No. 14-826-cv(L)

No. 14-832-cv(CON)

In the United States Court of Appeals for the Second Circuit

CHEVRON CORPORATION,
Plaintiff-Appellee,
v.

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

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

Reply in Support of Donziger Appellants' Motion for Judicial Notice

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Chevron contends (at 1) that our judicial-notice motion is "procedurally improper" because recent developments in the Canadian enforcement action and international arbitration do not, in its view, have "any bearing on any issue actually raised on appeal." But the main issue on appeal is whether Chevron's preemptive collateral attack on the Ecuadorian judgment is permissible. Both proceedings illustrate why it is not. It is perfectly proper for this Court to take notice.

1. In Canada, Chevron is now arguing that the enforcement court there is "bound by the factual findings" of Judge Kaplan. Dkt. 461-5, at 3, 22–23. That development is relevant to this appeal because it vindicates the enduring wisdom not only of this Court's decision in *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2012), but also the First Circuit's decision eight decades earlier in *Harrison v. Triplex Gold Mines*, 33 F.2d 667 (1929).

Harrison, cited in our motion and unaddressed by Chevron, is on all fours with this case: There, as here, the plaintiffs lost a foreign-country money judgment and then sued the judgment creditor in the U.S., "attempt[ing] to impeach collaterally [the] judgment[]" on the ground that it "had been secured by fraud." 33 F.2d at 670. The "main object" of the collateral attack was the same as Chevron's: "to prevent the defendants herein from receiving the benefit of the litigation so long contested" abroad. *Id.* at 672. Specifically, the plaintiffs asked the U.S. court to declare the judgment "null and void" (much like Chevron did in

Naranjo) and to issue *in personam* relief against the judgment creditors in the form of an anti-enforcement injunction and damages (much like Chevron did in this case, in the form of a U.S. anti-enforcement injunction and constructive trust). *Id.* at 668, 670. In opposition, the defendants contended (as we do here) that the collateral attack was impermissible, the court lacked jurisdiction, the fraud allegations could have "equally well be[en] pleaded and proved in defense of [enforcement] actions," and "the plaintiffs ha[d] a complete and adequate remedy at law." *Id.* at 670.

The First Circuit agreed with the defendants. It explained that the case was "distinguish[able] from cases cited by the plaintiffs, in that the successful litigants in the [foreign] action [we]re not seeking the aid of this court to enforce any rights or decrees obtained there." *Id.* at 672. As this Court later did in *Naranjo*, the First Circuit observed that "[n]o cases have been cited and none have been found which would sustain the jurisdiction of this court to declare null and void the orders and decrees of a court of general jurisdiction in [a foreign country]." *Id.* Then, turning to the *in personam* relief sought against the defendants, the court easily disposed of that claim, explaining that "[t]his is only another way of attempting to reach the same result as that already discussed"—blocking enforcement of the judgment. *Id.* The court thus dismissed the case for lack of "equitable jurisdiction" and made clear that it would not allow the plaintiffs to inject the U.S. courts into the fray, holding: "We cannot lend ourselves to such a proceeding." *Id.*

This Court reached a similar holding in *Naranjo*, refusing to permit Chevron's first preemptive collateral attack because it "would encourage efforts by parties to seek a res judicata advantage by litigating issues in New York in order to obtain advantage in connection with potential enforcement efforts in other countries," thereby "provok[ing] extensive friction between legal systems." 667 F.3d at 246. The most recent developments in Canada have now borne this out.

Chevron has no response to these cases, and barely bothers to give one. In its earlier supplemental letter brief, Chevron tried to distinguish *Harrison* on the ground that the fraud allegations there "had 'been presented to' the Canadian courts, the judgment debtor had 'a full and fair opportunity' to 'present every defense to the action,' and those defenses were 'contested and denied' by the Canadian courts." Dkt. 426-1, at 12. But Chevron is *currently* pressing its fraud allegations in the Constitutional Tribunal of Ecuador, and still has available to it the procedural path provided by Ecuadorian law: an action under the Collusion Prosecution Act. SPA-631. Chevron should not be rewarded for refusing to take it. In any event, *Naranjo* makes clear that preemptive collateral attacks on foreign money judgments are *never* permissible, at least not in New York. And *Harrison* likewise holds that U.S. courts lack the power to "declare null and void the orders and decrees of a court of general jurisdiction in [a foreign country]," and that the

same is true for a collateral attack dressed up as an *in personam* proceeding, for that "is only another way of attempting to reach the same result." 33 F.2d at 672.

