UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, vs. STEVEN DONZIGER, et al., Defendants.	CASE NO. 11-CV-0691-LAK

DEFENDANT STEVEN DONZIGER'S APPLICATION FOR TRANSFER OF CASE AS RELATED TO *AGUINDA, ET AL. v. TEXACO, ET AL.*, 93-CV-07527 JSR, PURSUANT TO RULE 15 OF THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES, SOUTHERN DISTRICT

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Pursuant to Rule 15 of the Rules for the Division of Business Among District Judges, Southern District, Defendants Steven R. Donziger and the Law Offices of Steven Donziger respectfully apply for the transfer of this case to the judge having the related case with the lowest docket number, *Aguinda, et al. v. Texaco, Inc.*, 93-CV-07527 JSR, or, in the alternative, for reference of this case to the Court's Assignment Committee for reassignment according to Rule 4(b) of the Rules for the Division of Business Among District Judges, Southern District, by lot or otherwise.

I. INTRODUCTION

In 1993, a class action was filed in this Court by Ecuadorian nationals against Chevron's predecessor in interest, Texaco, seeking recovery for environmental and personal injury from oil contamination in the Ecuadorian rain forest. At Chevron's request, that litigation was dismissed and transferred to the courts of Ecuador, where it proceeded to judgment against Chevron. Now Chevron has turned around and sued the Ecuadorian nationals, together with their lawyers and advisors, claiming fraud in the conduct of the Ecuadorian litigation, and seeking to enjoin enforcement of the judgment resulting from that litigation.

Local Civil Rule 1.6 imposes a duty on counsel to "bring promptly to the attention of the clerk all facts" relevant to the determination of whether a newly filed case is "related" to a previously filed case. This Chevron did not do. When it filed the instant case, Chevron did not disclose in its Civil Cover Sheet and Related Case Explanation that the instant case flows continuously and directly from the toxic tort case the Ecuadorian nationals originally begun in 1993 and litigated for nine years in this Court before being transferred, at Chevron's insistence, to Ecuador. Chevron did not disclose that original, related case, even though that case was transferred to Ecuador in specific reliance on Chevron's promises to honor the very Ecuadorian courts and judgment that this action now seeks to disparage and enjoin. Instead, when filing the instant action, Chevron disclosed as potentially related only the 2010 cases under 28 U.S.C. §1782 involving ancillary discovery proceedings, which had recently proceeded before Judge Kaplan. By virtue of this "selective" related case disclosure, Chevron was able to steer the instant case to Judge Kaplan.

Chevron should not, by its failure to disclose the truly lowest-numbered related case in its initial case filings, be able to game the system to steer this action toward a judge it perceives as sympathetic. Rather, the issue of the enforceability of the judgment in the underlying environmental case, which Chevron asked Judge Rakoff to dismiss and send to Ecuador, should be decided by the judge who presided over the case in the first instance, Judge Rakoff. In the alternative, this Court's Assignment Committee should review this matter and reassign this case, by lot or otherwise.

II. BACKGROUND REGARDING PRIOR LITIGATION

A. 1993-2002: Litigation In Judge Broderick's And Judge Rakoff's Courts.

The litigation of the indigenous Ecuadorian people against Chevron began on November 3, 1993, with a class action complaint filed in this Court on behalf of 30,000 inhabitants of the Oriente region of Ecuador, against Texaco. This case was randomly assigned to Judge Broderick. *Aguinda, et al. v. Texaco Inc*, 93-CV-07527. A second case was brought in 1994 by 25,000 residents of Peru who lived downstream from Ecuador's Oriente region. That case, *Jota v. Texaco,* 94-CV-09266, was deemed related to the *Aguinda* case, and was also assigned to Judge Broderick. Following Judge Broderick's death in May of 1995, the cases were reassigned, ultimately to Judge Rakoff.

These cases, seeking recovery for environmental and personal injury caused by Texaco's oil contamination of land and water in Ecuador, were litigated in Judge Broderick's and Judge Rakoff's courts for four years until 1996, when Judge Rakoff dismissed the cases on grounds of *forum non conveniens* and international comity. *Aguinda v. Texaco Inc.*, 945 F. Supp. 2d 625 (S.D.N.Y. 1996). The Second Circuit reversed the dismissal, and ordered further proceedings. *Jota v Texaco*, 157 F.3d 153 (2d Cir. 1998). After several more years of litigation, Judge Rakoff dismissed the cases again, on May 30, 2001, on *forum non conveniens* grounds, noting specifically that Texaco had now consented to jurisdiction in Ecuadorian and Peruvian courts, and noting that "these cases have everything to do with Ecuador and nothing to do with the United States." *Aguinda, et al. v. Texaco*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001). Judge Rakoff made detailed findings, accepting Texaco's arguments as to the absence of corrupt

influences in Ecuador and the impartiality and suitability of Ecuadorian courts. *Id*. at 544-46. In 2002, the Second Circuit affirmed (with modification) Judge Rakoff's dismissal of the cases. *Aguinda, et al. v. Texaco*, 303 F.3d 470 (2d Cir. 2002).

B. 1998-2001: Chevron's Promises To Judge Rakoff.

When the Second Circuit reversed Judge Rakoff's first dismissal of the *Aguinda* litigation on *forum non conveniens* grounds, it did so finding that "dismissal for *forum non conveniens* is not appropriate … absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts for purposes of this action." *Jota v. Texaco*, 157 F.3d 153, 159 (2d Cir. 1998). In response, Chevron made that commitment, several times.

