UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION

Petitioner,

v.

STEVEN DONZIGER, et al.

Defendants.

Civil Action No: 1:11-cv-00691-LAK

MEMORANDUM OF LAW OF DEFENDANTS HUGO GERARDO CAMACHO NARANJO AND JAVIER PIAGUAJE PAYAGUAJE IN OPPOSITION TO CHEVRON CORPORATION'S APPLICATION BY ORDER TO SHOW CAUSE WHY THE DECLARATORY JUDGMENT CLAIM SHOULD NOT BE BIFURCATED IN WHOLE OR IN PART

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INTRODUCTION

Chevron's Memorandum of Law in support of its motion to bifurcate and significantly accelerate the resolution of its declaratory judgment claim lays bare the company's desire to avoid ever having to answer for its own shocking misconduct in connection with the Ecuadorian proceedings. Chevron is well aware that any reasonable court presented with the total picture of what transpired in Ecuador and before the case was moved there—a picture that will undoubtedly become that much clearer when full discovery into Chevron's many indiscretions is taken—will hesitate to grant Chevron the bailout that it seeks under the auspices of this RICO case. The Lago Agrio Court's February 14, 2010 opinion—the culmination of eight years of evidence-gathering and hotly-contested litigation in Ecuador—tells the story of a company that abused the judicial process to an extent that would undoubtedly have resulted in severe sanctions had the same tactics been attempted in a United States court. (*See* Dkt. 153-7 at 35-44, 184-85.) Evidence already presented to this Court details Chevron's invocation of its political and military connections first in an effort to secure an Ecuadorian forum and then to sabotage the Lago Agrio Litigation from its inception and at every turn. (*See* Dkt. 153 at 8-50, and referenced exhibits.) The full scope of Chevron's misconduct continues to emerge in 28 U.S.C. § 1782 proceedings filed by the Ecuadorian Plaintiffs in California, where it is becoming increasingly apparent that Chevron and its representatives engaged in conduct violative of the United States Foreign Corrupt Practices Act (5 U.S.C. §§ 78dd-1 et seq.), and then attempted to hide or destroy evidence, silence certain witnesses with extravagant payments, and secretly move other witnesses out of the country to avoid discovery. (*See* Dkt. 173 (under seal).) Chevron knows that it is only a matter of time before it loses whatever moral high ground it seems to have gained by way of its current § 1782 discovery campaign—a day of reckoning that Chevron knows will

come sooner than expected unless it finds a way to postpone the resolution of issues in this case that might result in exposing the company's own misdeeds.

Chevron's pervasive misconduct, however, is not the only critical topic that Chevron hopes to gloss over en route to securing a declaration of non-enforcement through severely bifurcated and significantly expedited proceedings. Indeed, save for its complaint regarding the assessment of punitive damages, Chevron would like to avoid any examination of what the Lago Agrio Court actually did in the Ecuadorian case. That is because the Lago Agrio Court's thorough resolution of the enormously complex underlying litigation was something to which *any* court—American, Ecuadorian, or otherwise—would and should aspire; it is an accomplishment that speaks volumes about the competence of the Ecuadorian tribunal. The Lago Agrio Court's judgment reflects a thorough and critical review of the vast record of scientific evidence, careful consideration of difficult legal questions, and pragmatic resolutions to the many assertions of mutual improper conduct by the parties. As such, Chevron hopes to invalidate the Lago Agrio Court's good work by condemning the Ecuadorian judiciary in the abstract, using anecdotal evidence of questionable judicial practices culled together by "experts" who appear to be former politicians with an axe to grind with the Correa administration.[1] (*See, e.g.*, Dkt. 56-1 at ¶¶ 10-11, 20-21.)

[1] Adopting Chevron's tack, it is *alarmingly* easy to paint a picture of *any* judicial system as corrupt, particularly to an outsider with no background concerning the political bias of the system's critics. With nothing more than a dissenting law professor and a reasonable degree of skill using an internet search engine, even the United States courts could be presented as overly politicized and rife with corruption to the outside world. Nor is it surprising that Chevron would be able to recruit at least a few "experts" to aid in the company's vilification of Ecuador's President as a radical who loathes and threatens all things American, notwithstanding the fact that he is a graduate of the University of Illinois, has lived in and spoken fondly of the United States, and is apparently on decidedly good terms with Secretary of State Hillary Clinton. (*See "Dearest Hillary" Charms Ecuador's President Correa*, FOREIGN POLICY, Jun. 9, 2010, *available at* http://hillary.foreignpolicy.com/posts/2010/06/09/dearest_hillary_charms_ecuadors_

Chevron's gambit rests on the faulty premise that certain grounds for non-enforcement under Section 5304 of the New York Civil Practice Laws and Rules ("CPLR") can be surgically extracted from the balance of its claims, such that there is no risk that the Court's resolution of these extracted portions of Chevron's equitable claim would infringe upon a jury's subsequent consideration of common issues as to Chevron's legal claims and Defendants' anticipated counterclaims. But as much as Chevron would like this Court to believe that its legal and equitable claims can be neatly and tidily separated, the reality is quite the opposite: there is no way to resolve *any* portion of Chevron's equitable claims without treading into issues that necessarily implicate facts pertinent to Chevron's legal claims. In short, bifurcation *will* do violence to the Ecuadorian Plaintiffs' rights, as litigants in a U.S. court, granted by the Seventh Amendment of the United States Constitution. Moreover, even if Chevron's suggested bifurcation did not run afoul of the Ecuadorian Plaintiffs' Constitutional guarantees, this case does not present the rare "exceptional circumstances" where bifurcation is appropriate.

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president_correa (quoting Secretary of State Clinton's statement that the U.S. is "committed to a partnership of open dialogue and cooperation [with Ecuador] that is rooted in mutual respect and mutual interest and for the benefit of both of our peoples.") Undoubtedly, some of the actions taken by Mr. Correa have made him politically unpopular in some circles. But the United States courts should not be in the business of condemning foreign political leaders based on barbs slung by their political detractors—no more than any foreign court should see fit to adjudge our current President to be a dangerous radical just because so many apparently sane and otherwise rational people within this country vehemently accuse him of being so, based on their disagreement with universal health care and other issues. (*See, e.g., Bachmann: "Gangster Government" Turning U.S. Into "Sinking Titanic,"* The Huffington Post, June 10, 2009, *available at* http://www.huffingtonpost.com/2009/06/10/bachmann-gangster-governm_n_213847.html (quoting Minnesota Congresswoman Michele Bachman's statement on the Floor of the U.S. House of Representatives that "we have gangster government when the federal government has set up a new cartel and private businesses now have to go begging with their hand out to their local—hopefully well-politically connected—congressman or their senator. . . .").) Breathless allegations of corruption from the mouth of a company that once held a foreign government in the palm of its hand and is now disappointed because it lost that grip along the way should be taken with a grain of salt, if swallowed at all. Most certainly, they should not compel a United States district court to issue a sweeping condemnation of a longstanding democratic ally and trade partner of the United States.

