UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR A STAY PENDING APPEAL

Chevron bases its opposition to a stay almost entirely on its conviction that every part of the Court's opinion is correct, and on its repeated assertion that the defendants do not contest the Court's findings of fact. But the defendants have consistently and vigorously denied Chevron's allegations against them, did so under oath at trial, and will continue to do so on appeal. Indeed, they will challenge virtually every aspect of this Court's decision—both legal and factual—including whether the Court even had the authority to issue it in the first place.

The defendants are likely to succeed in that effort on appeal. Although Chevron does its best to mimic this Court's reasoning, the company does not deny that it must run the gauntlet to prevail on appeal. It must win every one of a series of uphill legal battles, some of which the Second Circuit has already suggested it would decide against the company. The defendants, by contrast, need win only one. That is easily enough to show a substantial possibility of success on appeal.

It is also enough to tip the equities in their favor. Chevron's whole argument on this score assumes the correctness of the Court's decision—that the defendants, in other words, are engaged in a RICO conspiracy and have no legitimate concerns. The company argues that

enjoining activity found by a district court to be illegal can never cause irreparable harm. But that is not how the irreparable-harm inquiry works. It requires a court to "consider[] the harms that would flow from an injunction *entered in error*." *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002) (emphasis added).

On that question, Chevron boasts that this Court's injunction, if allowed to take effect, will prevent the defendants from "continu[ing] their efforts" to enforce the Ecuadorian judgment and from "attempting to obtain additional financing" for those efforts. DI 1893, at 20-21. If that is so, then the injunction will prolong the decades-long wait for the massive environmental cleanup and remediation required by the Ecuadorian judgment—a delay that constitutes irreparable harm under any meaning of that term. And it will threaten to deprive Steven Donziger of his ability to make a living, which further constitutes irreparable harm. A stay pending appeal is warranted.

ARGUMENT

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

Chevron begins its discussion of the success-on-appeal factor with a quibble. It claims that the Second Circuit's long-held "substantial possibility" standard is "too lenient" and that the proper standard is the one articulated in *Nken v. Holder*, 556 U.S. 418, 434 (2009). DI 1893, at 15. But the Second Circuit has already recognized that *Nken* "did not address the issue of a moving party's likelihood of success on the merits" and "did not suggest," as Chevron does here, "that this factor requires a showing that the movant is 'more likely than not' to succeed on the merits." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010). And the Supreme Court itself has continued to follow a "flexible" "sliding scale" approach to stay applications, even after *Nken*, requiring only a "reasonable probability" or "fair prospect"

of success. *Id.* at 38 n.8 (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)). The Second Circuit's traditional standard is thus entirely consistent with Supreme Court precedent.

Chevron's arguments go downhill from there. On standing, Chevron does little more than parrot this Court. It claims that it had no obligation to prove that its requested relief would likely redress an actual injury caused by the alleged wrongdoing, as the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Instead, Chevron takes the view that it satisfied its burden of establishing standing at trial because certain relief that Chevron *wasn't requesting*—billions of dollars in damages and a worldwide anti-enforcement injunction—*would have* given it standing. That's deeply, doubly wrong: The relevant relief is the relief actually being requested. And even if it weren't, Chevron did not have standing to seek *any* injunctive relief at the outset because there was no Ecuadorian judgment against it at that time, let alone an enforceable one, nor were there any enforcement proceedings. Moreover, even then, Chevron could not establish causation or redressability; the only way an injunction could have possibly prevented a future "injury" was if a foreign court had chosen to give it effect, and a plaintiff cannot stake its claim for standing on such speculation. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013).

When Chevron finally confronts the correct Article III question, the weaknesses in its argument are all the more glaring. It says that it has suffered "injury to Ecuadorian trademarks and related revenue streams" held by a subsidiary, as well as to "its interest in a $96 million arbitration award." DI 1893, at 18. But "'injury arising solely out of harm to a subsidiary corporation is generally insufficient to confer standing on a parent corporation.'" *Petroleum Enhancer, LLC v. Woodward*, 690 F.3d 757, 770 (6th Cir. 2012) (quoting 9 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 4227 (2010)). And, regardless, that so-called injury—like Chevron's "legal fees and other expenses," DI 1893, at 18—cannot confer standing

on Chevron because it has not proven that the injury will likely be redressed by this Court's relief. Chevron provides only a prediction that the relief will prevent the defendants from "continu[ing] their efforts" to enforce the judgment and from "attempting to obtain additional financing" for those efforts—yet, at the same time, concedes that the relief "does not bar" the defendants from "pursuing enforcement actions" or "initiating" new ones "if they choose." *Id.* at 5, 20-21. And Chevron has no rebuttal to the Supreme Court's well-established rule that a plaintiff "cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper*, 133 S. Ct. at 1150 n.5 (quoting *Lujan*, 504 U.S. at 562). These failures, plus Chevron's inability to establish causation, destroy its case for standing, making it more than likely that it will lose on appeal.