After remand to Judge Rakoff's court, Chevron made a number of promises to submit to Ecuadorian jurisdiction, and to satisfy any Ecuadorian judgment, subject only to a defense under New York C.P.L.R. § 5304 to any enforcement action. Specifically:

- In a verified response to interrogatories, Chevron stated:

  "[Chevron] ... ***will* satisfy a final judgment** . . . in the event th[e] [*Aguinda*] action [is] dismissed by this Court on grounds of *forum non conveniens* or international comity and if plaintiffs refile claims in Ecuador. [Chevron] reserves its right to contest any such judgments under [N.Y. C.P.L.R. § 5301 *et seq*.]."

  See 2/25/11 Peters Decl.,[1] D.E. 140, Exhibit 25 at p. 3 (Response to Interrogatory No. 2).

- In its January 11, 1999 brief moving (again) to dismiss, Chevron stated:

  "*If this Court dismisses* these cases on *forum non conveniens* or comity grounds, Texaco *will agree* as follows: ... fourth, **Texaco *will satisfy* judgments** that might be entered in plaintiffs' favor, subject to Texaco's rights under New York's Recognition of Foreign Country Money Judgments Act [N.Y. C.P.L.R. § 5304]." (emphasis added.)[2]

  See 2/25/2011 Peters Decl., D.E. 141, Exhibit 28 at pp. 16-17.

- In its written "Agreements Regarding Conditions of Dismissal," Chevron again represented that it:

[1] Declaration of Elliot R. Peters, filed in support of Donziger's Opposition to Preliminary Injunction, dated 2/25/2011 ("2/25/11 Peters Decl.), D.E. 138-142.

[2] Texaco's Mem. of Law Supp. Renew. Mots. To Dismiss (Jan. 11, 1999) (emphasis added). *See* 2/25/2011 Peters Decl., D.E. 141, Exhibit 28 at pp. 16-17.

> "**[A]grees to satisfy a final judgment** . . . in favor of a named plaintiff in Aguinda, subject to Texaco Inc.'s reservation of its right to contest any such judgment under New York's Recognition of Foreign Country Money Judgments Act."
>
> *See* 2/25/2011 Peters Decl., D.E. 142, Exhibit 29 at p. 3, ¶5.

- And in its reply brief, Chevron represented again that it:

> "**[H]as agreed to satisfy *any* judgment** 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." (emphasis added.)
>
> *See* 2/25/2011, Peters Decl., D.E. 141, Exhibit 26 at p. 21.

In dismissing the litigation on *forum non conveniens* grounds, Judge Rakoff specifically relied on Texaco's "Notice of Agreements in Satisfying *Forum Non Conveniens* And International Comity Conditions," as well as the pages of the record documenting Texaco's promises. *See Aguinda v. Texaco*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001). When the Second Circuit affirmed the dismissal it specifically noted that in making its decision, the district court (Judge Rakoff) had "underscored that Texaco had now consented to jurisdiction in Ecuadorian and Peruvian courts." *Aguinda v. Texaco*, 303 F.3d 470, 476 (2d Cir. 2002).

C. 2002-2011: The Litigation Proceeds To Trial And Judgment In Ecuador.

In 2002, after nine years of litigating before Judges Broderick and Rakoff and the Second Circuit, the Ecuadorian plaintiffs continued their quest for recovery of damages for environmental and personal injures in the courts of Ecuador. Ultimately, eight years later, on February 14, 2011 the Ecuadorian plaintiffs obtained an $8.646 billion dollar judgment against Chevron.

D. February 2011: Chevron Counter-Sues The Ecuadorian Nationals And Their Advisors.

On February 1, 2011, Chevron filed the instant action, claiming fraud in the underlying environmental litigation, and seeking *inter alia* an injunction against, and a declaration of the unenforceability of, the judgment rendered in the Ecuadorian case. Despite the fact that the Ecuadorian judgment Chevron now seeks to enjoin was issued in a case which had been originally begun in this district, and which was litigated from 1993-2002 in this Court before

being transferred to Ecuador, at Chevron's request, Chevron completely failed to mention that original case in its related case notice for this case. Chevron failed to disclose on the civil cover sheet the nine-year S.D.N.Y history of a case which was not only "related," but indeed was *the very case whose judgment the instant action now seeks to invalidate*. Rather, Chevron's civil cover sheet disclosed as a "related" case only certain recent discovery/subpoena proceedings against third parties to foreign litigation under 28 U.S.C. § 1782, *In Re Application of Chevron*, 10-MISC-0002. A copy of the Civil Cover Sheet is attached as Exhibit A to the Declaration of Elliot R. Peters.[3]

Chevron also filed a "Related Case Explanation—Local Rule 1.6" when it filed this action. This four page document (attached as Exhibit B to Peters Declaration) goes on at length discussing the two 28 U.S.C. § 1782 discovery applications which had been recently assigned to Judge Kaplan. Those cases were (1) *In Re Application of Chevron Corp*, Nos. M-19-111, 10-MV-0001 (LAK) (a proceeding under 28 U.S.C. § 1782 by Chevron and its indicted employees Rodrigo Peres Pallares and Ricardo Reis Veiga, seeking discovery from filmmaker Joseph Berlinger and his colleague Michael Bonfiglio and productions of outtakes from the film *Crude* for use in foreign proceedings; and (2) *In Re Application of Chevron Corp*, Nos. M-19-111, 10-MC-00002 (LAK) (another proceeding under 28 U.S.C. § 1782 by Chevron and its indicted employees Rodrigo Peres Pallares and Ricardo Reis Veiga, seeking discovery from attorney Steven Donziger for use in foreign proceedings).[4]

[3] Declaration of Elliot R. Peters in Support of Defendant Steven Donziger's Application for Transfer of Case as Related to *Aguinda, et al. v. Texaco, et al.*, 93-cv-07527 JSR, Pursuant to Rule 15 of the Division of Business Among District Judges, Southern District ("Peters Decl.").