It is no answer to say, as Chevron does, that there is no comity concern here because the Canadian enforcement court is "free to determine what effect and weight, if any, to give to the rulings of the district court and Ecuador's courts." Opp. 3, 16–17. Of course it is. No court in *any* country—not even a U.S. trial court—has the authority to hand down edicts for all the world to obey. Even Chevron's erstwhile global anti-enforcement injunction would not have had an effect in foreign courts unless those courts had chosen to give it one. Yet that didn't stop this Court from vacating that injunction and highlighting the grave threat that it posed to international comity. The whole point is to avoid needlessly putting foreign courts in the uncomfortable position of having to choose between two competing foreign decisions, both purporting to govern the dispute. Because that is exactly what this action has done, as developments in Canada only confirm, it is every bit as offensive to comity as the one this Court ordered dismissed in *Naranjo*.

Then there is the matter of Article III. Chevron denies that its real interest in this litigation are the findings—even though it wants this Court to "exercise its remedial power to uphold" them, Dkt. 253, at 92 n.19, and even though it has now done in Canada precisely what we predicted. Instead, Chevron asserts (at 16) that its aims here were twofold: (1) to "prevent[] Donziger and his agents from seeking

to enforce the Lago Agrio judgment in the United States," and (2) to "prevent[] them from profiting from the Lago Agrio judgment." But, as we explained in our supplemental letter brief, *see* Dkt. 422-1, at 6, the former does not redress a legally cognizable injury because there has not been a U.S. enforcement proceeding and Chevron has not proved that one is "certainly impending" (or was certainly impending at the time of suit). *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013). As this Court put it in *Naranjo*, that injury "might never arise at all." 667 F.3d at 246. The second supposed aim of this litigation—to prevent the defendants from profiting from a judgment that has not yet been (and may never be) successfully enforced—also falls short of Article III's demands, for reasons we have already discussed. *See* Dkt. 150, at 79–81; Dkt. 317, at 8–20. If further confirmation were needed, it comes in the fact that *none* of the victims of the environmental contamination, nor their lawyers, have received a penny from the judgment in the nearly four years since the intermediate appellate court issued it. And they will not receive compensation unless numerous "independent actors not before the court" (including foreign courts and legislatures) exercise their judgment and discretion in ways that this Court cannot possibly predict. *Clapper*, 133 S. Ct. at 1150 n.5.

2. The developments in the arbitral proceeding are also relevant to this appeal—and hence appropriate for judicial notice—because they underscore the impropriety of Chevron's preemptive attack, and the risk that the arbitral panel

will come to a different conclusion about Chevron's bribery and ghostwriting allegations. That is particularly true as to the credibility of Chevron's star witness, Alberto Guerra, a man Chevron recognized as so essential to its case (and so untrustworthy) that it had a team of lawyers devote the better part of 53 days to help prepare his testimony. Although Chevron now euphemistically acknowledges (at 8–9) that Guerra "misspoke" during that testimony—about key details, such as how much money he was promised, and when he traveled to work on the case—Chevron's primary response appears to be that his lengthy history of admitted lies is not a new development because Guerra is a known liar. That says all there is to say about the risk of inconsistent results.[1]

At the same time, Chevron tries to distance itself from Guerra, asserting that the district court's judgment "does not depend on Guerra's testimony" because some of the RICO predicate acts "have nothing to do with the bribery of Guerrra." Opp. 2 n.1. But those acts—which include "attempted extortion" for mounting a "media, lobbying, and public relations campaign" to hold Chevron accountable for its wrongdoing, SPA-369–70, 381–89, and a Travel Act violation

[1] Contrary to what Chevron says, we are *not* asking this Court to "abstain" or "stay" the district court's judgment pending resolution of the arbitration, nor are we arguing that "this Court should vacate the district court's findings solely because there is a risk" of inconsistent results. Opp. 15. Our point, rather, is that the risk of inconsistency in the two preemptive collateral attacks brought by Chevron further demonstrates why this proceeding is inappropriate: There is no case in which a court has "len[t] [itself] to such a proceeding," *Harrison*, 33 F.2d at 672, much less one in which the plaintiff had already initiated a similar proceeding elsewhere.

