UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, *Plaintiff*, v. STEVEN DONZIGER, *et al.*, *Defendants*.	No. 11-CIV-0691 (LAK)

DEFENDANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY ADMINISTRATIVE STAY

This Court's decision in this case is without precedent. It seeks to preemptively undermine the judicial decree of a foreign sovereign nation and, in so doing, to let Chevron Corporation off the hook for decades of deliberate pollution in the Amazon rainforest. Along the way, it sidesteps jurisdictional hurdles, runs afoul of fundamental norms of international comity, and contravenes multiple decisions of the Second Circuit arising out of this same long-running controversy. It is unlikely to survive appeal. And there is no question that it will cause irreparable harm to the defendants and others if it is allowed to go into effect before the Second Circuit has had an opportunity to review it. Accordingly, the defendants respectfully move the Court under Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a)(1)(A), (C) for a stay of the Court's March 4, 2014 judgment pending review by the Second Circuit.

If this Court is inclined to deny the requested stay, however, we respectfully request that the Court issue its denial promptly, without opinion and without requiring Chevron to file a response. We also respectfully request, in the alternative, that the Court issue a temporary administrative stay of the judgment pending resolution by the Court of Appeals of a stay motion made under Federal Rule of Appellate Procedure 8(a)(2). Such an administrative stay would

allow the Court of Appeals to consider whether to grant a stay pending appeal on a non-emergency basis, with full briefing. If this Court enters a temporary administrative stay but denies a stay pending appeal, the defendants will promptly inform this Court of any decision by the Second Circuit regarding a stay pending appeal.

In view of the immediate and profound effects of this Court's judgment and the immediacy with which defendants may be required to take steps to comply, we respectfully request a ruling on this stay motion no later than Tuesday, March 25, 2014, after which we intend to seek a stay from the Court of Appeals if the requested relief is denied or withheld.

STANDARD FOR A STAY PENDING APPEAL

Rule 62(c) of the Federal Rules of Civil Procedure provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction." In this Circuit, four factors are considered before granting a stay pending appeal: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer irreparable injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected." *Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 207 (2d Cir. 2006), *rev'd on other grounds*, 552 U.S. 196 (2008); *see also In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170-71 (2d Cir. 2007). "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (brackets and internal quotation marks omitted); *see also Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 36-38 & n.8 (2d Cir. 2010).

ARGUMENT

I. The Defendants Have a Substantial Possibility of Success on Appeal.

To warrant a stay, it is enough that there is "a substantial possibility, although less than a likelihood, of success on appeal." *Torres*, 462 F.3d at 207. This does not mean that this Court must conclude that its own 497-page opinion, issued just days ago, was wrong. "Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Rather, "[w]hat is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Id.* at 844-45.

A. Because Chevron failed to demonstrate standing, this Court lacked jurisdiction to issue its opinion and judgment.

One reason that the defendants have a substantial possibility of success on appeal is that Chevron has utterly failed to demonstrate the basic elements of Article III standing—an "essential and unchanging" requirement "for each claim and form of relief sought" in every federal case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (internal quotation marks omitted). When Chevron filed this case, it sought billions of dollars in damages and a worldwide anti-enforcement injunction. But that requested relief changed as the litigation proceeded: Damages were dropped, and the injunction was quickly reversed by the Second Circuit. The correct Article III question, then, is whether Chevron has established that its *new* requested relief—the constructive trust and the more limited injunction granted by this Court—will likely remedy an actual injury caused by the defendants' alleged wrongdoing.

That is not a mootness question, as this Court reasoned. *See* DI 1874, at 307-08. It's about whether *Chevron* has satisfied the three elements of standing, not whether the *defendants* have established mootness. *Compare Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."), *with Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (describing defendant's burden to demonstrate mootness as "heavy"). If the plaintiff changes its requested relief, then the plaintiff must show that it has standing to pursue its new relief; it doesn't somehow become the defendant's burden to prove that the case has become moot. Were it otherwise, a plaintiff could ask for extraordinarily broad and unprecedented injunctive relief, withdraw that request or have it rejected, and then ask for different relief that *doesn't* redress an actual injury so long as the previous (withdrawn or rejected) relief *would have* redressed the injury. That view makes no sense, isn't supported by a single case cited by this Court, and certainly isn't "horn book" law. *See* DI 1874, at 308. The Second Circuit will likely reject it.[1]

On the proper jurisdictional question—whether Chevron established standing at trial with respect to its actual requested relief—this Court concluded that Chevron had done so for two reasons. The first is that Chevron has lost "Ecuadorian trademarks," as well as "its $96