[4] Also not disclosed in the "related case" memorandum or the civil cover sheet were three cases which had previously been pending before Judge Sand, which related to efforts to terminate arbitration proceedings initiated by Chevron: (1) *Republic of Ecuador and PetroEcuador v. ChevronTexaco, et al.*, 04-CV-8378-LBS; (2) *Republic of Ecuador v Chevron Corporation*, 09-09958-LBS; and (3) *Yaiguaje et al v. Chevron Corporation*, 10-CV-00316. The 2004 case was brought by the Republic of Ecuador to enjoin AAA arbitration proceedings Chevron had brought against Ecuador and PetroEcuador. The second two, related, cases were brought by the Republic of Ecuador and a group of Ecuadorian citizens seeking to stay an international arbitration proceeding brought by Chevron under the US-Ecuador Bilateral Investment Treaty.

III. ARGUMENT

A. Chevron should have disclosed the original, earliest filed case, as "related" when it filed this case.

An attorney's failure to disclose a related case upon filing a new civil action is sanctionable. *See Walker v. Motricity, Inc.*, 627 F. Supp. 2d 1137 (N.D. Cal. 2009), *rev'd on other grounds by Walker v. Morgan*, 386 Fed. App'x 601 (9th Cir. July 2, 2010); *Bailey v. Dart Container Corp. of Mich.*, 980 F. Supp. 584 (D. Mass. 1997); *Thaxton v. United States*, 11 Cl. Ct. 181 (1986). In *Thaxton*, the court imposed sanctions on counsel for failing to comply with the court's related-case disclosure rules, holding that "[t]his negligent disregard, whether blatant or accidental, is inexcusable. …" 11 Cl. Ct. at 183. The court went on to explain the importance of compliance with related-case disclosure rules, which "*seek to guard against forum shopping, which is repugnant to the integrity of the court and those persons seeking legal redress. The failure to file a Notice of Related Case(s) allows litigants to manipulate the court's docket in an improper attempt to increase the chances of success*." *Id.* (emphasis added). Similarly, in *Bailey*, the district court concluded that plaintiff's counsel's omission of a related case from the civil cover sheet for the later-filed action, even if unintentional, was "at a minimum, misguided, grossly negligent and reckless." 980 F. Supp. at 591. The court concluded that "an award of monetary sanctions against counsel fully supported by the record." *Id.* Finally, *Walker* involved a second removal of a case from state court. Even though the previously removed case was disclosed and discussed in the body of the second notice of removal, the trial court judge specifically criticized counsel for their "failure to disclose a related case on the civil cover sheet as required, thus eluding the eye of the [second-filed] judge." *Id.* at 1142.

Chevron's failure to disclose the closely-related *Aguinda, et al. v. Texaco, Inc.*, 93-CV-07527 JSR, case on either its civil cover sheet or in its Related Case Explanation—Local Rule 1.6, implicates the same kind of forum-shopping condemned in *Thaxton*, *Bailey*, and *Walker*, and should not be rewarded by this Court.

Chevron no doubt took comfort in its failure to disclose the prior *Aguinda* litigation in Judge Rakoff's court by the fact that Local Civil Rule 1.6, and the civil cover sheet form

JS44C/SDNY, only calls out for the disclosure of "related" cases that are currently "pending." For Chevron to take refuge in this one-word technicality, however, plainly violates the spirit of the related case rules. Those rules are intended to further substantive principles of judicial economy, efficiency and fairness. The Court's rules for determining "relatedness" do not limit relation of cases only to cases currently still open or pending. Rather, the rules state:

> Subject to the limitations set for the below, a civil case will be deemed related to one or more other civil cases and will be transferred for consolidation or coordinated pretrial proceedings when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (i) a substantial saving of judicial resources would result; or (ii) the just efficient and economical conduct of the litigations would be advanced; or (iii) the convenience of the parties or witnesses would be served. Without intending to limit the criteria considered by the judges of this court in determining relatedness, a congruence of parties or witnesses or the likelihood of a consolidated or joint trial or joint pre-trial discovery may be deemed relevant.

Rule 15(a), Rules for the Division of Business Among District Judges, Southern District.

A newly-filed case can certainly be related to a prior-filed case, even if the earlier case has terminated. For example, when on December 3, 2009 the Republic of Ecuador filed its case seeking to enjoin Chevron's efforts to pursue International Arbitration, *Republic of Ecuador v. Chevron Corp, et al.*, 09-CV-09958, that case was deemed "related" to the 2004 action where Ecuador was trying to enjoin Chevron from pursuing AAA arbitration, *Republic of Ecuador v. ChevronTexaco*, 09-CV-09958, even though that 2004 case was no longer active or "pending" and had been terminated on July 20, 2009.

That a case need not be "currently pending" in order to be the subject of disclosure as "related" makes obvious policy sense. Otherwise, to take an extreme example, a litigant could file a complaint, see it assigned to a judge he does not like, dismiss the case, and re-file it, hoping to secure a different judge. In that instance, one would never tolerate the litigant's contention that he had no obligation to disclose the earlier filed case as "related" because the lower numbered case was not "currently pending." This policy consideration is what animates Rule 4(b) of the Rules for the Division of Business Among District Judges:

> An action, case or proceeding may not be dismissed and thereafter refiled for the purpose of obtaining a different judge. If an action,

> case or proceeding, or one essentially the same, is dismissed and refiled, it shall be assigned to the same judge. **It is the duty of every attorney appearing to bring the facts of the refiling to the attention of the clerk.** (emphasis added).

In the present situation, an earlier "action case, or proceeding, or one essentially the same, [was] dismissed and refiled" – in the courts of Ecuador – at Chevron's request. Now the validity of the judgment in that "refiled" case is being challenged by Chevron.

