UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, -against- MARIA AGUINDA SALAZAR, et al. Defendants. -and- STEVEN DONZIGER, et al. Intervenors.	CASE NO. 1:11 Civ. 03718 (LAK)

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, AND DONZIGER & ASSOCIATES, PLLC'S MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED APPLICATION BY ORDER TO SHOW CAUSE WHY THIS COURT SHOULD NOT RECONSIDER ITS MAY 31, 2011 ORDER ON DONZIGER'S APPLICATION TO INTERVENE, AND GRANT DONZIGER FULL INTERVENTION IN CLAIM NINE

I. INTRODUCTION

In February of 2011, after eighteen years of hard-fought litigation, Chevron found itself on the losing side of an $18 billion judgment. This judgment redressed contamination of the water and the environment resulting from Chevron's predecessor Texaco having deliberately ignored proper waste management practices and dumped billions of gallons of toxic pollution across the Ecuadorian rainforest. That judgment is currently on appeal in Ecuador.

Recent events establish that Chevron plans a "do-over" of the trial that already occurred in Ecuador, and that the "do over" will be a fraud case focused on Steven Donziger. Chevron's recent fraud-focused expert submissions are of a piece with its strategy from the outset of this litigation. Since day one, Chevron has used isolated snippets from Donziger to create claims that the Ecuadorian judgment is the product of fraud or corruption and to divert attention from the undeniable evidence of environmental catastrophe underlying the Lago Agrio Court's decision. Unless the Court rethinks some of its decisions about who can defend, and how and when that defense should happen, the "do-over" will be a one-sided show trial without any semblance of fairness or due process or concern for the merits.

The fact is the present litigation has not been adequately litigated by the Lago Agrio plaintiffs, who until recently did not have lawyers who could provide a meaningful counterweight to the tens of millions of dollars of lawyer time that Chevron has poured into experts, privilege busting, and litigation overkill. Now the Lago Agrio plaintiffs have active and engaged lawyers from Smyser Kaplan & Veselka. But without a continuance, even those capable lawyers will simply be spectators at the show trial.

The exclusion of Donziger from full intervention in this "do-over" trial has reached the point of absurdity. The trial will be about him, and he won't be there to defend himself against Chevron calumny. From the beginning of this case, Donziger was willing to stipulate to temporary restraining order, in order to get a chance to defend himself and his actions in connection with the trial in Ecuador. There is no hurry that justifies the court's schedule. There is no final judgment in Ecuador, there has been no effort in enforcement, and Chevron is more than capable to defending itself around the world if necessary. There is absolutely no need for a

trial to determine the validity of a non-judgment that is still being litigated. If the Court has decided that nothing that comes out of the legal system in Ecuador matters, the Court should say so and avoid wasting more time and money. If what actually happened in Ecuador matters at all to the Court's decision, the Court should let Donziger intervene, grant the Lago Agrio plaintiffs' motion to continue, and let the parties conduct a real, not show, trial.

Accordingly, Steven Donziger, the Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC (collectively "Donziger") moves this Court, once again, to reconsider its May 31, 2011 Order denying Donziger's Application to Intervene in Claim Nine.[1] May 31, 2011 Memorandum and Order in *Chevron v. Donziger*, Case No. 11-CV-0691 (LAK) Dkt. No. 327, (hereinafter "May 31 Order"). In its May 31 Order, the Court states that it stands "ready to consider changes to this order, should circumstances warrant, as the matter proceeds." *Id*. at 16.[2] The Court made the same promise in its April 15, 2011 Order bifurcating Claim 9 for early trial. *See* Case No. 11-CV-0691 (LAK) Dkt. No. 278, at 22.[3]

Donziger renews his request for reconsideration in light of additional changed circumstances regarding the scope of the trial of Claim 9 occurring this week. These changed circumstances include: (1) this Court's August 8, 2011 Order (Dkt. No. 187) allowing a breathtaking scope of expert testimony in connection with Claim Nine of this action; (2) Chevron's August 8, 2011 subpoena directed to an alleged racketeering enterprise it calls the

---

[1] Donziger previously moved for reconsideration of this Court's May 31 Order on July 26, 2011. Dkt. Nos. 126, 127 and 128. Chevron opposed the motion, Dkt. No. 141, and on July 29, 2011 this Court denied the motion, Dkt. No. 164.

[2] Local Rule 6.3 requires Motions for Reconsideration to be filed within 14 days of the relevant Order, "unless otherwise provided by the Court." The Court's May 31 Order inviting consideration of changes to its order satisfies this requirement. Furthermore, this Court can reconsider its interlocutory orders at *any time* prior to the entry of judgment. "A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment." *U.S. v. LoRusso*, 695 F.2d 45, 53 (2d Cir. 1982); *see also Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 217 F. Supp. 2d 423, 428 (S.D.N.Y. 2002) (A district court "has inherent power to correct an interlocutory ruling at any time prior to the entry of final judgment.").