For the past year since it began invoking the power of the U.S. courts to collaterally attack the Lago Agrio litigation, Chevron has been standing on a hill throwing rocks at the Ecuadorian Plaintiffs, well outside the line of return fire. To obtain its preliminary injunction, Chevron unilaterally indicted the Defendants, anyone associated with the Defendants, the Ecuadorian tribunal, and even the Republic of Ecuador itself. In an improperly expedited fashion, Chevron conveniently foreclosed a full examination into its own scandalous allegations and its own misconduct. In fact, this Court assured the Defendants, when refusing to accept their arguments about Chevron's unclean hands at the expedited preliminary injunction stage, that they would have the opportunity for that defense to "of course be asserted by them in later proceedings." (Dkt. 181 at 122.) Now, Chevron seeks to have the Court completely deny the Ecuadorian Plaintiffs that opportunity as well.

Chevron's motion to bifurcate these proceedings—a bid which appears to be a direct response to the Ecuadorian Plaintiffs' resolve to shed light on the company's misconduct in Ecuador—is just another effort to assure that this collateral dispute remains one-sided. But for the reasons articulated herein, the tortured claim-splitting framework advocated by Chevron must be rejected.[2]

[2] At the outset, the Ecuadorian Plaintiffs state that by submitting this opposition they do not waive or intend to waive any of their defenses, including those based on a lack of personal jurisdiction, insufficiency of process and insufficiency of service of process. Moreover, the Ecuadorian Plaintiffs further do not concede the question of whether Chevron's declaratory judgment claim is proper to begin with, a matter they will fully brief at the appropriate time. For now, Chevron has not cited a single case in which a judgment debtor was permitted to seek a declaration of non-recognition of a foreign country money judgment from a Court absent any attempt by a judgment creditor to enforce that judgment in the first instance. Absent any affirmative attempt by a judgment creditor to enforce a foreign judgment in New York—or, in this case, even a reasonably concrete basis to believe that an enforcement action here is imminent—there is simply no basis for a local court to engage in the analysis required by CPLR § 5304. Chevron's request for bifurcation in this instance essentially asks this Court to render an

ARGUMENT

I. Bifurcation Of All Or Any Part Of Chevron's Declaratory Judgment Claim Will Violate Defendants' Rights Under The Seventh Amendment To the United States Constitution

Rule 42(b) of the Federal Rules of Civil Procedure, which governs bifurcation, mandates that the court "must preserve any federal right to a jury trial," as guaranteed by the Seventh Amendment to the United States Constitution. (Fed. R. Civ. P. 42(b).) For more than fifty years, the law has been clear that in cases where equitable claims to be decided by the court and legal claims triable to a jury share *any* common issue and are raised in a single action, the court must defer decision on the equitable claims until the jury has decided the legal claims. *See, e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (holding that district court's Rule 42(b) bifurcation of declaratory and legal relief sharing common issues, and decision on equitable claims first, violated party's Seventh Amendment right to trial by jury and required reversal); *Heyman v Kline*, 456 F.2d 123, 130 (2d Cir. 1972) (stating "[i]t is now fundamental . . . that when legal and equitable claims are tried together, common questions of fact must be decided by the jury in order to preserve the integrity of the seventh amendment guarantee"); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, (2d Cir. 1988) (reaffirming *Beacon Theatres* and *Kline*).[3]

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advisory opinion regarding matters that have not matured in the very first instance to the exclusion of all other matters or claims.

[3] The United States Supreme Court's *Beacon Theatres* decision left little, if any, room for exception to the rule that a court cannot vitiate a party's Seventh Amendment rights by preempting the jury's findings on issues common to legal and equitable claims brought in a single action. According to the *Beacon Theatres* Court, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of issues be lost through prior determination of equitable claims." *Id.* at 510-11 (emphasis added). Indeed, as observed by Wright & Miller, "[a]lthough the Court paid lip service to the possibility of special and compelling circumstances in which the trial court might have discretion to vary this sequence of trial, its deliberate statement that it 'cannot now anticipate' these circumstances makes it highly doubtful that there are any circumstances that would qualify." 9 Fed. Prac. & Proc. Civ. § 2338 (3d ed.). Not

This Court's conclusions as to any issues common to equitable and legal claims to be tried in this case would impermissibly usurp the jury's function to decide those issues. *Wade*, 844 F.2d at 955 (stating that "the jury's verdict on the common factual issues precludes a contrary finding of fact by the court"). Indeed, this constitutionally-based mandate is so strong that the only cure for its violation is vacatur of the district court's determinations on *all* claims, and remand for a full retrial on "all claims and counterclaims—both legal and equitable[—]" with the "jury's verdict controlling whether [plaintiff] is entitled to any equitable and declaratory relief." *Id*. at 954 (*quoting Kline*, 456 F.2d at 131) (second alteration in original); *see also Calnetics Corp. v. Volkswagen of Am., Inc*., 532 F.2d 674, 690 (9th Cir. 1976) (remanding for full retrial on all claims impacted by district judge's improper preemption of jury determinations on issues common to those claims); *Bouchet v. Nat'l Urban League, Inc*., 730 F.2d 799, 803-04 (D.C. Cir. 1984) (Scalia, J.) (confirming that violation of the *Beacon Theatres* rule requires the judge's determinations on all claims sharing common issues "to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury").

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surprisingly, then, research has uncovered only a single case post-*Beacon Theatres* (*i.e.*, one case in over 50 years) in which a court found that the exception should apply (albeit without explicitly analyzing the exception) in a single action where legal and equitable claims shared common issues. That case, *Western Geophysical Co. v. Bolt Assocs. Inc*., 440 F.2d 765 (2d Cir. 1971), is distinguishable from the present action. In *Western Geophysical*, the complaint was wholly equitable in nature, and, moreover, the defendant had waived its right to a jury trial on the counterclaims raised earlier in the case. *Id*. at 772. On the eve of trial, the defendant demanded and was granted a trial by jury on an additional counterclaim that it belatedly injected into the action three-and-a-half years after the suit was brought, "after extensive discovery had been had on the issues raised by the complaint, the answer and the first five counterclaims, and a month after the date for the pre-trial conference had been set." *Id*. In the instant case, in contrast to the unique circumstances presented by *Western Geophysical*, Chevron's claims themselves are both legal and equitable in nature—it is not the last-minute injection of a new claim that muddies the analysis. It is clear that the *Western Geophysical* court was loathe to allow eleventh-hour gamesmanship to alter the makeup of the trial. No such consideration is present here.