A "congruence of parties" is one of the factors specifically called out by Rule 15(a) as being a criterion to be considered in determining relatedness. In the instant case, Chevron is suing Ecuador nationals who sued them in 1993, and is seeking to enjoin the judgment which was originally sought by Ecuador nationals in this Court in 1993. The 2010 discovery proceedings handled by Judge Kaplan are far less "congruent" to the instant case. The first §1782 action seeking third-party discovery against a filmmaker for use in a foreign tribunal has no congruence of parties with the current action (except Chevron), and the second § 1782 action has the congruence of only one party besides Chevron: Attorney Donziger.

The 2010 Judge Kaplan "discovery" actions, as well as the 2004 and 2009 Judge Sand "arbitration" actions, are collateral to the core litigation at issue here,[5] which is the Ecuadorian nationals' case against Chevron for recovery for environmental and personal toxic tort injuries. That was Judge Rakoff's case. That is the case where, after being transferred to Ecuador, a judgment was rendered which Chevron now challenges. That is the case to which this case should be related, so that Judge Rakoff may see through the litigation process which was pending for years in his Court before being transferred to Ecuador.

It is particularly appropriate that this case be heard by Judge Rakoff. As noted above, Chevron made numerous representations and promises, to Judge Rakoff, that it would abide by a judgment in Ecuador, subject only to reserving a defense to an enforcement action under

[5] One assumes that the reason the 2004 and 2009 arbitration cases and the 2010 third party discovery cases were not considered "related" to the original *Aguinda v. Texaco* case is because they involved issues collateral to the original *Aguinda v. Texaco* environmental case. By contrast, the instant case challenges the judgment rendered by the Ecuadorian courts to which Judge Rakoff sent the original *Aguinda* case, in reliance on Chevron's promises to satisfy the Ecuadorian judgment if Judge Rakoff sent the case to Ecuador. As such, this case flows from and is directly related to the 1993 *Aguinda v. Texaco* case.

provisions of New York C.P.L.R. § 5304. Judge Rakoff dismissed the case from his court in specific reliance on Chevron's representations and promises. Now, Chevron is reneging on those promises, and is seeking to invalidate and bar enforcement of the judgment through this RICO action. Chevron should not, by its selective disclosure in its related case notice, be able to avoid Judge Rakoff, who is the proper judicial officer to decide whether Chevron is breaching the promises it made directly to Judge Rakoff, and on which Judge Rakoff relied when sending the case to Ecuador.

The instant challenge to the Ecuadorian court's litigation and judgment should be heard by the judge who had the originally filed environmental tort action. In the alternative, this case should be re-assigned by the Assignment Committee, by lot or otherwise. But it should not be assigned to a judge selected by Chevron.

B. Chevron has sought to steer this case to Judge Kaplan because it perceives him as favorable to its positions.

It makes sense that Chevron would seek to steer this case to Judge Kaplan. This Court has expressed views sympathetic to Chevron, and antithetic to the Ecuadorian plaintiffs and their counsel, Steven Donziger. These views are set forth below, and provide the background to explain why Chevron would prefer to be in Judge Kaplan's court, a preference which Judicial Assignment Rules do not respect.

1. This Court has expressed the view that it views the Ecuadorian litigation as a "game" which has been manufactured by greedy plaintiffs' lawyers.

This Court has expressed the view that it finds the Ecuadorian litigation to be a "game." (*See* Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 35:19 (The Court rejecting arguments "about how long Mr. Donziger needs" by stating "**I know the game here.**" (emphasis added); Peters Decl., Ex. D, 07/19/2010 Hr'g. Tr. 22:13-18 ("I don't frankly see why I should allow you and the lawyers for the *Aguinda* plaintiffs to run one of **the great stall games** of all time to be perfectly frank. No professional disrespect, lawyers represent their clients and try to get the best results for them all the time but **I understand the game here**." (emphasis added); Peters Decl., Ex. E, 11/22/2010 Hr'g. Tr. 26:19-21 (The Court rejecting arguments about waiver of privilege by stating "**[I]t's a giant game here. It's a giant game.** The **name of the game** is to string it out."

(emphasis added)).

Similarly, this Court has stated its view that, "from the beginning," the *Aguinda* Litigation was sprung "from the **imagination** of American lawyers" (Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 77:20-78:13; *see also* Ex. C at 15:25-16:4 (Court stating that "the basic facts are **that this lawsuit is put together and financed by Donziger and the Kohn firm, American class action lawyers**. They start out in the U.S. to hit Chevron as big as they can.")). The Court observed sarcastically that "**[t]he imagination** of American lawyers is just without parallel in the world. . . . [W]e used to do a lot of other things. Now we cure people and we kill them with interrogatories. It's a sad pass. But that's where we are." (*Id.*, Ex. C, at 78:9-13 (emphasis added)).

2. This Court has expressed comments belittling the *Aguinda* plaintiffs, the Ecuadorian Government, and the Ecuadorian justice system.

Not surprisingly, given the Court's expressions that the Ecuadorian Litigation sprang from U.S. lawyers' "imaginations," the Court has also belittled the Ecuadorian Plaintiffs, even calling their very existence into question. *See, e.g.*, Peters Decl., Ex. F, D.E. 40, *In re Chevron Corp.*, 10-mc-00001-LAK, Order at 1 (Aug. 24, 2010) ("Not to be outdone, the **so-called** *Aguinda* plaintiffs, whose standing in this matter is debatable to say the least, moved to strike certain of Chevron's filings." (emphasis added)). The Court has also displayed disrespect for the Ecuadorian government, stating that it "has been working closely with Donziger for years and stands to gain billions for Ecuador if the *Aguinda* plaintiffs prevail against Chevron." Peters Decl., Ex. G, D.E. 123, *In re Chevron Corp.*, 10-mc-00002-LAK, Mem. & Op. at 24 (Nov. 29, 2010) (emphasis added). The Court has further expressed disrespect of the Ecuadorian justice system which Chevron seeks to attack in the instant suit. In the first § 1782 action where Chevron sued the filmmaker of *Crude* in April 2010 to discover outtakes from the film, this Court disregarded a pending motion before the Ecuadorian court concerning its receptivity to Chevron's § 1782 discovery. Contrasting the Ecuadorian court to one it deemed more worthy, this Court quipped, "[b]elieve me, if this were the High Court in London, you can be sure I'd wait." (2/25/2011 Peters Decl., Ex. 33, 04/30/2010 Hr'g Tr. 36:5-10.)

