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JUDGE KAPLAN'S CHAMBERS

**VIA HAND DELIVERY**

Honorable Lewis A. Kaplan  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: *Chevron Corporation v. Steven Donziger, et al.*  
Case No. 11-CV-0691-LAK

Your Honor:

We write as counsel for Defendants Steven Donziger and the Law Offices of Steven R. Donziger (collectively, "Donziger") in response to Chevron's letter to the Court, dated April 5, 2011, in which Chevron attempts to submit additional arguments regarding whether Defendants are entitled to assert an unclean hands defense in response to Chevron's Ninth Claim for Declaratory Judgment. The parties previously briefed this issue in connection with Chevron's motion for bifurcation, which the Court has taken under submission, and Chevron has not requested the Court's permission to submit additional arguments. Accordingly, we respectfully request that the Court strike Chevron's unsolicited letter brief and admonish Chevron to refrain from burdening the Court with additional arguments on a submitted motion without first obtaining the Court's permission to do so.

If the Court is inclined to consider Chevron's letter brief, however, we would like to submit the following arguments in response. *First*, Chevron's assertion that Defendants are not entitled to assert an unclean hands defense in response to Chevron's declaratory judgment claim contradicts settled case law and is inconsistent with the facts of this case. During the March 30, 2011 telephone conference with the Court, the Court asked Chevron's counsel, Mr. Mastro: Is it not conceivable that if Defendants "made out a sufficient unclean hands defense, it might be a defense to an action to the extent it seeks an injunction, which is unmistakably an equitable remedy?" 3/30/11 Hearing Transcript, 8:14-18. Contrary to Chevron's assertions, the answer to the Court's question is unquestionably "Yes." It is basic hornbook law that a court may deny equitable relief to one with unclean hands. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995) ("Equity's maxim that a suitor who engaged in his own reprehensible conduct in

Honorable Lewis A. Kaplan  
United States District Court  
April 6, 2011  
Page 2

the course of the transaction at issue must be denied equitable relief because of unclean hands..."); *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 814 (1945) ("He who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."). Accordingly, because Chevron's declaratory judgment claim seeks an injunction, which is "unmistakably an equitable remedy," Defendants are entitled to show that Chevron may not obtain such relief because of its own misconduct relating to the matter in which it seeks relief. *See, e.g., See Abbott Laboratories v. Gardner*, 387 U.S. 136, 155 (1967) ("[T]he declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed."); *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005) ("A court may deny injunctive relief based on the defense of unclean hands where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith" related to the matter at issue. (internal quotation marks omitted)); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2759 (factors that courts have considered in whether to deny declaratory relief include "any inequitable conduct on the part of the party seeking the declaration").

Second, Chevron's contention that Donziger is somehow hiding "the factual bases" for his unclean hands defense makes no sense. In Opposition to Chevron's Motion for a Preliminary Injunction, Donziger made a detailed offer of proof with respect to evidence regarding Chevron's unclean hands. *See* Doc. No. 137 at 28-31. Among other things, in 2009, Chevron-affiliated operatives participated in a "sting" operation aimed at disqualifying the Ecuadorian judge presiding over the *Aguinda* litigation, and which did result in the judge's disqualification. *Id.* at 30. Additionally, in October 2005, Chevron worked with the Ecuadorian military to secure a "suspension" of a key judicial inspection of a contaminated site during the trial, under questionable circumstances. *Id.* at 32. Defendants also briefed the Court on several other types of misconduct engaged in by Chevron and its employees in Ecuador, each of which was aimed at improperly influencing the outcome of the *Aguinda* litigation. Of course, Donziger's offer of proof was based upon the limited information available pre-discovery. Discovery is necessary to obtain additional factual support.

Third, although Chevron's letter brief attempts to argue that the unclean hands defense has no "bearing on Chevron's request to enjoin the Defendants from enforcing" the judgment (Letter at 1), what Chevron is actually saying is that this Court should decide at this early juncture in the litigation, before the commencement of discovery, that Chevron's alleged misconduct does not bear any "immediate and necessary relation" to matter at hand, and that Defendants' alleged misconduct is "more unconscionable" than what Chevron has done. The Court, however, cannot rule at the pleading stage that Defendants cannot prevail *as a matter of fact* on their unclean hands defense. Donziger's offer of proof regarding Chevron's misconduct demonstrates that, if proven, Chevron's misconduct clearly relates to the claim at issue—whether the Ecuadorian judgment was procured by fraud and whether Chevron's fraudulent conduct in the same litigation prevents it from seeking injunctive relief in this Court. Whether Defendants'

Honorable Lewis A. Kaplan  
United States District Court  
April 6, 2011  
Page 3

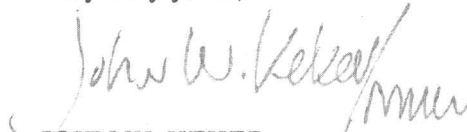
misconduct is more unconscionable than Chevron's misconduct is an issue for trial, and the parties should be permitted to seek discovery on this issue.

*Fourth*, Chevron argues—without citation to any authority—that had the Lago Agrio Plaintiffs filed an action seeking judgment recognition and enforcement in New York, they could not use Chevron's unclean hands as a basis to make recognition and enforcement of the Ecuadorian judgment “more proper.” Letter, at 2. But, of course, the Lago Agrio Plaintiffs have not filed an enforcement action in New York, or anywhere. Rather, Chevron has affirmatively petitioned this Court for sweeping equitable relief barring any such action. Moreover, Chevron bears the burden under N.Y. C.P.L.R. § 5304 of establishing that the Ecuadorian judgment was procured by fraud. See *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 743 N.Y.S.2d 408, 423 (2002) (“It is undisputed that defendants bear the burden of proving these discretionary grounds for non-recognition [of a foreign judgment.]”); *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 286 (S.D.N.Y. 1999) (“[T]he defendant opposing enforcement has the burden of proving that a discretionary basis for non-recognition pursuant to CPLR § 5304(b) applies.”). Chevron's unclean hands are certainly relevant to whether it should be able to pursue and prevail on that claim. Chevron should not be permitted obtain a declaration that the Ecuadorian judgment was procured by fraud, if Chevron itself attempted to defraud the Ecuadorian judicial system to avoid or forestall the very same judgment.

*Lastly*, regardless of whether Defendants are permitted to pursue their unclean hands defense, Chevron's and its agents' conduct relating to the *Aguinda* litigation is directly relevant to the questions posed by Chevron's Ninth Claim for Relief of whether the Ecuadorian judicial system provides impartial tribunals and due process. Indeed, Chevron itself argues in its Motion to Bifurcate that the conduct of its operatives Diego Borja and Wayne Hansen “are remarkably revealing about the corruption and lack of due process in Ecuador in general and in this case in particular.” Chevron. Mem. ISO Mot. to Bifurcate [Doc. No. 200], at 8 n.3. Chevron's conduct also is relevant to put Donziger's and the other Defendants' statements and conduct regarding the *Aguinda* litigation in their full and proper context.

In sum, although it wishes otherwise, Chevron's procedurally improper and substantively baseless attacks on Defendants' unclean hands defense cannot serve to block Defendants from seeking discovery into Chevron's own misconduct in Ecuador.

Very truly yours,

  
JOHN W. KEKER

ERP/aap

cc: counsel of record (via electronic mail)