The relevant question for this Court under *Beacon Theatres* and its progeny, then, is whether Chevron's declaratory judgment claim can be resolved without any risk of treading into questions that must be resolved by a jury in the context of Chevron's other claims and the counterclaims Defendants intend to assert.[4] The potentially grave consequences—nullification of the proceedings—require extreme caution; when there is any doubt, the proceedings must proceed in the ordinary course. Here, there exists more than mere doubt about whether bifurcation could occur without a Seventh Amendment violation; infringement on the Constitutional rights of the Ecuadorian Plaintiffs is a *certainty*.

A. The Ecuadorian Plaintiffs' Unclean Hands Defense Will Raise A Host Of Issues Also Germane To The Legal Claims To Be Litigated In This Case

As an initial matter, the pertinence of the unclean hands defense assures that no claim in this case—no matter how abstract or discrete it may appear—can be finally resolved without a substantial examination of the conduct of both parties vis à vis the Lago Agrio litigation. Notwithstanding Chevron's unsupported proposal that the unclean hands doctrine only applies where a plaintiffs' "unclean" activity is ostensibly the mirror image of what is being alleged against the defendant, the nexus between the claim at issue and the alleged unclean hands of the plaintiff need not be so perfect. Indeed, in the very case cited by Chevron—*Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*,—the Supreme Court stated that the

[4] Chevron is already cognizant of the fact that certain of the Defendants had contemplated filing a civil RICO claim against Chevron prior to its initiation of this litigation. Indeed, the timing of Chevron's Complaint in the instant matter—coming directly on the heels of Chevron's discovery of Defendants' intentions by virtue of the seemingly limitless discovery this Court has permitted into the files of Defendant Steven Donziger based on his failure to produce a privilege log in a timely manner—suggests that the instant RICO action was largely preemptory; an effort to make the Defendants' filing appear as if it were motivated only by a desire for revenge and sour grapes. The Court should expect counterclaims premised on Chevron's fraudulent conduct. The prospect of these counterclaims, which have not yet been asserted, illustrates that this Court's anxiousness and invitation to bifurcate and proceed at blazing speed to trial on Chevron's declaratory judgment claim is completely inappropriate.

defense of unclean hands "require[s] that [the party seeking relief] shall have acted fairly and without fraud or deceit *as to the controversy* in issue," which means that unclean hands is invocable when there is "[a]ny willful act *concerning the cause of action* which rightfully can be said to transgress equitable standards of conduct." 324 U.S. 806, 815 (1945) (emphasis added). Indeed, courts tend to overlook as a matter of law the unclean hands defense only where the evidence of unclean hands bears not the slightest relationship to the proceedings, and the defendant alleges "[m]isconduct in the abstract, unrelated to the claim to which it is asserted as a defense." *A. H. Emery Co. v. Marcan Products Corp.*, 389 F.2d 11, 18 (2d Cir. 1968) (internal quotation omitted); *see also Specialty Minerals, Inc. v. Pluess-Staufer AG*, 395 F. Supp. 2d 109, 112 (S.D.N.Y. 2005) (rejecting unclean hands defense in patent infringement case where allegation of plaintiff's deceitful conduct occurred in connection with unrelated patent not at issue); *Int'l Bus. Machines Corp. v. Martson*, 37 F. Supp.2d 613, 619 (S.D.N.Y. 1999) (doctrine of unclean hands deemed inapplicable where former defendant employee accused of violating employment stock option agreement argued that he was improperly terminated by employer).

The Ecuadorian Plaintiffs will adduce evidence that Chevron has engaged in secret but ultimately futile dealings with the Ecuadorian government designed to affect the outcome of the Lago Agrio Litigation—the very same type of dealings that give rise to Chevron's assertion that systemic corruption and lack of impartial tribunals militate against enforcement of any judgment emanating from the Courts of Ecuador. Moreover, Chevron cannot credibly argue that its numerous and diverse efforts to corrupt and sabotage *the very judgment it now seeks to condemn* are insufficiently related to its claims for non-enforcement—no matter whether that claim sounds in a generalized absence of due process, a lack of personal jurisdiction, or a violation of public

policy grounded in the assessment of punitive damages.[5] *See, e.g., Estate of Lennon by Lennon v. Screen Creations, Ltd.*, 939 F. Supp. 287 (S.D.N.Y. 1996) (double-dealing plaintiff prohibited from obtaining injunctive relief on trademark infringement claim where plaintiff engaged in deceitful conduct in connection with negotiations for the trademark licensing agreement); *ACLI Gov't Sec., Inc. v. Rhoades*, No. 96 Civ. 7502 (SAS), 1997 WL 137437, at *6 (Mar. 25, 1997) (in action seeking satisfaction of prior judgment, debtor party not entitled to equitable relief on claim that judgment was previously satisfied where debtor "perpetrated a series of egregious abuses of the legal system" to delay payment on the judgment at issue). Chevron is truly splitting hairs here, in a manner telling of the company's desperation to avoid being subjected to the same microscope under which it has placed the Ecuadorian Plaintiffs with such exuberant false-righteousness.

Citing *Dunlop-McCullen*, Chevron alternatively contends that the unclean hands defense cannot be applied against it because the alleged misconduct of the Ecuadorian Plaintiffs' representatives was qualitatively worse than Chevron's misconduct. (Dkt. 200 at 7-8.) However, the evidence gathered by the Ecuadorian Plaintiffs' thus far suggests, *inter alia*, that Chevron has, or likely has: (1) colluded with Ecuadorian government officials to quash the Lago Agrio Litigation; (2) used its influence over the Ecuadorian military to block the collection of scientific evidence at well sites where Chevron anticipated damaging results; (3) orchestrated a scheme to bribe a judge; (4) operated a sham laboratory under the name of a legitimate one to create an appearance of independence; (5) paid witnesses exorbitant sums of money to cover up the company's misconduct, and shuttled other witnesses out of the country to avoid discovery; and

[5] Chevron has also apparently lost all sight of the fact that in any case where equitable (and especially, injunctive) relief is sought, unclean hands is always an available defense. *Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998). Whether or not it can be proven is another story, but the ability to prove it cannot be precluded.

(6) engaged in an array of procedural misconduct designed to stonewall the Lago Agrio Litigation, including the harassment of expert witnesses and threats of criminal sanctions directed against the judge in order to coerce him to rule in Chevron's favor. (*See, generally*, Dkt. 152; Dkt. 173.) It is difficult to comprehend Chevron's position that the foregoing misconduct is significantly—if at all—less reprehensible than the charges levied upon the Ecuadorian Plaintiffs. But the real problem with Chevron's subjective assertion is that it is entirely premature. While it may be appropriate for this Court to decide whether the *Dunlop-McCullen* analysis precludes the Ecuadorian Plaintiffs' from succeeding on an unclean hands defense, that can only be done once *both* parties have taken discovery and entered their proofs on the issue at trial. Chevron would like the Court to improperly make that call now based on Chevron's one-sided assertions.[6] If handled appropriately, the resolution of Chevron's "preclusion" argument on unclean hands will necessarily involve, first of all, a factual presentation and determination regarding the full scope of the conduct of both parties in connection with the Lago Agrio Litigation—the same conduct that forms the predicate for most other claims, counterclaims, and defenses in this case. As such, Chevron's invocation of *Dunlop-McCullen* only further demonstrates that bifurcation cannot be accomplished without offense to the Seventh Amendment.