[1] This Court drew support from Professor Monaghan's classic description of "mootness as the doctrine of standing set in a time frame." DI 1874, at 308 n.1231. But that description of mootness is "not comprehensive" because the same "conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). For example, "a defendant claiming that its voluntary compliance moots a case"—or that outside events do the same—"bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. By contrast, in a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury is *certainly impending*." *Id.* (emphasis added; alterations omitted). And there are exceptions to mootness that "could not exist" if it "were simply 'standing set in a time frame.'" *Id.*

million arbitration award against the [Republic of Ecuador] to the extent that the award otherwise would have been enforced in Ecuador." *Id.* at 313-14. The second is that Chevron "currently is incurring substantial legal fees and other expenses to defend enforcement proceedings," and "is threatened with the risk of further disruptive pre-judgment attachment in foreign countries, as occurred in Argentina, and with the risk that some foreign country will enforce the judgment." *Id.* at 315 (footnote omitted). Neither reason is likely to withstand appellate scrutiny. Chevron has not proven causation (under either Article III or RICO), nor has it shown that it has suffered an actual injury that will likely be redressed by this Court's decision.[2]

First, Chevron never demonstrated that any of its asserted injuries were *caused* by the defendants' allegedly unlawful actions, rather than its own willful pollution or "the independent action of some third party." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). It didn't even try. To the contrary, Chevron chose not to contest its liability for the environmental contamination it created. And it did not prove that the Ecuadorian appellate courts failed to undertake a *de novo* review of the judgment. For that reason alone, Chevron lacks Article III standing. Indeed, this Court's discussion of Article III standing offers nothing more than a passing, conclusory reference to this enormous causation hurdle.

In addition to Article III's causation requirement, Chevron also failed to prove that the alleged RICO violations were the "'but for' cause of [its] injury." *Holmes v. Sec. Investor Prot. Corp.*,

[2] In an errata filed after its decision, this Court supplemented these reasons with one more: "additional enforcement proceedings, including pre-judgment attachment, in the United States." DI 1883. But there are *no* U.S. enforcement proceedings, nor have there ever been any, nor are any certainly impending (or even likely). The best Chevron could do on this score was hypothesize that the defendants "could try" to pursue a "strategy" that was "suggested" to them, "first seeking to enforce the Lago Agrio judgment in a friendly foreign jurisdiction, and then"—if the foreign court applied its law to enforce the judgment—"attempt to have a United States court recognize that [possible decision] here." DI 1847, at 344. That is not nearly enough for standing. A plaintiff must do more than speculate about "the unfettered choices made by independent actors not before the court." *Lujan*, 504 U.S. at 562 (internal quotation marks omitted).

503 U.S. 258, 268 (1992). This Court's 497-page decision devotes just one sentence to that question. It says: "Significantly, Chevron's injuries are not attributable to a cause independent of defendants' ghostwriting, bribery and other misconduct." DI 1874, at 404. But the Court does not explain how it ruled out the obvious "independent" cause: Chevron's own decades-long illegal pollution in the Ecuadorian Amazon, which ravaged entire communities and killed or injured thousands of people. Because Chevron decided not to contest is liability for that pollution here, it cannot prove—as a matter of logic—that there would be no judgment against it "but for" the alleged RICO violations. Whether one conceives of that as a failure to establish Article III standing or a failure to prove RICO causation, the end result is that this Court's judgment is unlikely to survive appellate review.

Second, Chevron has not established that this Court's decision will likely redress an actual injury. As to the first alleged injury relied on by this Court (the loss of trademarks and an arbitral award): Chevron offered nothing but speculation that the Lago Agrio plaintiffs "have nearly consummated the seizure and sale of [Chevron's] trademarks" and "are slated to receive the funds generated in [an] auction of those trademarks," which allegedly poses a "real threat" to the company. DI 1863, at 5, 13, 14. But the only way this Court's decision will remedy that harm, even in the slightest, is if all the following things happen: (1) the Republic of Ecuador decides to hold an auction, (2) someone decides to buy the trademarks, (3) the Republic then decides to give the funds to the two Ecuadorian defendants in this case (rather than the dozens of other Lago Agrio plaintiffs or to someone else), and (4) the Republic further decides, in response to this Court's judgment, to require that the defendants give the funds to Chevron. That hypothetical chain of events—which rests on speculation about numerous "unfettered choices made by independent actors not before the courts"—is well short of likely redressability. *Lujan*, 504 U.S. at

562 (internal quotation marks omitted). So too for the arbitral award, which Chevron hasn't even alleged (let alone proven) to be a cognizable injury.