Likewise for "but for" causation under RICO. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Chevron makes no attempt—none whatsoever—to meet this bedrock requirement. Like this Court, Chevron has no response to our basic point that it cannot prove, as a matter of logic, that there would be no judgment against it "but for" the alleged RICO violations because it decided not to contest its environmental liability here. Chevron says only that this shortcoming is "beside the point." DI 1893, at 19. The Second Circuit will likely disagree.

Next up is the availability of injunctive relief in a private RICO case—yet another independent, dispositive issue on which the defendants are likely to prevail on appeal. Chevron concedes that the Second Circuit's "initial, tentative views on this topic" squarely conflict with its position here. *Id.* at 23. Yet Chevron believes that the Second Circuit will not "adhere" to those views because Judge Rakoff and one other circuit have since concluded otherwise—not because of anything the Second Circuit has done. *Id.* But it is far more likely that the Second Circuit will

"adhere" to its previous opinions and, in doing so, agree with the overwhelming majority of courts and the Solicitor General of the United States.

Nor does Chevron meaningfully respond to our independent argument that, even if RICO allowed for injunctive relief in private actions generally, it does not do so without a claim for money damages. Chevron contends that Judge Rakoff's RICO treatise—which addresses this very question and sides with us—is "out of date" and does not reflect his "current views." *Id.* at 23-24. But the treatise is from *this year*. And Judge Rakoff's 12-year-old opinion in *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239 (S.D.N.Y. 2002), is not inconsistent with his view because it involved a claim for damages and reasoned that an injunction could be issued as ancillary relief. Putting it all together, then, the Second Circuit will likely disagree with Judge Rakoff about the availability of injunctive relief in private RICO actions as a general matter. But even if it were to agree with him, thus reversing its prior course, that still wouldn't help Chevron here because the defendants would win anyway.

Then there's international comity and judicial estoppel—two more hurdles that Chevron must clear to prevail on appeal. And yet, on both of these issues, in cases involving this same dispute, the Second Circuit has ruled against Chevron. That says something about the company's prospects on appeal. As for comity, the Second Circuit has stressed the "grave[]" concerns raised by an injunction seeking to preemptively nullify a foreign judgment or thwart its possible enforcement in other countries. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012). That's exactly what the relief does here: It purports to deprive foreign courts of the ability to make their own determinations about the facts—which might be very different from this Court's version—and apply their own laws on enforceability, and then give effect to their own decisions. Chevron does not dispute that this Court preemptively determined, based on exceedingly thin evidence, that "Ecuador, at no time relevant to this case, provided impartial tribunals or

procedures compatible with due process of law." DI 1874, at 433. Nor does Chevron disavow this Court's wholesale condemnation of the Ecuadorian government, or its criticism of 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. The Second Circuit will likely conclude that those preemptive determinations—which form the basis of a preemptive worldwide anti-collection injunction—offend fundamental principles of international comity.

As for estoppel, the Second Circuit has already concluded that "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, . . . is enforceable against Chevron in this action and any future proceedings between the parties." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.4 (2d Cir. 2011). Like this Court, Chevron's primary response to this conclusion is to dismiss it as "unnecessary to [the] decision." DI 1874, at 27. But the Second Circuit is more likely to conclude that it meant what it said.

II. The Equities and the Public Interest Favor a Stay.

Turning to the equities, Chevron contends that Mr. Donziger and the Ecuadorians will not suffer any irreparable harm absent a stay—even though this Court's injunction threatens to destroy Mr. Donziger's law practice, and even though the Ecuadorians are currently enduring the devastating, continuing effects of Chevron's decades-long pollution of the Amazon. But, as discussed above, Chevron emphatically argues that the relief granted by this Court will effectively block enforcement of the Ecuadorian judgment anywhere on the globe because it will prevent the defendants from "continu[ing] their efforts" to enforce the judgment and from "attempting to obtain additional financing" for those efforts. DI 1893, at 20-21.