[6] It is worth noting that while Chevron seeks to move forward on its Declaratory Judgment claim only against the Ecuadorian Plaintiffs, its arguments on the effort to preclude consideration of the unclean hands defense in this regard refer not to the purported unclean hands of the Ecuadorian Plaintiffs themselves, but rather to their "lawyers and co-conspirators." (Dkt. 200 at 8.) Chevron never explains how or why the alleged unclean hands of those actors should so stain the Ecuadorian Plaintiffs. Indeed, as noted by the Lago Agrio Court in addressing the same alleged misconduct now placed before this Court, the alleged acts of the Ecuadorian Plaintiffs' representatives cannot defeat the Ecuadorian Plaintiffs' right to recover for the damage caused by Chevron. (*See, e.g.*, Dkt. 153-7 at 51-52.)

B. Even Absent The Unclean Hands Defense, The Resolution Of Any Portion Of Chevron's Equitable Declaratory Judgment Claim Will Implicate Questions That Must Be Resolved By the Jury In The Context Of Chevron's Legal Claims and the Defendants' Anticipated Counterclaims

Even assuming *arguendo* that the application of the unclean hands defense does not foreclose the possibility of bifurcation, the resolution of each and every contemplated element of Chevron's declaratory judgment claim for non-enforcement will necessarily tread into matters that will be considered by the jury in resolving Chevron's legal claims and Defendants' anticipated counterclaims. Chevron has contemplated bifurcation of one or more of the following elements of its request for a declaration of non-enforceability of the Lago Agrio judgment: (1) the judgment is non-enforceable under CPLR § 5304(a)(1) because Ecuador does not provide impartial tribunals and/or procedures that afford litigants due process of law; (2) the judgment is non-enforceable under CPLR § 5304(a)(2) because the Lago Agrio court lacked personal jurisdiction over Chevron; (3) the judgment should not be enforced because it was obtained by fraud, per CPLR § 5304(b)(3); and (4) the judgment should not be enforced because the cause of action on which the judgment is based is repugnant to the public policy of New York per CPLR § 5304(b)(4), an argument which Chevron appears to premise on the Lago Agrio Court's award of punitive damages. We address these components of Chevron's declaratory judgment claim *seriatim*, below.

1. Non-recognition under CPLR § 5304(a)(1)

Chevron's motion to bifurcate these proceedings appears to be motivated primarily by its desire to obtain from this Court a sweeping condemnation of the Ecuadorian judicial system. For a variety of reasons, however, placing the Ecuadorian judicial system on trial at the outset will necessarily contravene the Ecuadorian Plaintiffs' Seventh Amendment rights.

First, even assuming that this issue can be tried without adducing *any* evidence pertaining to the particular facts of the Lago Agrio Litigation, a global determination that the courts of Ecuador are generally corrupt, subject to pressure from the executive branch, and fail to provide due process will strip the jury of its ability to resolve a question that is vital to the Ecuadorian Plaintiffs' defense of Chevron's racketeering and fraud claims. Chevron's racketeering and fraud claims rest substantially on allegations that the Ecuadorian Plaintiffs collaborated with a Lago Agrio Court that was complicit in the alleged racketeering operation, and that the Ecuadorian Plaintiffs unlawfully colluded with the executive branch as means of applying pressure on the Lago Agrio Court. (*See, e.g.*, Dkt. 1 at ¶¶ 3, 72, 75-77, 79, 83, 86, 118, 128.) In defending against Chevron's racketeering and fraud claims, the Ecuadorian Plaintiffs must be able to present evidence to the jury that refutes the notion of both systemic corruption as well as corruption in connection with this particular case. And even if there were no specific overlapping questions (and obviously, there are many), it would be naïve to think that this Court's global condemnation of the Ecuadorian judicial system would not irretrievably prejudice the jury to the point that one of the Ecuadorian Plaintiffs' primary defenses to Chevron's racketeering and fraud claims is effectively nullified.

The Ecuadorian Plaintiffs intend to raise the issue of estoppel in opposition to Chevron's § 5304(a)(1) claim, based on the fact that the company was assuring the United States courts that Ecuador was a fair forum for litigation of the *Aguinda* case (including ghostwriting letters from Ecuadorian officials to the U.S. Department of State pleading that Ecuador's sovereignty be respected) while simultaneously working behind the scenes with Ecuadorian government officials to assure that the case would be swiftly quashed once re-filed in Ecuador. (Dkt. 152 at ¶¶ 5-15.) These issues concerning Chevron's manipulation of the former Ecuadorian regime are

highly relevant to Chevron's allegations of fraud and racketeering. Chevron's fraud and racketeering charges are premised in no small part on comments made by Defendant Steven Donziger about the nexus between Ecuadorian politics and the judicial system, as captured on the outtakes from the film *Crude*. (*See, e.g.*, Dkt. 1 at ¶ 70 ("Donziger has boasted that, unlike in the United States, the 'game' is 'dirty' and there are 'almost no rules' in Ecuador. Donziger and his co-conspirators have sought repeatedly to capitalize on the Ecuadorian judiciary's weaknesses . . . using political connections to obtain rulings in their favor based on the judges' fear of repercussions rather than the facts or law.") The Ecuadorian Plaintiffs have long maintained that much of what is captured in those outtakes is merely representative of Mr. Donziger's frustration with *Chevron's* gaming of the system, and perhaps a misplaced desire to "fight fire with fire." If the Court were to make these necessary findings on the evidence concerning Chevron's manipulation of the Ecuadorian government, the jury would be stripped of its ability to resolve an issue that is critical to the legal claims in this case.

Finally, all of the foregoing assumes that Chevron could and would prosecute its systemic lack of due process case without *any* affirmative reference to the facts and incidents of the Lago Agrio Litigation; and even then, the Seventh Amendment problems are grave. But the reality is, based on the manner in which Chevron has couched its arguments to date, it is wholly unrealistic to believe that Chevron intends to present, or is capable of presenting, its systemic lack of due process case without implicating the facts of the underlying litigation in one way or another. (*See, e.g.*, Dkt. 5 at 23-27, 72-74; Dkt. 1 at ¶¶ 70-86.) Indeed, this Court's critical views on the collective Ecuadorian judicial system appear to derive largely from Defendant Steven Donziger's gripes about that system expressed in private moments caught on film. and, from President Correa's public statements and interactions with the Ecuadorian Plaintiffs' representatives,

Defendants Yanza and Fajardo. (Dkt. 181 at 82-84.) These allegations are not only key components of Chevron's racketeering and fraud claims, but they were also central to this Court's analysis of the declaratory judgment claim for purposes of issuing the preliminary injunction. No matter what promises Chevron might be inclined to make about prosecuting the Ecuadorian judicial system in the abstract going forward, Chevron cannot undo the fact that it has already made substantial headway with this Court on its due process argument by reference to the facts and incidents of *this* case—facts and incidents that will be squarely before the jury on Chevron's other claims.