As to the second asserted injury (legal fees in enforcement proceedings and the risks of foreign enforcement or pre-judgment attachment): That does not come close to establishing standing. The relief this Court has granted does not even purport to redress any of these potential "injuries." Far from it: The relief expressly exempts them from its scope (and seems to apply to only three people in any event). Nor has Chevron proven that the "risks" it faces are "certainly impending" injuries. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). Even if foreign enforcement *efforts* are "certainly impending," their *success* is a different matter. And on that question, Chevron itself has confidently predicted that those efforts will not be successful. *See* DI 1847, at 340 ("No tribunal with respect for the rule of law will ever enforce the Lago Agrio judgment.").[3]

B. RICO does not allow for private injunctive relief.

Another reason the defendants are likely to prevail on appeal is that RICO does not allow for private injunctive relief—particularly when there's no claim for money damages. Although the Second Circuit has yet to definitively rule that RICO does not permit a private party to seek injunctive relief, the Circuit has repeatedly emphasized that it "seems altogether likely that

[3] In a footnote, this Court refused to apply *Clapper*'s holding that a future harm must be "certainly impending" to be cognizable. *See* DI 1874, at 317 n.1257. And it disregarded *Clapper*'s instruction that—even under a so-called "substantial risk" standard—a plaintiff "cannot rely on speculation about 'the unfettered choices made by independent actors not before the court,'" like whether a foreign court will enforce the Ecuadorian judgment. 133 S. Ct. at 1150 n.5 (quoting *Lujan*, 504 U.S. at 562). Instead, the Court believed that it "would be entirely wrong to apply literally some of the language used in *Clapper*." DI 1874, at 317 n.1257. Based on that belief, the Court created an exception for this case.

But "certainly impending" isn't just "some . . . language" from *Clapper*; it's the *standard* the Court applied as part of its *holding*. And there is nothing "wrong" with applying Supreme Court precedent and letting that Court decide if it wants to create an exception to allow for "speculation about 'the unfettered choices made by independent actors not before the court'" in some circumstances. *Clapper*, 133 S. Ct. at 1150 n.5 (quoting *Lujan*, 504 U.S. at 562).

[RICO] as it now stands was not intended to provide private parties injunctive relief." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *see also 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). Indeed, the Second Circuit has expressly rejected Professor Blakey's argument to the contrary—which he advanced again in this case as *amicus curiae*—calling it "rather remarkable" and "bizarre and wholly unconvincing as a matter of plain English." *Sedima*, 741 F.2d at 489 n.20 (internal quotation marks omitted). That alone is enough to clear the substantial-possibility-of-success standard.

But there's more. Other circuits have expressed similar doubts about the availability of equitable relief to a private party in a civil RICO action, and the Ninth Circuit has squarely held that it's not available. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).[4] Indeed, "most courts hold that RICO does not authorize injunctions in a private civil action." Jed S. Rakoff, *RICO: Civil and Criminal Law and Strategy* § 7.04[3] (2014).

Moreover, the Supreme Court has suggested 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). And the United States has joined the weight of authority in concluding that RICO does not authorize private parties "to

[4] *See, e.g.*, *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 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 Entm't 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.").

seek equitable remedies." Br. of United States in *Scheidler v. Nat'l Org. for Women, Inc.*, 2005 WL 2138277, at *19-*27.

This Court's opinion cites only two cases holding to the contrary. *See* DI 1874, at 341-45 (citing *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), and *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239 (S.D.N.Y. 2002)). And, importantly, the question presented by this case is different even from those two cases: Can a private party obtain equitable relief under RICO without making a claim for money damages? On that question, the text of the statute is clear and the authorities agree: RICO provides a private right of action only to plaintiffs seeking damages. Even Judge Rakoff, one of the few judges who has said equitable relief may be available to private parties, has explained that RICO does not authorize injunctive relief without a claim for damages: "Civil RICO claims are *only* available where monetary relief is sought . . . . Thus, if the suit is in essence a claim . . . for injunctive relief, RICO will not be a suitable vehicle." Rakoff, *RICO* § 7.02[2] (2014) (emphasis added). No case or authority holds otherwise, and this Court's opinion didn't cite any. Instead, it ignored the issue entirely. The Second Circuit is likely to take a different view.

C. The Court's judgment and opinion contravene *Naranjo*.

Yet another independent reason the defendants will likely prevail on appeal is that the relief awarded by this Court is inconsistent with the Second Circuit's decision in *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2011). That decision—which the Court did not discuss until the last four pages of its 497-page opinion—emphasized the "grave[]" international comity concerns raised by an injunction seeking to preemptively nullify a foreign judgment or thwart its possible enforcement in other countries. *Id.* at 244.

