite all its advantages—an unprecedented mountain of discovery, a spare-no-expense litigation strategy, a receptive forum, and ample opportunity—Chevron has not come close to establishing a case under RICO. Indeed, Chevron cannot even show that the defendants committed the predicate acts of mail fraud, wire fraud, or extortion.

1. Chevron has failed to prove mail or wire fraud.

Chevron has not shown that it was injured by a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1342. Chevron rests its claims, almost entirely, on the purportedly misleading statements that the defendants made with respect to the preparation of the Cabrera Report and the "independence" of Cabrera. DI 45-1 ¶¶ 229-245. Chevron has not shown, however, that the statements—which are largely statements of legal opinion—were fraudulent or that they caused Chevron any injury.

First, the statements regarding Cabrera's "independence" are statements of legal opinion and, as a general matter, "fraud cannot be predicated upon misrepresentations of law." *Hallak v. L3 Commc'ns Corp.*, 490 F. App'x 2, 5-6 (9th Cir. 2012)

Second, Chevron has failed to prove that such statements were false or that they

were made with the requisite scienter—that is, that "the speaker [was] knowingly misstating his truly held opinion." *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004). Chevron elicited no evidence showing that, at the time the statements were made, Mr. Donziger or the other RICO defendants did not have a good-faith belief that Cabrera was independent within the meaning of Ecuadorian law. Donziger Testimony 11/19, at 2578:4-2580:10. Indeed, the preparation of the Cabrera report *was* proper under Ecuadorian law.

Third, Chevron has put forth no theory of reliance. As the Supreme Court has recently suggested, "a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud" cannot "prevail without showing that *someone* relied on the defendant's misrepresentations." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008) (emphasis added); *see also Blue Cross & Blue Shield of New Jersey, Inc. v. Phillip Morris, Inc.*, 113 F. Supp. 2d 345, 369 (E.D.N.Y. 2000). Chevron has not shown, for example, how any of Mr. Donziger's co-counsel were misled. Chevron has not established by anything more than naked assertions how the statement about Cabrera's independence as a matter of Ecuadorian law was false or misleading to co-counsel and, if it was objectively false, whether it was reasonable to rely on such representations given co-counsel's knowledge about the preparation of the Cabrera Report.

Finally, and most fundamentally, Chevron has not shown how, even presuming falsity and reliance, the statements it complained about harmed it in any way—particularly given the fact that the trial court in Ecuador set aside the Cabrera Report and found overwhelming independent evidence of Chevron's environmental contamination in Chevron's own files.

2. Litigation—especially meritorious litigation—is not extortion.

Chevron also accuses the defendants of extortion—a theory that, if accepted, would allow those who lose litigation anywhere in the world to bring retaliatory RICO actions against prevailing plaintiffs. But litigation is not extortion—especially where, as here, that litigation has been proven meritorious and its merit isn't even contested. Virtually every court to have considered the issue has concluded that neither threatening nor prosecuting a lawsuit in order to obtain money or property constitutes extortion for purposes of RICO—even if the lawsuit is proven to be meritless or based upon false evidence. *See e.g., Deck v. Engineered Laminates*, 349 F.3d 1253 (10th Cir. 2003) ("We recognize that litigation can induce fear in a defendant; and it would be fair, at least in other contexts, to characterize as 'wrongful' the filing of a groundless lawsuit, particularly when the plaintiff resorts to fraudulent evidence. But we join a multitude of other courts in holding that meritless litigation is not extortion under [18 U.S.C.] § 1951.") (citing cases).

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The defendants have not yet obtained any property from Chevron. Even though Chevron has reaped profits from its environmental exploitation for years, the company has not paid a dime to its victims in the Amazon. And even if the defendants' enforcement efforts ultimately prove successful in the future, they will still not have obtained property from Chevron "by wrongful use of actual or threatened force, violence, or fear," as the statute requires. 18 U.S.C. §

1951(b)(2). Chevron's extortion theory is based on being placed in "a reasonable fear of economic loss." DI 45-1 ¶¶ 346-351. But a threat that results in economic fear is not extortion unless (1) the defendant is not legally entitled to the property that he or she seeks *and* (2) does not hold a good-faith belief in that entitlement. "[A] threat to cause economic loss is not inherently wrongful; it becomes wrongful only when it is used to obtain property to which the threatener is *not entitled*." *United States v. Jackson*, 180 F.3d 55, 70, *on reh'g*, 196 F. 3d 383 (2d Cir. 1999) (emphasis added). And the plaintiff must prove "that the defendant *knew* that he was not legally entitled to the property that he received." *United States v. Strum*, 870 F.2d 769, 774 (1st Cir. 1989).

The Ecuadorian plaintiffs' legal right to recovery is uncontested. As three levels of the Ecuadorian judiciary have unanimously concluded—and as Chevron has made no attempt to dispute in these proceedings—the record evidence amply demonstrated that Chevron was responsible for environmental contamination greatly exceeding the legal limits in Ecuador. Nor has Chevron attempted to rebut the showing of the defendants' good-faith belief in the Ecuadorian plaintiffs' right to recovery. Hence, Chevron's extortion claim, even assuming the truth of all of Chevron's allegations, fails as a matter of law.

CONCLUSION

During the first half of the Twentieth Century, a cartoonist named Rube Goldberg became well known for depicting complex devices, constructed from disparate elements, which perform simple tasks in indirect, convoluted ways.[176] Goldberg's cartoons were

[176] http://en.wikipedia.org/wiki/Rube_Goldberg_machine. There was, for example, the "self-operating napkin," which "is activated when soup spoon (A) is raised to mouth, pulling string (B) and thereby jerking ladle (C), which throws cracker (D) past parrot (E).

ingenious, complex, and ultimately, absurd.

In this litigation, Chevron has not delivered on its promises to this Court. The promised "smoking gun" evidence of bribery has been replaced with a factual narrative which combines rambling rhetoric, unguarded boasting and suspicious-sounding emails from plaintiffs' lawyers, with the internally inconsistent story of an admitted criminal and serial liar, who admits to repeated lies to curry favor with Chevron. To find Guerra credible, the Court would need to engage in true Goldberg engineering, rationalizing away his career-long involvement in judicial bribery, his willingness to lie to Chevron to gain advantage, the extraordinary rewards he has received for telling a story that pleases Chevron, and the multiple, fundamental, irreconcilable inconsistencies in his testimony.

Of course, finding Guerra credible is only the first step in constructing Chevron's larger legal contraption. Finding Guerra credible must be combined with an aggressive, complex and creative reading of American statutory and case law. Only such a reading can get Chevron where it wants to go.

The verdict Chevron is asking this Court to render is, like Goldberg's cartoons, ingenuous, complex, entertaining—and absurd.

Because this Court has neither subject-matter jurisdiction nor legal authority to grant any of the relief requested by Chevron, this lawsuit should be dismissed.

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Parrot jumps after cracker and perch (F) tilts, upsetting seeds (G) into pail (H). Extra weight in pail pulls cord (I), which opens and lights automatic cigar lighter (J), setting off skyrocket (K) which causes sickle (L) to cut string (M) and allow pendulum with attached napkin to swing back and forth, thereby wiping chin." *Id.*

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Dated: December 23, 2013

Respectfully submitted,

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