In sum, whether or not Chevron can pursue its claim under CPLR § 5304(a)(1) without specific reference to the Lago Agrio Litigation, in either case, considerable violence will be done to the Ecuadorian Plaintiffs' Seventh Amendment rights.

2. Non-recognition under CPLR § 5304(a)(2)

As an initial matter, the Second Circuit's March 17, 2011 opinion in a related case involving the arbitration commenced by Chevron against the Republic of Ecuador under the U.S./Ecuador Bilateral Investment Treaty strongly suggests that Chevron is now precluded from challenging the Lago Agrio judgment under § 5304(a)(2). Specifically, the Court found (1) that Chevron is bound by the promises made by Texaco and Chevron Texaco in securing *a forum non conveniens* dismissal in the *Aguinda* litigation and has subjected itself to Ecuadorian jurisdiction; and (2) that the Lago Agrio Litigation is the same case as the *Aguinda* action originally filed in New York. *Republic of Ecuador v. Chevron Corporation*, 10-1020-cv(L); Dkt. 282-1, 6-7, n.3, n.5 (2d Cir. Mar. 17, 2011); *see also* CPLR § 5305(a)(3) (foreclosing a party from challenging enforcement under § 5304(a)(2) where that party "agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved"). Indeed, in excerpting the portions of

CPLR § 5304 to which Chevron may avail itself, the Second Circuit specifically omitted the jurisdictional defense under § 5304(a)(2).[7] *Id*. at 22, n.8.

The Second Circuit thus appears to have clearly put to rest any issue of whether the Lago Agrio Court properly exercised personal jurisdiction over Chevron. Nonetheless, even if the issue of personal jurisdiction were not *res judicata*, the Court's consideration of this element of Chevron's declaratory judgment claim would most certainly tread into the province of the jury on all of the remaining claims. As with the estoppel arguments described above in reference to § 5304(a)(1), the facts and incidents surrounding Chevron's procurement of a dismissal of the *Aguinda* case and the subsequent re-filing of the case in Ecuador, as well as its conduct in eight years of litigation in Ecuador—facts that would be central to Chevron's claim under § 5304(a)(2) as qualified by § 5305 —bear heavily on the remaining legal claims and defenses in this case. What Chevron did during those earlier proceedings will have significant impact on the jury's

[7] Had the Second Circuit not already resolved this issue, Chevron's personal jurisdiction argument appears to be frivolous in any event, based on the plain language of CPLR § 5305 and the relevant case law and commentary. *See* CPLR 5305(a)(2) ("The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if . . . .the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him"); *see also CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 223-24, 792 N.E.2d 155, 160-61 (2003) (noting that CPLR § 5305(a)(2) "foreclose[s] a defendant from contesting a foreign judgment for lack of personal jurisdiction once the defendant has done *anything more than it had to do to preserve its jurisdictional objection*, and finding that party's appeal to the High Court "abrogate[d] the reviewability of defendants' argument that the English judgments are unenforceable in New York because the English courts lacked jurisdiction over them.") (emphasis added); N.Y. C.P.L.R. C5304:1 suppl. pract. cmt. (McKinney 2003) ("[CPLR 5305] provides that a voluntary appearance put in solely to contest jurisdiction will keep the jurisdictional issue open for the New York court to reinvestigate on its own, such as where the defendant withdrew after losing on the jurisdictional point in the foreign court and a default judgment was then rendered. *But if the appearance before the foreign court went beyond that, such as by the defendant's arguing some part of the merits, CPLR 5305(a)(2) does mandate New York recognition for the foreign judgment*.") (emphasis added.) If Chevron's eight-year defense on the merits in Ecuador did not preclude its personal jurisdiction challenge under § 5305(a)(2), its recent appeal of the trial court's decision most certainly did.

determination of the claims of RICO violations, fraud, unjust enrichment, and tortious interference, at a minimum.

3. Non-recognition under CPLR § 5304(b)(3)

As for the component of Chevron's Declaratory Judgment Claim that would have this Court deem the Lago Agrio Court's judgment unenforceable on the basis that it is the alleged product of fraud, both Chevron (implicitly) and the Court (expressly) have already acknowledged the impossibility of trying this claim without stripping the Ecuadorian Plaintiffs of their Seventh Amendment rights. (Court Conference Transcript, March 15, 2011 ("Tr. Mar. 15, 2011"), at 35:19-36:15.) It is obvious that the factual issues which must be resolved to reach a determination under § 5304(b)(3) constitute a majority of the total issues that would need to be resolved by a jury in passing on Chevron's racketeering and fraud claims. If the Court were to rule on this element of Chevron's Declaratory Judgment claim, there would be little left for a jury to decide at all—and little left of the Ecuadorian Plaintiffs' Constitutional rights.

4. Non-recognition under CPLR § 5304(b)(4)

As an initial matter, Chevron appears to misconstrue the nature of the inquiry permitted by § 5304(b)(4). The provision is clear that the reviewing court may deny recognition of a foreign judgment if the "cause of action on which the judgment is based" is repugnant to the public policy of New York. CPLR § 5304(b)(4). Notwithstanding Chevron's vague and amorphous invocation of § 5304(b)(4), this subsection does *not* operate as a "catch-all" non-recognition mechanism to be invoked wherever the reviewing court finds something distasteful about the foreign proceedings but none of the other § 5304 subsections provide a basis for non-recognition. Authority arising under this subsection confirms the plain language—it is properly invoked when the claim itself offends some fundamental policy of New York, such as a cause of action that would tend to substantially chill speech. *See Sarl Louis Feraud Intern. v. Viewfinder,*