Attempting to satisfy those concerns, this Court's injunction expressly permits the "filing or prosecuting [of] any action for recognition or enforcement of the Judgment or any New

Judgment, or any for prejudgment seizure or attachment of assets based in courts outside the United States." DI 1875, at 3.[5] As already explained, that exception creates insurmountable redressability problems because it doesn't spare Chevron from having to defend against any current or certainly impending enforcement proceedings. At the same time, the injunction also exacerbates the very comity concerns raised in *Naranjo*.

To see why, consider Canada, where the Court of Appeal for Ontario recently determined: "After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction." *Yaiguaje v. Chevron*, 2013 ONCA 758, at 28-29 (Court of Appeal for Ontario, Dec. 17, 2013). Suppose that the Ontario court, applying its own law, were to hold that the judgment is enforceable—rejecting "Chevron['s] conten[tions] that the trial judgment was obtained through fraud, bribery and other illegal means," *id.* at 4—and the Canadian Supreme Court affirmed. Could the defendants in this case eventually collect on that judgment, as they would be permitted to do under the decisions of two countries' high courts? No. This Court's injunction wouldn't let them. It would send whatever money they might receive as compensation for Chevron's wrongdoing *back to Chevron*.

In other words, the injunction is even *more* disrespectful to foreign courts than the one already invalidated by the Second Circuit. It says to them: "Go ahead. Have your enforcement actions. But if you disagree about the enforceability of the judgment, that doesn't matter. Whatever you decide, Chevron gets any money that would otherwise go to these people." Yet the Court's decision gives no reason why foreign courts cannot be trusted to apply their own laws on the enforceability of judgments and come to their own conclusions about "what is asserted to

[5] Otherwise, the injunction prohibits the defendants from "undertaking any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment"—which would seem to include bringing an enforcement action. DI 1875, at 3 (¶ 6).

be the extreme incapacity of the [Ecuadorian] legal system." *Naranjo*, 667 F.3d at 244. It gives no reason why those courts cannot consider all the same arguments (and all the same evidence) that Chevron put forth in this case. And it certainly gives no reason why this Court is somehow uniquely capable of deciding the judgment's enforceability such that it must take it upon itself to do so even in the absence of an enforcement attempt.

What the Court's decision does instead is condemn the entire Ecuadorian government (including its president and all three levels of its judiciary) based on the testimony of a single person, Vladimiro Alvarez Grau—"an avowed political opponent of the country's current President, Rafael Correa." *Id.* at 238. Relying on that testimony, the Court determined that "Ecuador, at no time relevant to this case, provided impartial tribunals or procedures compatible with due process of law." DI 1874, at 433. It also criticized the intermediate appellate court's failure to specifically address certain arguments raised by Chevron, as well as the speed with which that court issued its decision, and from that concluded that "the appellate court did not review the record *de novo*." *Id.* at 414. That is anathema to international comity.[6]

D. Chevron was judicially estopped from obtaining the relief granted.

Even if this Court had jurisdiction and the power to grant injunctive relief, and even if the international comity concerns identified by the Second Circuit could be sidestepped, Chevron was judicially estopped from seeking and obtaining the relief granted here because (1) it "took an inconsistent position in a prior proceeding" and (2) the court "adopted" that position "by

[6] The Court determined that the intermediate appellate court did not actually review the judgment *de novo* because "it would have been impossible for any court to have conducted a *de novo* review of the 188-page Judgment and the trial record in the time the appellate court rendered its decision"—even as this Court issued a 497-page decision with 1,800-plus footnotes less than a month after briefing was completed in this case. DI 1874, at 415. The Court added that the Ecuadorian standard of review (known as "merit of the record") is not the same as *de novo* review. But the Second Circuit has already recognized that "this standard of review is similar to the American standard of *de novo* review, and is applicable to questions both of fact and of law." *Naranjo*, 667 F.3d at 237.

rendering a favorable judgment" to Chevron. *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999). This Court was able to conclude otherwise only by rejecting the previous conclusions of the Second Circuit.

With respect to prong one: Chevron promised the court in *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, that if this case were sent to Ecuador, it would satisfy any judgment against it subject to one narrow exception. Chevron (then Texaco) did not mince words: "If this Court dismisses these cases on *forum non conveniens* or comity grounds, Texaco will agree" to "satisfy judgments that might be entered in plaintiffs' favor, subject to [its] rights under New York's Recognition of Foreign Country Money Judgments Act, N.Y.C.P.L.R. § 5301 *et seq.*" PX 8004, at 3-4.[7]

With respect to prong two: The *Aguinda* court then granted Chevron's request and dismissed the case. *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470. That should have been the end of the inquiry (and therefore, of this case). Because the Second Circuit has already held that Chevron's rights under the Recognition Act do not include the right to have this Court "declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor," *Naranjo*, 667 F.3d at 240, the one condition that Chevron put on its promise, PX 8004, at 4, cannot be satisfied.