If that is right, then there is unquestionably irreparable harm to the defendants because the cleanup and remediation that the Ecuadorian judgment calls for would be delayed pending

appeal, resulting in widespread environmental injury, increased exposure to known carcinogens, and even deaths. *See* Donziger Decl. ¶ 5 ("To the extent Chevron is correct that this Court's order will further delay or reduce the likelihood of my clients receiving the relief to which they are entitled under Ecuadorian law, they will be irreparably harmed pending appeal of this Court's judgment unless a stay is granted because they will continue to endure exposure to harmful toxins, and because the cost of future remediation will increase."); *see also Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987) ("Environmental 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."); *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) ("[T]here 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."); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 873-74 (D.N.J. 2003) (pollution "left unabated" "presents irreparable harm to human health and the environment"). And Mr. Donziger's law practice—his entire livelihood—would be obliterated. *See* Donziger Decl. ¶¶ 2-3; *see also Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 434-35 (2d Cir. 1993) (holding that destruction of a business constitutes irreparable harm).[1]

Moreover, the defendants would still be likely to prevail on appeal because they would have to win just one of the following legal issues: Article III standing, RICO causation, RICO injunctive relief, international comity, and judicial estoppel—all "serious and substantial." *See Ark. Peace Ctr. v. Ark. Dept. of Pollution Control*, 992 F.2d 145, 146 (8th Cir. 1993). And because that is so—and the defendants have shown irreparable harm "because their interests include the

[1] This Court's injunction also threatens to deprive the Ecuadorian defendants of appellate representation by eliminating their ability to monetize the judgment, thereby hamstringing their efforts to find and pay for a lawyer and causing them irreparable harm. *See* Gomez Decl. ¶¶ 3-8.

important public interest in protecting the environment by cleaning up hazardous waste sites"—this Court should let its decision be reviewed before it goes into effect. *Id.*

This Court should do the same even if Chevron's prediction is wrong. If that is the case, then Chevron has no standing under Article III, and this Court therefore had no jurisdiction to hold a seven-week bench trial and issue its 497-page opinion. That would mean not only that the defendants would prevail on appeal, but also that Mr. Donziger would have been irreparably harmed in the meantime because he would have been deprived of his interest in, and ability to work on, a case to which he has devoted nearly all of his professional life. *See* Donziger Decl. ¶¶ 2-3 ("If I am forced to turn over my shares in Amazonia and relinquish any interest I have in the Lago Agrio litigation, my law practice—my only means of earning a livelihood—will be effectively destroyed. Even if I prevail on appeal, I will not be able to undo the damage to my practice suffered in the interim."). And the loss of goodwill and harm to his reputation that would be caused by this Court's decision—an illegitimate decision in this scenario, and one that all but labels him a criminal—speaks for itself.[2]

On the side of the ledger, Chevron has not demonstrated that it will suffer *any* injury—let alone irreparable harm—if this Court grants a stay pending appeal. Chevron does not deny that "a stay of the injunction barring enforcement actions in the United States will not harm Chevron because no such enforcement actions exist." DI 1888, at 20-21. Nor does Chevron deny that it

[2] Although Chevron repeatedly asserts that the defendants do not contest this Court's factual findings, that could not be further from the truth. The defendants have strenuously contested Chevron's allegations throughout the litigation, and they will continue to do so on appeal. *See, e.g.*, Form C in *Chevron Corp. v. Donziger*, No. 14-826 (2d Cir.) (listing "[w]hether any of the district court's factual findings are clearly erroneous" as an issue likely to be raised on appeal). Mr. Donziger, for example, has vigorously and repeatedly denied the allegation that he "bribed" a judge—an allegation based solely on the shifting and internally inconsistent testimony of an admitted con man now on Chevron's payroll. *See* DX 1750. Mr. Donziger has done the same with respect to the "ghostwriting" allegations, as well as the allegations that the Cabrera Report was prepared in violation of Ecuadorian law. *See id.*

"will face enforcement actions outside the United States regardless of whether a stay pending appeal is granted." *Id.* at 21; *see* DI 1893, at 5 ("The injunction does not bar Defendants from appealing this Court's decision while pursuing their pending enforcement actions in Canada, Argentina, and Brazil, or even initiating additional foreign enforcement actions if they choose."). Instead, Chevron's claim to irreparable harms rests entirely on a belief that the defendants might be able "to monetize the judgment during the appeal," DI 1893, at 31—an implausible scenario for which Chevron offers no evidence.

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 the defendants' motion under Federal Rule of Appellate Procedure 8(a)(2). The defendants respectfully request a ruling on this motion as soon as possible.

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Respectfully submitted,

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