Inc., 489 F.3d 474, 478-80 (2d Cir. 2007) (noting that the "plain language of the statute makes clear" that the Court must analyze the "cause of action on which the judgment was based," and observing that § 5304(b)(4) may be invoked as a basis for non-recognition only in the rare circumstance where the foreign law at issue is "antithetical" to a pillar of domestic policy, such as the First Amendment); *see also Ameropa AG v. Havi Ocean Co. LLC*, No. 10 Civ. 3240, 2011 WL 570130, at *3 (S.D.N.Y. Feb. 16, 2011) (holding that CPLR § 5304(b)(4) was inapplicable because New York courts "have interpreted the public policy exception very narrowly…focus[ing] on the underlying cause of action on which the judgment is based, rather than on any effect enforcement of judgment may have") (internal citations omitted); *Tropp v. Corp. of Lloyd's*, No. 07 Civ. 414, 2008 WL 5758763, at *16 (S.D.N.Y. Mar. 26, 2008) (holding that CPLR § 5304(b)(4) did not apply where, at bottom, cause of action was a breach of contract claim, notwithstanding questions as to whether the particular contractual framework would be acceptable under New York law). Here, as recently recognized by the Second Circuit, the Lago Agrio Litigation is the Ecuadorian analog of the *Aguinda* case that was filed in New York in 1993, with the claims therein being no more than "the Ecuadorian equivalent of those dismissed on *forum non conveniens* grounds." *Republic of Ecuador v. Chevron Corporation*, 10-1020-cv(L); Dkt. 282-1, 7, n.5 (2d Cir. Mar. 17, 2011). As such, there can be no argument that the cause of action—a claim for various categories of remedial damages arising out of deliberate environmental contamination—somehow offends the fundamental policy of New York.

Chevron suggests that the Lago Agrio Court's imposition of punitive damages is reviewable under § 5304(b)(4). Even assuming that were true—and it is not—it is unclear how the assessment of punitive damages against a defendant that was adjudged to have knowingly and intentionally discharged billions of gallon of toxic wastewater into one of the most sensitive

ecosystems on Earth, and filled hundreds of unlined pits carved into the jungle with toxic sludge, could be deemed an affront to a fundamental policy of New York. *See, e.g.*, *Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 722-23 (2d Cir. 1977) (affirming assessment of punitive damages under New York law based on oil terminal's discharge of fuel oil wastes and other pollutants onto property of neighboring community, where company was "fully cognizant" of the pollution and intentionally violated, deliberately decided to, and otherwise "elected to ignore" its obligations to abate the pollution); *see also* 81 N.Y. Jur. 2d Nuisances § 81 (2011) ("[P]ersons maliciously polluting or contaminating the environment can be . . . made to pay punitive damages for deliberate or contemptuous disregard of the environmental rights of others"). Nonetheless, even if this Court were to adopt Chevron's impermissibly broad interpretation of § 5304(b)(4), it would be impossible to conduct a trial under this provision without substantially, if not totally, usurping the jury's role as to Chevron's fraud and racketeering claims. Assuming that Chevron's argument is something to the effect that the judgment violates "public policy" because it is the product of an alleged fraud, for reasons already stated herein and already recognized by both Chevron and the Court, a trial under § 5304(b)(4) would obviously run afoul of the Seventh Amendment.

It is also possible that Chevron might limit its "public policy" argument to an attack on the Lago Agrio Court's assessment of punitive damages. But as explained by the Lago Agrio Court's opinion, punitive damages were assessed based not only on the egregious nature of the underlying environmental violations, but on eight years worth of vexatious litigation misconduct, including but not limited to: repeated filings of the same motion; bad-faith requests for relief that Chevron knew was unavailable, including intermediate appellate relief; eleventh-hour raising of minor issues that the company had multiple opportunities to address earlier in the trial, in an

attempt to cause delay; attacking each and every expert report not prepared by a Chevron expert, frivolously claiming that every report was infected with "crucial error" to the point that Chevron's arguments would no longer be considered credible; failing to submit documents requested by the Court when it appeared such documents might not be helpful to Chevron; and refusing to pay court-appointed experts so that they could not complete their work, engendering further delay. (*See* Dkt. 153-7 at 35-44, 184-85); *see also* N.Y. Comp. Codes R. & Regs. 22, § 130-1.1 ("the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct . . . [, which includes conduct that] . . . is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[,] . . . is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another . . . [,] or . . . asserts material factual statements that are false.") But the Court presented Chevron with a means of avoiding penalty for its misconduct—recognizing that Chevron had failed to treat the Ecuadorian Plaintiffs with even a modicum of human dignity throughout the trial, the Court held that it would waive punitive damages if Chevron would issue a public apology. (Dkt. 153-7, at 184-86.) Contrary to Chevron's assertions (obviously designed to make the Lago Agrio Court appear frivolous) that the company was punished for failing to say that it is sorry, Chevron was punished because of its shocking misconduct—the apology was merely a potential, equitable way out of that punishment. As previously stated herein, the litigation misconduct that gave rise to punitive damages will be a focal point of the Ecuadorian Plaintiffs' defense of Chevron's legal claims, as well the prosecution of Ecuadorian Plaintiffs' counterclaims. Again, the Seventh Amendment forecloses this Court's preemptive resolution of Chevron's § 5304(b)(4) claim; these issues must be left to a jury.

* * *

In sum, there is no way to divorce Chevron's equitable claims from its legal claims and Defendants' anticipated counterclaims without seriously compromising the Ecuadorian Plaintiffs' Seventh Amendment rights. In a case as gnarled as this one, Chevron's contention that the claims and issues are amenable to neat and clean separation simply does not comport with reality. Chevron's instant motion is nothing more than an attempt to obtain the ultimate relief it wants without the need for a thorough examination of what truly occurred in Ecuador—an examination that will expose Chevron as a bad faith litigant that tried and ultimately failed to abuse the Ecuadorian judicial system to avoid owning up to its responsibilities.

II. Even If Some Portion of the Declaratory Judgment Claim Could Be Severed Without Running Afoul Of The Seventh Amendment, Bifurcation Is Unwarranted Here On Other Grounds As Well

Bifurcation of issues or claims pursuant to Rule 42(b) "is the exception . . . not the rule," and "is a procedural device to be employed only in *exceptional circumstances*." *L-3 Commc'ns Corp. v OSI Sys.*, 418 F. Supp. 2d 380, 382 (S.D.N.Y. 2005) (emphasis added); *Marisol v. Giuliani*, 929 F. Supp. 662, 693 (S.D.N.Y 1996). "[T]he presumption is that all claims in a case will be resolved in a single trial," and the movant must demonstrate "*special and persuasive* reasons" for departing from the norm. *Jeanty v. County of Orange*, 379 F. Supp. 2d 533, 550 (S.D.N.Y. 2005) (emphasis added). Far from representing the rare "exceptional circumstance," the proposed claim and issue splitting here in fact presents the paradigm case for *denying* bifurcation. Even if one were to hypothetically remove the grave Constitutional concerns attendant to bifurcation in this case, bifurcation would remain inappropriate here in light of the (at best) questionable efficiency and economy of proceeding in that manner.