The Court's opinion casts aside that binding promise on the ground that it was rejected by the *Aguinda* plaintiffs and not relied upon by the court. But judicial estoppel does not require reliance; it requires an "inconsistent position" and a "favorable judgment." *Mitchell*, 190 F.3d at 6; *see also Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.4 (2d Cir. 2011) ("[A]n express adoption of the prior inconsistent position is not required. The court need only adopt the position

[7] This was no one-time promise. Chevron made it no less than *five times* in a successful effort to induce the court to dismiss the case and force the plaintiffs to litigate in Ecuador. *See* DI 1197-1, Ex. A, at 57 nn. 235-236.

'in some manner, such as by rendering a favorable judgment.'"). As the Second Circuit has already held, that exists here:

> We therefore conclude that the district court adopted Texaco's promise to satisfy any judgment issued by the Ecuadorian courts, subject to its rights under New York's Recognition of Foreign Country Money Judgments Act, in awarding Texaco the relief it sought in its motion to dismiss. As a result, that promise, along with Texaco's more general promises to submit to Ecuadorian jurisdiction, is enforceable against Chevron in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards.

Republic of Ecuador, 638 F.3d at 389 n.4. Although this Court's opinion "respectfully disagrees" with the Second Circuit's conclusion and dismisses it as "dictum" (DI 1874, at 459), the Second Circuit is likely to adhere to its precedent.

In any event, the *Aguinda* plaintiffs did not reject Chevron's condition. They argued to the court why that condition was insufficient to permit dismissal *and lost*, after which they spent almost a decade litigating the case in Ecuador (even as Chevron initially refused to submit to jurisdiction). And the *Aguinda* court, too, relied on Chevron's promise in holding that the company had met the requirement for dismissal: The court cited several submissions in which Chevron agreed to satisfy any judgment subject only to its rights under the Recognition Act. *See Aguinda*, 142 F. Supp. 2d at 539.

This Court concluded that the doctrine of judicial estoppel does not apply here because, in its view, Texaco's promises are not binding on Chevron. DI 1874, at 456-57. But that argument has already been rejected by the Second Circuit. *See Republic of Ecuador*, 638 F.3d at 389 n.3. As that Court put it: "Texaco's promise to satisfy any judgment by the Ecuadorian courts . . . is enforceable against Chevron in this action." *Id.* at 389 n.4.

Finally, the Court determined, in the alternative, that this case falls within Texaco's reservation of its right to challenge the judgment under the *defenses* available under the New York

Recognition Act. Second Circuit precedent forecloses that argument as well: "The 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. Indeed, as discussed above, the upshot of the Second Circuit's decision in *Naranjo* is that allowing such a "preemptive suit of a putative judgment-debtor" in the case of a foreign nation's judgment is not merely unauthorized by state law but contrary to basic norms of international comity.

E. This Court lacks personal jurisdiction over defendants Camacho and Piaguaje.

This Court has determined that it may exercise personal jurisdiction over Ecuadorian defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje because it struck their personal-jurisdiction defense as a discovery sanction for failing to produce documents relevant to that defense. DI 1874, at 434. But the Court cited no controlling precedent for the proposition that a federal court may exercise jurisdiction over a party solely as a discovery sanction. Using circular reasoning, the Court relied on case law—applicable only when the Court *already has* personal jurisdiction over the parties—as authority to enter sanctions *giving it* personal jurisdiction.

Recognizing that "a reviewing court might disagree with [its] sanctions ruling," this Court alternatively exercised personal jurisdiction over Camacho and Piaguaje becaused they had retained New York counsel and/or participated in litigation in New York in the 1990s. DI 1874, at 434-455. But mere retention of a lawyer or involvement in litigation in New York (a world center of law and finance) does not subject a party to personal jurisdiction there in another case.[8] As the Second Circuit has made clear, "[a] party's consent to jurisdiction in one

[8] *See, e.g.*, *Kargo, Inc. v. Pegaso PCS, S.A. de C.V.*, 2008 WL 2930546, at *5 (S.D.N.Y. 2008) (retention of "attorneys, accountants, and business advisors in New York" failed to establish a "continuous and systematic course" of "doing business" in New York); *Ginsberg v. Gov't Props. Trust*,

case . . . extends to that case alone." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 n.5 (2d Cir. 1991); *see also Indem. Ins. Co. of N. Am. v. K-Line Am., Inc.*, 2007 WL 1732435, *7 (S.D.N.Y. 2007) ("That [the defendant] once brought suit in New York fifteen years ago does not establish that it is presently doing business in New York.").