3. This Court urged Chevron to bring this action against the *Aguinda* plaintiffs and their lawyers and advisors.

Animated by its view that the Ecuadorian nationals and their counsel were engaged in an elaborate game or hoax, this Court urged Chevron to bring the instant RICO action:

> THE COURT: "The object of **the whole game**, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it. . . . So **the name of the game** is, arguably, to put a lot of pressure on the courts to feed them a record in part false for the purpose of getting a big judgment or threatening a big judgment, which conceivably might be enforceable in the U.S. or in Britain or some other such place, in order to persuade Chevron to come up with some money. **Now, do the phrases Hobbs Act, extortion, RICO, have any bearing here?**"

(Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 24:6-22 (emphasis added)).

It is no wonder that Chevron would seek to have the instant action assigned to the very Judge who invited and encouraged its instigation.

4. This Court has expressed its views as to the merits of the underlying suit by the *Aguinda* plaintiffs against Chevron for recovery of damages for environmental and personal injury.

This Court has indicated its views that Chevron's is the accurate position in the underlying environmental litigation. For example, at a recent conference, the Court noted:

> If it is my understanding that emotions are high on both sides of this matter, it is also my understanding that Chevron **never did business in Ecuador** and further my understanding that Texaco was **out of Ecuador for years** before they acquired Texaco and further that Texaco has been **out of Ecuador for 19 years** and that whatever has happened since 1992 has **happened on the watch of the Ecuadorian-owned oil company. Let's just try to keep some facts more or less in order.**

(Peters Decl., Ex. H, 02/08/2011 Hr'g. Tr. 39:4-12).

The court has made other, similar statements concerning its views of the underlying environmental litigation. For example, the Court stated that:

- "[W]hatever pollution may have occurred in the past eighteen years [ ] seems to be the responsibility of the [Government of Ecuador], not Chevron or Texaco." Peters Decl., Ex. I, D.E. 97 (*In re Chevron Corp.*, 10-mc-00002-LAK) Op. at 12 (S.D.N.Y. Nov. 5, 2010).

- "Texaco long ago entered into a settlement with the [Government of Ecuador], signed on behalf by the Individual Petitioners, which may well have released the claims upon which the *Aguinda* Plaintiffs sue." *Id.*, Ex. I at 3.

- "[T]he Ecuadorian legislature amend[ed] the constitution to revive a claim or to create some new claim. I understand all that. Believe me I do." (Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 78:2-5.)

5. This Court has ruled against litigation positions taken by the *Aguinda* Plaintiffs, and Mr. Donziger, time and time again.

That a litigant loses motions, or that its arguments are rejected, is by no means *per se* evidence of bias by a court. But the spate of rulings for Chevron and against the *Aguinda* plaintiffs is certainly probative of Chevron's likely motive for trying to steer this case for assignment to Judge Kaplan. Examples of this Court's rejections of arguments put forth by the Ecuadorian Plaintiffs include the following:

- Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 77:8-12 ("MR. MAAZEL: Every single complaint we heard from Mr. Mastro that we heard today is before the Court there. They have a forum. They made their complaints. THE COURT: **Let's start with the proposition [that] that's a loser.** What's your next point?" (emphasis added));

- Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 36:20-24 ("THE COURT: Look, so far as we know, whatever the breadth of the subpoena, the likelihood that there is actually an attorney-client communication under any of this **I think is about the same as the likelihood that the Ecuadorian Air Force is going to take over New Jersey. Let's get real**." (emphasis added));

- Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 39:24-40:01 (cutting off Mr. Maazel: "You know, the focus on the trees in lieu of the forest is just staggering to me");

- Peters Decl., Ex. C, 09/23/2010 Hr'g. Tr. 41:24-25 (cutting off Mr. Maazel: "**All right. We've had enough meatloaf this morning.**" (emphasis added));

- Peters Decl., Ex. E, 11/22/2010 Hr'g. Tr. 17:25-18:3 ("THE COURT: Look Mr. Maazel, let me put it to you very simply. If you have anything other than this to say, the time has come. **Because your chances of prevailing on this argument are zero.**" (emphasis added)).

Examples of the Court's rulings against Mr. Donziger in the prior § 1782 litigation include the following:

- On November 22, 2010, this Court ruled that Donziger had waived the attorney-client privilege with respect to "the universe" of his documents based solely upon Donziger's failure to ask for an extension of time to submit a privilege log (even though he had lodged an objection to the subpoena itself). (Peters Decl., Ex. E, 11/22/2010 Hr'g. Tr. 13:12-13.)

- On October 20, 2010, this Court denied Donziger's motion to quash the subpoenas and ruled that Donziger's claims of privilege "have been waived, are premature, or both." Peters Decl., Ex. J, D.E. 86, *In re Chevron Corp.*, 10-mc-00002, Mem. & Order at 7 (S.D.N.Y. Oct. 20, 2010).