A. The Inter-Relatedness Of The Claims and Defenses in This Case Renders Doubtful Any Perceived Economy To Be Gained Through Bifurcation—Economy That Could Only Be Achieved At Great Prejudice To The Ecuadorian Plaintiffs

Among the principal questions that courts in this Circuit ask in addressing the propriety of bifurcation are whether the issues or claims to be split apart are significantly different from one another, whether the evidence to be adduced on the issues overlaps, and whether the party opposing bifurcation will be prejudiced if bifurcation is granted.[8] *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001). These considerations weigh overwhelmingly against bifurcation of the instant case.

As to the first factor—similarity of the issues—Chevron knows well that there is substantial similarity among the facts and issues common to all of its claims. In fact, in all of the nine separate counts in its Complaint, Chevron incorporates each and every allegation which precedes them. Once Chevron reaches the Declaratory Judgment count (the ninth and final count), it incorporates and relies upon every one of the preceding 390 paragraphs of allegations in its 149 page Complaint. Now, in contradiction to its own pleading, Chevron duplicitously would have the Court believe that none of those facts, which it has expressly incorporated into its Declaratory Judgment count, has any bearing on the determination of that claim.

Chevron does concede in its moving brief that "the fairness of Ecuadorian proceedings will necessarily be of particular importance to the declaratory judgment action, but will not be *as*

[8] The *Dallas* opinion identifies additional considerations that do not warrant substantial consideration here, including "whether the issues are to be tried before a jury or to the court" and "whether the posture of discovery on the issues favors a single trial or bifurcation." *Dallas*, 143 F. Supp. 2d at 315. Obviously, where, as here, the Seventh Amendment and the *Beacon Theatres* doctrine require that common issues must first be decided by the jury, the former factor clearly weighs against bifurcation of legal and equitable claims. As to the latter factor, discovery has not advanced on any claim or defense such that there would be an obvious efficiency in trying that claim first.

central to Chevron's RICO and state-law claims." [9] (Dkt. 200 at 6 (emphasis added).) Its gratuitous opinion that the fairness of the proceedings might not be "as central to" its success on the RICO and state law claims speaks nothing to the commonality of issues that pervades those claims and the claim for declaratory relief, nor does it acknowledge that the Ecuadorian Plaintiffs are entitled to raise very many of the same facts, issues, and arguments in defense of all of Chevron's claims. Even if one were to assume *arguendo* that there exists *no* precise overlap of factual issues such that would offend to the Seventh Amendment, bifurcation would still lead to the staggered consideration of related questions more efficiently dealt with as collectively and concurrently as possible.[10] In short, notwithstanding Chevron's representations that this case can be sliced cleanly—a miscalculation that might be explained by Chevron's apparent and incorrect belief that the Ecuadorian Plaintiffs will fail to raise any defenses or counterclaims—the interrelatedness of the claims, defenses, and counterclaims hardly reflects the ideal scenario for bifurcation. *See* 9A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 2388 (3d ed. 2008) ("The repetitive trial of the same issue in severed claims is not to be the usual course."). The possibilities for collateral litigation as to whether an issue is *res judicata* or not are endless.

As to the second factor—overlapping evidence—judicial economy will plainly suffer from the duplicative documentary and testimonial evidence that will repeatedly be presented and

[9] By employing the comparative phrase "as central to" rather than the declarative "not related to," Chevron tacitly acknowledges the commonality of purpose those same facts will have on both the declaratory judgment claims and Chevron's other claims in the case.

[10] This problem would become particularly acute if certain of the Defendants were excluded from the systematic denial of due process/personal jurisdiction/public policy phase of the trial, and the Court ultimately finds itself presented with Chevron's CPLR § 5304(b)(3) "procurement by fraud" claim—a claim that would obviously require the participation of the remaining Defendants, who would have every right to retread ground already covered in the earlier portion of the trial for which they were not present.

assessed in the context of the substantially related issues common to the many claims and defenses in this case. This Court routinely denies bifurcation where, as here, the issues among the claims are inter-related and a bifurcated trial would engender needlessly redundant evidentiary presentations. *See, e.g., Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 256 F.R.D. 131, 132 (S.D.N.Y. 2009) (denying bifurcation where, notwithstanding argument that claims were entirely independent, issues common among the claims bore "a close and direct relationship," were "inextricably intertwined[,] and . . . [would] require overlapping if not identical proof"); *Lennon v. Seaman*, No. 99 CIV. 2664 (LBS), 2002 WL 109525, at *10 (S.D.N.Y. Jan. 28, 2002) (denying bifurcation because "substantial redundancy" would result by splitting "intrinsically interrelated" issues and "substantial overlap" of witness and documentary evidence would occur); *L-3 Commc'ns Corp. v OSI Sys.*, 418 F. Supp. 2d 380, 382 (S.D.N.Y. 2005) (denying bifurcation of issues in part because they were "markedly intertwined" and "a considerable overlap in testimony and documentary evidence" on those issues was likely); *see also* 9A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 2388 (3d ed. 2008) ("If . . . the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts or witnesses as the other issues in the cases, or if any saving in time is wholly speculative, it is likely that a separate trial on that issue will be denied by the district judge . . . .").

Finally, the prejudice that would inure to the Ecuadorian Plaintiffs militates against bifurcation. As noted at Section I(B), *supra*, in a case as public as this—where the Court's every proclamation appears the following day in publications of all kind—the Court's early resolution of issues related (if not identical) to questions later posed to a jury will inflict devastating prejudice on the Ecuadorian Plaintiffs. A jury could hardly be expected to be receptive to the

Ecuadorian Plaintiffs' argument that the Lago Agrio court was not complicit in any racketeering scheme were the Court to have already proclaimed the Ecuadorian judiciary to be *categorically* corrupt. Nor could a jury reasonably be expected to block out a judicial determination that the Lago Agrio judgment is somehow so repugnant to the public policy of the State of New York that it must be disregarded when considering whether the Defendants' engaged in untoward activity in procuring that judgment. The *extreme* gravity of Chevron's fraud and racketeering charges—charges that conceivably might result in crippling liability against the Defendants, ostensibly destroying their lives because they dared to sue an oil giant—demands that this Court proceed with extreme caution when it comes to potentially tainting the jury. Indeed, this factor *alone* requires rejection of Chevron's petition to bifurcate this action.

B. Bifurcation Will Not Serve Even The Pretextual Need For Expediency Claimed By Chevron

The downside risk inherent in bifurcation of this trial—namely, a certainty that Plaintiffs' Seventh Amendment rights will be violated leading to nullification of the bifurcated proceedings—is grave. The potential reward, however, is illusory. Chevron's bifurcation plan is premised—albeit pretextually—on the notion that bifurcation offers the prospect of a final judgment in as little as 3 months, which would presumably create an additional barrier to enforcement of the Lago Agrio Court's judgment (if, in fact, that judgment even becomes enforceable on appeal). But there is no way to attain Chevron's desired ends without—in what would be the ultimate irony—depriving the Ecuadorian Plaintiffs' of their due process along the way. Assuming that the Court were to extract *only* Chevron's systemic lack of due process claim under CPLR §5304(a)(1)—and assuming Chevron's prosecution of that claim does not in *any*

way invoke or rely on events germane to the Lago Agrio Litigation—all of the following would likely need to occur before a judgment could be rendered on that claim:[11]

(1) Amendment of pleadings and commensurate motion practice. Chevron has already represented that it will attempt to amend its Complaint in this action. (Dkt. 200 at 7, n.1 ("Chevron intends to amend its complaint in the near future.")