Moreover, this Court grounds its alternative personal-jurisdiction holding solely in Mr. Donziger's activity as Camacho and Piaguaje's attorney. But "[t]o be considered an agent for jurisdictional purposes, the putative agent must have acted in the state 'for the benefit of, and with the knowledge and consent of' the non-resident principal." *Ross v. UKI Ltd.*, 2004 WL 384885, at * 4 (S.D.N.Y. 2004) (quoting *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122 (2d Cir. 1981)). "In addition, the plaintiff must demonstrate that the principal exercised some control over the activities of the purported agent." *Chong v. Healthtronics, Inc.*, 2007 WL 183683, at *7 (E.D.N.Y. 2007). And the "allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a 'primary actor' in the specific matter in question." *In re Sumitomo Copper Litig.*, 120 F. Supp. 2d 328, 336 (S.D.N.Y. 2000). None of that happened here.[9] In short, the Court's personal-jurisdiction holdings raise a substantial possibility of reversal on appeal.

II. The Defendants Will Suffer Irreparable Injury Absent a Stay.

As explained above, under Second Circuit precedent, the degree of irreparable injury that a movant must demonstrate to support a stay pending appeal is inversely proportional to the

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Inc., 2007 WL 2981683, at *5 n.2 (S.D.N.Y. 2007) (rejecting argument that defendant was subject to jurisdiction because he previously initiated a lawsuit in New York); *Andros Compania Maritima S.A. v. Intertanker Ltd.*, 714 F. Supp. 669, 675-76 (S.D.N.Y. 1989) (same).

[9] The Court also ignored binding precedent holding that if an agent acts contrary to the principal's interests, then that agent's conduct should not be imputed to the principal and jurisdiction should not attach as a result. *See Wight v. BankAmerica Corp.,* 219 F.3d 79, 87 (2d Cir. 2000).

degree of probability of success on the merits. *See Mohammed*, 309 F.3d at 101. Because the defendants here have demonstrated a very substantial likelihood of success on appeal, the degree of irreparable injury they must demonstrate is reduced. That standard is readily met here because, absent a stay, the Court's decision will inflict profound irreparable harm on the Donziger Defendants, the LAP Representatives, and numerous third parties potentially affected by the judgment.

First, unless a stay pending appeal is granted, this Court's order threatens to destroy Mr. Donziger's law practice and thereby deprive him of his means of earning a livelihood and providing for his family. The Chevron-Ecuador case constitutes Mr. Donziger's only personal source of earned income; his law practice has no other cases or clients, and he has worked on the matter for two decades. As this Court observed: "Donziger has pursued his quest to hold Texaco and later Chevron accountable for the alleged pollution in Ecuador, first through *Aguinda* in this Court and then in the Lago Agrio case, for over twenty years. He has done little else in that time." DI 1874, at 435.

Absent a stay, the Court's order will immediately enjoin Mr. Donziger from "undertaking any acts to monetize or profit from" the Ecuadorian judgment, "including without limitation by selling, assigning, pledging, transferring or encumbering" any interest in that judgment, and will require him "forthwith" to turn over his entire interest in the judgment and future interests "traceable" to the judgment. DI 1875, at 2-3 (¶¶ 1, 5). Depriving Mr. Donziger of his interest in, and ability to work on, a case to which he has devoted the better part of the last two decades unquestionably constitutes irreparable harm under Second Circuit law. *See Ross-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (loss of "an ongoing business representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm"); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d

1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish irreparable harm.").

Circuit precedent recognizes that "[m]ajor disruption of a business can be as harmful as termination, and a '*threat* to the continued existence of a business can constitute irreparable injury.'" *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978)) (emphasis in *Nemer*). In *Nemer*, for example, the Circuit found irreparable harm where an auto dealer suffered a 20% drop in foot traffic and a drop in monthly sales. 992 F.2d at 436. The harm to Mr. Donziger, of course, is far greater. Indeed, by broadly enjoining him from "undertaking *any* acts to monetize or profit from the Judgment," DI 1875, at 3 (¶ 5) (emphasis added), the Court's order threatens to "obliterate" his practice—a harm that cannot be later remedied by damages. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) ("[T]he right to continue a business in which William Semmes had engaged for twenty years . . . is not measurable entirely in monetary terms."). Thus, this is not a case in which the injunction may be allowed to remain in effect pending appeal because it would affect "only a small, non-critical fraction" of the movant's business. *Galvin v. N.Y. Racing Ass'n*, 70 F. Supp. 2d 163, 170 (E.D.N.Y. 1998). To the contrary, the order constitutes irreparable harm because it threatens—by design—the "very viability" of Mr. Donziger's practice. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995).[10]

[10] That principle is just as applicable to Mr. Donziger's ability to continue his legal practice as it is to an ordinary commercial business. *See Galvin*, 70 F. Supp. 2d at 169 (applying the Second Circuit rule that "the termination of most or all of a business is 'irreparable harm'" to a veterinary practice); *see also Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011) (movant who faced inability to pursue legal practice "demonstrated irreparable harm in the form of the loss of opportunity to pursue her chosen profession").