- On November 29, 2010, this Court ordered Donziger to immediately "produce each and every document responsive to the subpoenas (irrespective of whether any privilege or other production against disclosure has been or thereafter may be claimed)." Peters Decl., Ex. G, D.E. 123, *In re Chevron Corp.*, 10-mc-00002-LAK, Mem. & Op. at 32 (S.D.N.Y. Nov. 29, 2010).[6]

6. Even the press has noticed this Court's hostility toward Mr. Donziger.

That this Court appears more sympathetic to Chevron than to Mr. Donziger and the Ecuadorian plaintiffs has not been lost on those observing the progress of the case—the press. *See* Peters Decl. Ex. L (D. Fisher, *Chevron Ecuador Plaintiffs Face Tough Sell In U.S.*, Forbes, Forbes.com (blog) (Feb. 15, 2011); *available at* http://blogs.forbes.com/danielfisher /2011/02/15/chevron-ecuador-plaintiffs-face-tough-sell-in-u-s/ (last visited 2/272011) ("Steven Donziger, the former journalist and Harvard Law grad who spearheaded the litigation—and seems to have drawn the distaste of Judge Kaplan—reportedly has stepped back from the case.")).

It is no wonder, therefore, that Chevron sought to steer the instant Hobbs Act, extortion and RICO case to the Judge who encouraged Chevron to file it.

7. The Special Master appointed by Judge Kaplan has also been hostile to Mr. Donziger.

The Special Master appointed by Judge Kaplan to oversee the deposition of Mr. Donziger in the § 1782 proceedings was hostile to Mr. Donziger. Whatever the merits of the positions and decisions made by the Special Master, it cannot be doubted that Chevron might favor having future litigation before Judge Kaplan, in the hopes that Judge Kaplan would utilize the same Special Master in any discovery disputes in this case.

Because the Special Master's hostility toward Mr. Donziger is in some sense "one step removed" from the actions of this Court, we include discussion of the Special Master's conduct in a separate Appendix filed with this Application. Again, we do not seek here to litigate the bias

[6] That the Court's ruling in this regard was affirmed on appeal does not alter the fact that such a drastic evidentiary ruling has rarely issued for a procedural misstep. Indeed, the Second Circuit expressly stated that "**the severity of the consequences** imposed by the District Court in this case **are justified almost entirely** by the urgency of petitioners' need for the discovery in light of impending criminal proceedings in Ecuador." *Aguinda Plaintiffs v. Chevron Corp.*, Nos. 10-4341-cv, 10-4405-cv(CON), 2010 U.S. App. LEXIS 25546, at *5 (2d Cir. Dec. 15, 2010) (emphases added).

or lack of bias of the Special Master, nor the propriety of his decisions. Rather, the Special Master's appearance of being "on Chevron's side" provides further evidence of why Chevron would seek assignment of this case to this Court, and would fail to acknowledge and disclose that this case is obviously related to the 1993 original *Aguinda* litigation.

IV. CONCLUSION

Through its selective "related case" filings, Chevron sought assignment of this case to Judge Kaplan. This is understandable, given that Judge Kaplan actually suggested the filing of this case against Mr. Donziger, and given the expressions of sympathy to Chevron's positions expressed by Judge Kaplan. However, Chevron does not have the right to choose its preferred judge. District Court practice requires the relation of cases to the lowest numbered (and randomly assigned) case. This case should be related to *Aguinda v. Texaco*, 93-CV-07527 JSR, and Chevron should not have hidden that relation when seeking assignment of this case to Judge Kaplan.

Dated: February 28, 2011

By: */s/ Elliot R. Peters*

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APPENDIX

This Appendix is submitted in support of Defendant Steven Donziger's Application For Transfer Of Case As Related To *Aguinda, et al. v. Texaco, et al*., 93-CV-07527 JSR, Pursuant To Rule 15 Of The Division Of Business Among District Judges, Southern District.

Special Master Max Gitter's bias against the *Aguinda* Plaintiffs seems plain. Indeed, on the first day of Mr. Donziger's deposition, in a telling slip of the tongue, the Special Master referred to Chevron as "we." (Peters Decl., Ex. K, Donziger Dep. I (11/29/2010) 221:12-24 ("The picture was false, as we know, because **we** got an order from the magistrate judge on a motion for clarification referring to the misleading press release that led to this poster being put on the web." (emphasis added)).) This would foreshadow the biased treatment that was to come during the next thirteen days of depositions.

The Court's Special Master did not merely resolve discovery disputes. Rather, he rapidly became a full-fledged Chevron advocate, actively participating in the examination of witnesses on Chevron's behalf. (*See* Peters Decl., Ex. K, Donziger Dep. II (12/01/2010) 564:16-23; Donziger Dep. VII (12/23/2010) 1970:13-1972:8; Donziger Dep. III (12/08/2010) 790:3-25 (rephrasing questions of Chevron's counsel).) At times, Mr. Donziger found himself fielding questions from a veritable tag-team consisting of Chevron's counsel and the supposedly neutral Special Master. For example:

- Peters Decl., Ex. K, Donziger Dep. II (12/01/2010) 564:16-23 ("THE SPECIAL MASTER: Let's go back. Let me do it. Do you want to do it or shall I do it? Let's just finish this whole thing up. Go back a little bit. MR. VINEGRAD: I would like to do it. THE SPECIAL MASTER: Go ahead, do it yourself.");
- Peters Decl., Ex. K, Donziger Dep VII (12/23/2010) 1970:13-1971:3 ("THE SPECIAL MASTER: Excuse me, I want to ask some questions now. Are you finished with this clip? MR. VINEGRAD: Go ahead, Mr. Gitter. THE SPECIAL MASTER: Are you finished with this clip? MR. VINEGRAD: Not quite. THE SPECIAL MASTER: You finish first. MR. VINEGRAD: Please, you are the Special Master. You ask the questions. THE SPECIAL MASTER: That is okay. I want you to finish first.").)