for paying damages expert Richard Cabrera, SPA-406, as required by Ecuadorian law—are plainly insufficient to support the injunction. Even setting aside their dubious foundation, none of those acts was the "but for" or proximate cause of an actual, quantifiable injury to Chevron's property, as RICO requires. Both the Ecuadorian trial court and the intermediate court whose judgment Chevron challenges, for example, expressly refused to rely on the Cabrera Report in holding Chevron liable for its decades of willful pollution in the Ecuadorian rainforest—pollution that site visits and expert reports in the arbitral proceeding now confirm.[2]

Even as to Judge Kaplan's bribery and ghostwriting findings, Chevron's decision to not contest its pollution here is fatal to its case for but-for causation, as we have repeatedly pointed out. *See* Dkt. 150, at 114–15; Dkt. 317, at 43–45; Dkt. 333-1; Dkt. 422, at 10; Dkt. 442-1. Chevron has only two responses. The first is that we "have waived any argument that the district court abused its discretion . . .

[2] Although Chevron says (at 2) that there is "copious" evidence of the bribery scheme "completely independent from Guerra's testimony," developments in the arbitral proceeding show otherwise: computer forensic evidence disproves his account, *see* Arbitral Hearing Tr. 2808–12, *available at* http://bit.ly/1jU3ra2; contemporaneous emails show legitimate concern among the Ecuadorian plaintiffs' lawyers in the weeks leading up to the judgment, *id.* at 2811, as well as their intention to file two documents that Chevron now claims were never filed, *id.* at 2853–56; the Ecuadorian record contains many thousands of pages that cannot be searched electronically and have not been searched by hand, *id.* at 483–579, casting further doubt on Chevron's claim of overlap with any "internal work product," Opp. 2; and none of the remaining evidence is from Judge Zambrano's second term as presiding judge, *see* Dkt. 461-2, and thus—as Judge Kaplan correctly observed—cannot corroborate Guerra's "claim of an arrangement between Zambrano and the LAPs" to ghostwrite the judgment. SPA-244.

by excluding purported evidence of environmental conditions here." Opp. 17–18. But we are not challenging the court's evidentiary ruling; we are challenging Chevron's failure to put on any environmental evidence to carry its burden of proving causation. Chevron's second response is to claim that it need not establish causation because of "the indelible stain from the Lago Agrio judgment." *Id.* at 18. Neither of the cases it cites for that proposition, however, addresses the but-for-causation requirements of RICO or the common law, even assuming they permit such a preemptive collateral attack. Indeed, even if Chevron were attacking a domestic judgment, it would have to prove that the alleged fraud "changed the outcome of the original action," *United States v. Beggerly*, 524 U.S. 38, 47 n.4 (1998), such that the judgment "would not have been rendered against [it] *but for* the [alleged fraud]." *Marshall v. Holmes*, 141 U.S. 589, 596 (1891) (emphasis added); *see also* Dkt. 422-1, at 10. It has not even tried to make this showing.

A final point: Chevron continues to assert (at 2–3) that Judge Kaplan's findings are "unchallenged" and "unrefuted." It is true that Mr. Donziger has chosen to focus this appeal on the myriad glaring legal defects of Chevron's case, rather than undertaking the task of disproving the hundreds of pages of findings, one by one, under the clear-error standard. But that does not mean they are undisputed. To the contrary, Mr. Donziger has repeatedly emphasized that he vigorously contests the findings, and he welcomes the opportunity to let an

enforcement court assess the evidence and draw its own conclusions. If Chevron were equally confident in its version of the facts, then it too should welcome the opportunity to make its case in Canada, or any other country asked to enforce the judgment—without having a U.S. court attempting to put its thumb on the scale. That remedy is not only adequate; it is "far better" than creating a new cause of action "by which disappointed litigants in foreign cases can ask a New York court" to issue relief designed to hamstring "efforts to enforce those foreign judgments against them." *Naranjo*, 667 F.3d at 243, 246.

CONCLUSION

For the foregoing reasons, the Donziger Appellants respectfully request that the Court take judicial notice of the recent filings in the international arbitration and Canadian enforcement proceedings.

Dated: November 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I electronically filed the foregoing reply with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: November 30, 2015

/s/ Deepak Gupta
Deepak Gupta