Second, the Court's order emphasizes that it binds not only the parties but "their officers, agents, servants, employees, and attorneys; and other persons who are in active concert and participation with any of the foregoing." DI 1875, at 4 (¶ 8). It is thus likely to (and intended to) chill third parties from funding or associating with Mr. Donziger and his law practice, thereby resulting in irreparable loss of goodwill and harm to his reputation—both independent forms of irreparable harm. *See Tom Doherty Assocs.,* 60 F.3d at 38; *Nemer,* 992 F.3d at 436; *Interphoto Corp. v. Minolta Corp*., 417 F.2d 621, 622 (2d Cir. 1969).

Third, the Court's order also immediately enjoins defendants Camacho and Piaguaje from seeking to monetize the Ecuadorian judgment—activity critical to their Ecuadorian counsel's ability to raise funds to litigate this action, any appeal of this action, and foreign enforcement actions—all of which are expressly permitted by the Court's order. *See* DI 1875, at 3 (¶¶ 5 & 6). Without the ability to monetize the judgment, the LAP Representatives will likely be without sufficient funds to finance any appeal of this action, and consequently without counsel, because even a contingency arrangement would monetize the judgment and therefore violate the order. As a result, the LAP Representatives are effectively deprived of any meaningful right to appeal by the Court's order.

Fourth, the Court's order requires the defendants to transfer and assign "all property, whether personal *or real*, tangible or intangible, vested or contingent" that is "traceable to the Judgment or the enforcement of the Judgment anywhere in the world." *Id.* at 2 (¶¶ 1, 2) (emphasis added). Thus, unless a stay issues, Mr. Donziger and the other defendants face the loss of real property—a loss that, even if temporary, is recognized as irreparable harm as a matter of law. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999); *Varsames v. Palazzolo*, 96 F. Supp. 2d 361, 367 (S.D.N.Y. 2001) ("Deprivation of an interest in real property constitutes irreparable harm.").

Fifth, absent a stay, this Court's order would require Mr. Donziger to transfer forthwith "all of his right, title and interest in his shares" in Amazonia Recovery Limited. DI 1875, at 2 (¶¶ 1, 3). As a matter of law, Mr. Donziger's immediate loss of his shares in Amazonia, and all rights accompanying those shares, constitutes irreparable harm both to him and his fellow shareholders.[11] He might be able to recover his shares after an appeal (if they are not automatically nullified as a result of the transfer), or their value in dollars, but no damages could ever make up for the loss of his ability to exercise or sell his shares, or to participate in the entity's affairs, during the pendency of the appeal. Nor, as already discussed above, could later relief make up for the devastating impact of this forced transfer on Mr. Donziger's ability to earn a living.[12]

This much might be true in many cases involving forced transfers of stock, which courts have recognized as causing irreparable harm. But the irreparable harm here is magnified by the unique context in which the transfer arises. Amazonia is a corporation formed for the specific purpose of enforcing and collecting on the environmental-pollution judgment *against* Chevron. *See* Memo. of Association of Amazonia Recovery Ltd., at 1 (explaining entity's purpose). Indeed, the

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[11] *See*, *e.g.*, *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 427 F. Supp. 2d 491, 498 (S.D.N.Y. 2006) (Kaplan, J.), *aff'd*, 246 F. App'x 73 (2d Cir. 2007) ("[t]he dilution of a party's stake in, or a party's loss of control of, a business" constitutes irreparable harm); *Suchodolski Associates, Inc. v. Cardell Fin. Corp.*, 2003 WL 22909149 (S.D.N.Y. 2003) (same); *Street v. Vitti*, 685 F. Supp. 379, 384 (S.D.N.Y. 1988) (finding irreparable harm when a forced sale of plaintiff's shares "destroy[ed] their voice in management"); *Asarco Inc. v. Court*, 611 F. Supp. 468, 480 (D.N.J. 1985) (enjoining the issue of preferred stock because it would dilute the vote of a shareholder and thereby cause irreparable harm); *Clark v. Pattern Analysis & Recognition Corp.*, 87 Misc. 2d 385, 386 (N.Y. Sup. Ct. 1976) (there is "irreparable damage to plaintiffs [because] they would lose their status as shareholders"). The same goes for the accompanying loss of the right to vote one's shares. *See*, *e.g.*, *Beztak Co. v. Bank One Columbus, N.A.*, 811 F. Supp. 274, 284 (E.D. Mich. 1992); *AHI Metnall, L.P. by AHI Kan., Inc. v. J.C. Nichols Co.*, 891 F. Supp. 1352, 1359 (W.D. Mo. 1995).