At certain points in the deposition, the tandem questioning was so prevalent (and at times,

hostile), that it is all but impossible to distinguish between Chevron's counsel and the Special Master:

> THE SPECIAL MASTER: Did you say it on film? The question is, did you say it on film?
>
> THE WITNESS: I don't remember, sir.
>
> THE SPECIAL MASTER: When did you review the outtakes that you saw in preparation for this deposition?
>
> THE WITNESS: On different occasions starting many weeks ago. There is a lot of outtakes.
>
> THE SPECIAL MASTER: I know, because I saw a lot of outtakes. Are you unable to answer the question? And the question is, is it true, are you unable to answer that question? The question is -- you know, it makes a declarative statement, you are on film on numerous occasions saying in effect you are out to get in this lawsuit as much money as you can; isn't that true? The entirety of the question is, isn't that true, and are you telling us you cannot answer that question? Is that what you are telling us?
>
> THE WITNESS: That's what I'm saying right now . . .
>
> MR. VINEGRAD: Do you remember being at a meeting in the Selva Viva office in Ecuador in March of 2007 with a number of plaintiffs' experts and others in which you said "we could jack this thing up to $30 billion in one day"? Do you remember doing that? Yes or no.
>
> A. I remember reading about it in one of your -- one of Chevron's briefs.
>
> Q. That's not my question. Do you remember making that statement at that meeting? Yes or no.
>
> MR. KAPLAN: May we have an instruction, that Mr. Vinegrad, as passionate as he might be, not pound the table?

(Peters Decl., Ex. K, Donziger Dep. II (12/01/2010) 473:24-475:21.)

In his court-appointed capacity, the Special Master did not confine his questioning to the scope of the § 1782 actions, but *sua sponte* expanded the scope of the subpoena and cross-examined Mr. Donziger about the underlying the *Aguinda* litigation:

> Q. And is it your testimony that you have scientific evidence that those constituents are found in harmful levels in the Oriente and that you have linked them to TexPet's operations?
>
> A. Yes.

> MS. NEUMAN: I can break for the day, Mr. Gitter.
>
> THE SPECIAL MASTER: Is it also your testimony that those constituents are not found in the -- as a consequence of the production by PetroEcuador? Yes or no, please. . . .
>
> THE WITNESS: That's not what the case is about. . . .
>
> THE SPECIAL MASTER: Can you answer the question, please? Whether it is or not.

(Peters Decl., Ex. K, Donziger Dep. VI (12/22/2010) 1704:7-1705:5.)

And even though the Court ruled, on November 29, 2010, that Mr. Donziger had waived certain privileges up to that point, the Special Master has permitted questioning into communications that Mr. Donziger has had with his clients and with co-counsel long after that date—in flagrant disregard for the *Aguinda* Plaintiffs' right to representation, the attorney-client privilege, and other privileges. (Peters Decl., Ex. K, Donziger Dep. X (01/14/2011) 2870:6-12; Donziger Dep. XII (01/19/2011) 3932:17-25; Donziger Dep. XIV (01/31/2011) 4039:9-4043:15.)

Finally, and perhaps most ominously, the Special Master expanded the § 1782 deposition to permit a line of questioning that is only potentially relevant to the instant RICO action. On Day 10 of the Donziger deposition, January 14, 2011, some 18 days prior to the instant Action being filed, after Chevron Attorney Randy Mastro and the Special Master stepped outside of the room for an *ex parte* meeting, an extensive and lengthy line of questioning ensued about a document which discusses a litigation funder and the law firm Patton Boggs LLP. When Donziger's attorney objected that there is no need to go into such great detail about a document with little relevance to the § 1782 action, the Special Master—as, now in hindsight, is apparent—reveals that he is aware that the instant Action is forthcoming: "[a]ctually, as I believe you will find out in the not that distant future, there was real relevance to this. Go on."[7] (Peters Decl., Ex. K, Donziger Dep. XI (01/14/2011) 3219-3235; Donziger Dep. XI (01/18/2011) 3332-3334.)

Not only did the Special Master ask improper questions on Chevron's behalf, but he also manipulated the answers in Chevron's favor. On several occasions, after Mr. Donziger responded to questions requiring clarification, the Special Master struck all qualifying

[7] Both Patton Boggs LLP and the litigation funder referenced in the docket have been mentioned

language—many times *sua sponte*, and not in response to any objection by Chevron—altering the response, and modifying the record to appear that there were responses of only "yes" or "no" in place of properly qualified responses given by Mr. Donziger. (Peters Decl., Ex. K, Donziger Dep. II (12/01/2010) 527:19-528:10; Donziger Dep. II (12/01/2010) 656:5-657:6; Donziger Dep. II (12/01/2010) 676:5-17; Donziger Dep. III (12/08/2010) 788:2-13; Donziger Dep. III (12/08/2010) 846:10-20; Donziger Dep. VI (12/22/2010) 1435:24-1436:15.) On the record, the Special Master also characterized testimony that Mr. Donziger would offer in defense of himself or on the *Aguinda* Plaintiffs' behalf as "self-serving." (*Id.*, Donziger Dep. II (12/01/2010) 652:20-24 ("THE SPECIAL MASTER: Please ask the question in a beautiful way so that he cannot give you the kind of, you know, open-ended, self-serving [responses], and I mean that in the kindest way.").)