(2) Motions pursuant to Fed. R. Civ. P. 12(b) or (c).

(3) Joinder of necessary parties, including, potentially, the Republic of Ecuador, pursuant to Fed. R. Civ. P. 19.

(4) Preparation of expert reports/declarations on topics including but not limited to the Ecuadorian Constitution and the country's civil and judicial codes; the political climate in Ecuador; the history and independence of the Ecuadorian judiciary; the propriety or impropriety of placing the Ecuadorian judicial system on trial; the potential ramifications on international law and relations of a declaration that no judgment emanating from Ecuador may be enforced and a concomitant worldwide injunction prohibiting other courts from considering that issue for themselves.

(5) Factual discovery, largely in Ecuador, of the facts upon which the experts identified in paragraph (4) above will premise their opinions:

(6) Documentary discovery and depositions of expert witnesses, and related motion practice.

(7) In the event that the Court continues to rely on anecdotal hearsay evidence to condemn the Ecuadorian judiciary, such as the media clippings proffered by Chevron in support of its Motion for a Preliminary Injunction, factual investigation into those hearsay applications will be necessary. (*See, e.g.*, Dkt. 56-1 and referenced exhibits.)

(8) Gathering of evidence in both Ecuador and in the United States concerning Chevron's manipulation of the Ecuadorian government in support of the Ecuadorian Plaintiffs' estoppel argument, including but not limited to discovery directed to current and former ChevronTexaco officials and Ecuadorian government officials.

(9) Gathering of evidence in Ecuador and in the United States in support of the Ecuadorian Plaintiffs' unclean hands defense, including but not limited to discovery from Chevron officials, Chevron's consultants in Ecuador and the

[11] The Ecuadorian Plaintiffs wish to clarify that the following list is for illustrative purposes only—the Ecuadorian Plaintiffs anticipate that Chevron will attempt to wield it either to in some way bind or discredit the Ecuadorian Plaintiffs as the proceedings unfold.

United States, and other agents of Chevron, including its Ecuadorian and American counsel.

(10) Letters rogatory pursuant to 28 U.S.C. § 1781 in furtherance of discovery sought by one or more of the parties, or desired by the Court itself.

(11) Discovery directed to the administration of President Rafael Correa, including potentially to the President himself, who appears to be the focal point of Chevron's argument that the Ecuadorian courts are incapable of providing due process.

(12) Motions for summary judgment pursuant to Fed. R. Civ. P. 56.

(13) Motions *in limine*.

(14) The trial itself.

(15) Post-trial briefing.

The foregoing is no "parade of horribles;" it is the reality of adjudicating an issue so laden with factual and legal nuance, with such a long and complex history, and with such grave, far-reaching consequences. Notably, the vast majority of the evidence sought and proceedings identified in this non-exhaustive list will be obtained in Ecuador. Recognizing, as any reasonable court must, the inherent logistical difficulties of conducting and completing those tasks overseas in any expedited fashion and that procedural rules on such international evidence gathering will also pose difficulties which cannot be raised, addressed and cured in the one or two months which Chevron seeks before going to trial, the notion that Chevron might be able to stroll into this Court and obtain its desired scathing rebuke of the judiciary of a foreign nation in a few months with minimal work is unfathomable. There is simply no way that this Court could rightly condemn—or for that matter, acquit—not only a foreign sovereign's judicial system, but ostensibly its entire system of government, in a period of time remotely close to 3-6 months.

The Ecuadorian Plaintiffs litigated against Chevron for approximately *seventeen years* in order to finally obtain a judgment that might afford them relief for the environmental disaster left

on their doorstep—eight of them in Ecuador.[12] But after allowing the Ecuadorian Plaintiffs *less than two business days* to assert their rights in opposition to Chevron's tsunamic wall of paper disguised as a TRO application—a 149-page complaint, a 70-page brief, nearly 7,000 pages of affidavits and exhibits, and hours of video footage—this Court saw fit to begin its swift unraveling of those seventeen years of effort. And affording the Ecuadorian Plaintiffs a mere *three additional days* to avoid a more lasting evisceration of the victory that they fought so long and hard for on multiple continents, this Court dealt the Ecuadorian Plaintiffs yet another blow, and issued an unprecedented worldwide preliminary injunction. Now, Chevron asks this Court to complete the process of destroying seventeen years worth of litigation—and it wishes this to happen in approximately *three months*. And Chevron has made this extraordinary request (*ex parte* by order to show cause, without any valid justification) upon invitation from this Court in its preliminary injunction decision—just as this Court invited Chevron to file the RICO case itself just months ago. The Ecuadorian Plaintiffs are left wondering: Whose due process is really at stake in this case?

[12] This Court has made no secret of its conviction—a belief apparently developed at the outset of related § 1782 proceedings with the benefit of Chevron's story alone—that the Ecuadorian Plaintiffs' suit is misdirected, and that State-owned Petroecuador should instead be held accountable for the contamination in the Oriente region of Ecuador, in light of the fact that Texaco ceased its role as operator in the Napo Concession in 1990. This Court, however, should bear in mind that the *Aguinda* case was filed in 1993. Chevron should not be permitted to use its resounding success in delaying the resolution of the underlying environmental lawsuit as a weapon against the Ecuadorian Plaintiffs. When the Ecuadorian Plaintiffs picked this fight, Texaco was the proper opponent; the fact that Texaco became ChevronTexaco which then became Chevron, or that another party may have come along and dumped more toxins on top of those left by Chevron, changes *nothing* as to the underlying liability and Chevron's duty to answer for it.

CONCLUSION

For the foregoing reasons, the Court should deny in its entirety Chevron Corporation's Application By Order To Show Cause Why The Declaratory Judgment Claim Should Not Be Bifurcated In Whole Or In Part.[13]

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[13] If the Court remains inclined to proceed separately on any portion of Chevron's Declaratory Judgment claim, it should do so as a matter of severance under Fed. R. Civ. P. 21, rather than bifurcation under Fed. R. Civ. P. 42(b). Proceeding under Rule 21 would appear preferable to the alternative from the perspective of *both* parties, insofar as it would result in the attainment of a final, appealable judgment on the severed claim(s). *See, e,g, Hecht v. City of New York*, 217 F.R.D. 148, 149-50 (S.D. N.Y. 2003).