[12] Chevron's control of Amazonia would also further deprive defendants Camacho and Piaguje of all practicable ability to undertake and to finance further litigation of this action, any appeal of this Court's judgment, and even the foreign enforcement actions that are expressly permitted by the judgment.

corporation's bylaws require that all parties take all lawful actions possible to enforce, collect, and distribute the Ecuadorian judgment against Chevron. Shareholders Agreement, at 3. Were Chevron to receive control of Mr. Donziger's shares, it is unlikely that Chevron would abide by those bylaws, as it would not seek to enforce the judgment against itself, but avoid that result at all costs.

If the stock is transferred, then, Chevron would be on the inside of an entity it has fought for years to destroy. As an enemy inside the tent, Chevron would have the ability to inflict damage on the corporation and its affairs that cannot be undone by a reversal on appeal. Chevron's "mere presence" as a shareholder would threaten the entity's purpose and existence, "taint" its internal governance processes, *Irving Bank Corp.*, 139 Misc. 665, 668-69 (N.Y. Sup. Ct. 1988), and have a "chilling effect" on shareholders, who will likely seek to limit their activity in Amazonia's affairs as a result, *Packer v. Yampol*, 12 Del. J. Corp. L. 332, 350 (Del. Ch. 1986)—all recognized forms of irreparable harm. Indeed, as a shareholder, Chevron would have the right to access Amazonia's internal, privileged information and attend shareholder and even board meetings where such proprietary information would otherwise be exchanged. Just as in cases involving trade secrets, the release of such information into the hands of the enemy constitutes irreparable harm because the information "once lost is, of course, lost forever." *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (quoting *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 62 (2d Cir. 1984)).

III. A Stay Will Not Harm Chevron and the Public Interests Affected Favor a Stay.

By contrast, a stay pending appeal would not harm Chevron. If Chevron were to prevail on appeal, it would be able to receive all the property subject to this Court's constructive trust at that time. In the meantime, a stay of the injunction barring enforcement actions in the United

States will not harm Chevron because no such enforcement actions exist, and Chevron has not shown (and cannot show) that the filing of any such action would be imminent absent the injunction. And Chevron will face enforcement actions outside the United States regardless of whether a stay pending appeal is granted; the Court's judgment does not purport to bar them.

Finally, the public interests affected favor a stay. To the extent that the Court's order in any way hinders the long-running quest of thousands of Ecuadorians to seek compensation and remediation for pollution of the Amazon, that hindrance cuts in favor of a stay. As the Second Circuit has observed, "there is a public interest in having any of the Plaintiffs who might be entitled to recovery receive compensation while still living and able to use it to cover medical costs and improve the quality of their lives." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (discussing stay pending appeal). Indeed, any delay in enforcement efforts would simply prolong the environmental harm to the LAP Representatives and thousands of other people in Ecuador who have waited decades for a cleanup and remediation, and would thus present yet another form of irreparable harm. As the Supreme Court has explained, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). That is particularly so here, given the extent of the pollution and the length of time that it has gone unabated. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 873-74 (D.N.J. 2003) (pollution, "left unabated" for twenty years, "presents irreparable harm to human health and the environment").

Last but not least, a stay is warranted in light of the strong public interest in maintaining international comity. *See In re Agency for Deposit Ins., Rehab., Bankr. & Liquidation of Banks*, 2004 WL 414831 (S.D.N.Y. Mar. 4, 2004); *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1262 (S.D.N.Y. 1979). As the Second Circuit previously explained in this case, a preemptive

determination of the kind issued by this Court "would unquestionably provoke extensive friction between legal systems by encouraging challenges to the legitimacy of foreign courts in cases in which the enforceability of the foreign judgment might otherwise never be presented in New York." *Naranjo*, 667 F.3d at 246. Before a single trial judge in New York is permitted to enforce a judgment based on a wholesale condemnation of a sovereign nation's judiciary, it is not too much to ask that the judgment undergo at least one level of appellate review.

CONCLUSION

For the foregoing reasons, the defendants respectfully request a stay pending appeal. If this Court is not inclined to grant a stay pending appeal, however, the defendants respectfully respect that the Court enter an administrative stay of the Court's judgment pending resolution by the Second Circuit of defendants' motion under Federal Rule of Appellate Procedure 8(a)(2). Defendants respectfully request a ruling on this motion no later than Tuesday, March 25, 2014.

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Respectfully submitted,

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