The Special Master also rushed to defend Chevron from any potentially damaging testimony. For example, when during the course of the deposition it was revealed that several well-paid Chevron executives had not paid any income taxes, the Special Master, again *sua sponte*, took over the questioning of the witness in order to protect Chevron and its employees:

> THE SPECIAL MASTER: Did the web site -- you know a lot of people in the United States who are unbelievably wealthy who pay no taxes, correct?
>
> MR. KAPLAN: Objection to the cross-examination by the Special Master. . . .
>
> THE SPECIAL MASTER: Excuse me, 48 hours to petition Judge Kaplan to overrule me. Okay? Are you going to instruct him not to answer?
>
> MR. KAPLAN: I haven't instructed him.
>
> THE SPECIAL MASTER: Fine, let's go on. Would you agree with me that there are a lot of very wealthy people in the United States who pay no taxes, essentially?
>
> THE WITNESS: There [have] got to be some.
>
> THE SPECIAL MASTER: Well, maybe I just know more wealthy people than you do. . . . [W]hat I would like to know is whether as of the date of this e-mail there was more information that your office or group possessed to demonstrate that the failure to pay

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as "unnamed co-conspirators" in the instant Action.

> taxes was a violation of law as opposed to just, you know, maybe taking deductions.

(Peters Decl., Ex. K, Donziger Dep. V (12/13/2010) 1329:22-1331:12; 1333:5-12.)

The Court's Special Master also limited the ability of Mr. Donziger's counsel to zealously defend the deposition. Over the course of the fourteen days of deposition testimony, the Court's Special Master repeatedly accused Donziger's counsel and the *Aguinda* Plaintiffs' counsel of improper attorney conduct and created rules designed to stifle their ability to defend the deposition. For example:

- Peters Decl., Ex. K, Donziger Dep. I (11/29/2010) 221:19-24 (in commenting on a § 1782 action in Colorado that he was not involved in, the Court's Special Master stated, "I should say that to my chagrin, your office were counsel of record in the Colorado action and participated in the underlying proceeding and therefore knew that it was false to say that Ms. Neuman had been sanctioned.");

- Peters Decl., Ex. K, Donziger Dep. III (12/08/2010) 795:9-796:9 (referring to Donziger's attorney's forty years of experience of objecting to subjective questions as "foolish consistency.").)

Incredibly, the Special Master even went so far as to admonish Mr. Donziger's attorneys for preserving objections during the deposition—regardless of whether the objections had merit—because it may have the unintended consequence of disrupting the Chevron's attorney's "flow." For example:

- Peters Decl., Ex. K, Donziger Dep. VIII (12/29/2010) 2085:2-2087:4 ("I think I'm at least as good as you are in finding an objectionable question. . . . One has the impression that you and Mr. Abady, [objecting] is like the game shows where somebody has got a hand on a buzzer and the person who hits the buzzer first wins. Keep your hand off the buzzer unless you need to have it on the buzzer is my preference. . . I ask you to try to reduce the total number of objections, hold your objections as to relevance until the next break . . . And, generally, keep your hands off the buzzer.");

- Peters Decl., Ex. K, Donziger Dep. XII (01/19/2011) 3483:23-3484:8 ("I'm tired of classic cross-examination being challenged with objections, and whether they are intended or not, interruptions can often have the effect of breaking the flow of cross-examination. And as I'm sure you well know, **Mr. Kaplan, flow is the key to cross-examination; at least that's the way I teach cross-examination**." (emphasis added)).)

The Special Master espoused these positions on lodging objections despite his previous ruling that certain objections pursuant to the attorney work product doctrine were waived because a timely objection was not made on the record. (Peters Decl., Ex. K, Donziger Dep. II

(12/01/2010) 467:3-13 ("MR. BRINCKERHOFF: I'm going to object. I think this goes beyond the scope of the letter itself into areas of work product privilege. THE SPECIAL MASTER: Counsel, you should have objected, then, to the flip side, when he gave his version. You can't do it selectively. Overruled. Please answer the question. An example of consistency -- no further discussion. I overrule the objection.").)

To add to this atmosphere of confusion and intimidation, the Court's Special Master kept the threat of sanctions dangling over the heads of Mr. Donziger and counsel. For example:

- Peters Decl., Ex. K, Donziger Dep. VII (12/23/2010) 2054:18-21 ("I'm telling you now I'm going to read this transcript. I'm going to decide what I think needs to be done about this kind of behavior by the witness.");

- Peters Decl., Ex. K, Donziger Dep. VIII (12/29/2010) 2306:25-2307:5 ("THE SPECIAL MASTER: Ms. Neuman, I've just read this [email] trail. To say it is disturbing is a gross understatement. I would like an identification of the people that are listed here, please."); Donziger Dep. XII 3536:15-3537:8 ("THE SPECIAL MASTER: …. What's the matter with that form? It's a question. I mean, he could — MR. WILSON: The phrase 'on his payroll,' there is no foundation. It is ambiguous. THE SPECIAL MASTER: It is none of the above and it is a question. MR. WILSON: It presupposes that there was a financial — THE SPECIAL MASTER: It doesn't presuppose a thing. It asks a question. He could have just put semicolon, 'isn't that correct.' And I could go on and on. Every one of these is like that. They are all questions. **You go ahead and proceed at your peril, sir**." (emphasis added).)

But, this was apparently a one-way street, as other attorneys were rarely reprimanded, despite engaging in such improper and intimidating tactics as shouting and pounding on the table during questioning. (*See, e.g.*, Peters Decl., Ex. K, Donziger Dep. III (12/08/2010) 893:20-894:18; Donziger Dep. III (12/08/2010) 722:10-25.)

In short, the Special Master was hostile to Mr. Donziger in the § 1782 discovery proceedings. Whether or not that hostility was warranted is not at issue here. Our point is simply that, for Chevron's perspective, the Special Master's expressed hostility toward Mr. Donziger provides yet another reason why Chevron would be amenable to steering new litigation, like this case, toward the Judge who relies on this Special Master.

Dated: February 28, 2011

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