[3] Specifically, the Court stated that it "retains complete flexibility to ensure that the matter is handled appropriately and that any Seventh Amendment rights are preserved" and promised to "stand ready to consider changes to this order, should circumstances warrant, as the matter proceeds."

"Entity;" and (3) Chevron's recent deposition strategy, which is focused entirely on Donziger and his colleagues. These developments demonstrate that Chevron seeks in November to re-litigate the Ecuadorian trial, and to try Chevron's RICO and fraud claims against Donziger, without him present.

Chevron's true intentions having been recently laid bare via its expert reports, and its latest clearly harassing subpoena sent to Donziger, and its attempts to depose every lawyer who worked with Donziger, it is in the interests of justice and fundamental fairness that this Court permit Donziger to be a full party in the case, and be provided additional time for his counsel to prepare discovery and depositions given the near-term cutoff dates established by the Court in its breakneck scheduling order. "***Whatever disagreement there may be as to the scope of the phrase 'due process of law', there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.***" *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J.).

II. FACTUAL BACKGROUND AND ARGUMENT

A. The Court's April 15, 2011 Bifurcation Order assumed a lack of overlap in factual issues between Claim Nine and the RICO and state law fraud claims.

Chevron originally named Donziger as a defendant to its Ninth Claim in this case, and pursued and successfully obtained a March 7, 2011 preliminary injunction against Donziger on the basis of that claim.

On April 15, 2011, this Court granted Chevron's motion to bifurcate Claim Nine, citing the "desirability of an expedited resolution" of that claim. Case No. 11-CV-0691 (LAK) Dkt. No. 278, at 22. Also on April 15, 2011, the Court issued a Scheduling Order governing proceedings with respect to Claim Nine. Case No. 11-CV-0691 (LAK) Dkt. No. 279. Among other things, the Scheduling Order: (i) established a deadline of September 15, 2011 for completion of all discovery; (ii) required that summary judgment or other dispositive motion be filed no later than September 23, 2011; and (iii) set a trial date of November 14, 2011. *Id.*

In granting Chevron's Motion to Bifurcate, this Court made a number of observations:

- The Court ridiculed as "at least exaggerated" and "overdrawn" the Defendants'

contention that there would be a substantial overlap in the proof between Claim 9 and the complaint's remaining RICO and state law fraud claims. Case No. 11-CV-0691 (LAK) Dkt. No. 278, at 14 and 15.

- The Court observed that many of the grounds for non-recognition of the Ecuadorian judgment "could be determined without reference to any of the facts alleged in the RICO and state law claims or defenses thereto." *Id*. at 14.
- The Court indicated that there was only a "*possible* evidentiary overlap" and that there "may be some overlap" between Claim 9 and the RICO and state law claims, "[b]ut these are merely possibilities," concluding that "[i]n sum, then, there is a possibility, but by no means a certainty, of some factual overlap". The Court concluded that because "the potential areas of overlapping proof between Count 9 and the other counts are limited…[t]he balance strongly favors bifurcation, subject to revision if that proves necessary." *Id.* at 14-17 (emphasis in original).
- The Court determined that bifurcation of Claim 9 would pose no *Beacon Theatres* issue unless it were tried non-jury, and "its resolution determined factual issues essential not only to Count 9, but also to RICO or state law claims." *Id*. at 20.
- The Court opined that if Chevron were to drop Donziger as a defendant to Claim 9, "it could further reduce or eliminate any overlap of proof." *Id.* at 16 n.42

B. Donziger has been excluded from participating in the bifurcated (now severed) Claim Nine.

Following the Court's suggestion, five days after the April 15 Bifurcation order, on April 20, Chevron filed an Amended Complaint dropping Donziger as defendant to Claim Nine. Case No. 11-CV-0691 (LAK) Dkt. No. 283. Chevron elected to drop Donziger, even though Claim Nine re-alleges and incorporates by reference every single prior paragraph in the Amended Complaint, including over one hundred paragraphs that allege specific acts of purported wrongdoing by Donziger.

On April 29, 2011, this Court granted an Order to Show Cause Why Donziger Should

Not Be Permitted to Intervene in the Declaratory Judgment Claim. Following briefing, on May 31, 2011, the Court granted Donziger *de minimis* "limited" intervention, but denied his application in all other respects. The order succeeded in keeping Donziger from any meaningful participation in discovery or trial, while insulating the Order from immediate appeal.

C. Chevron's list of designated expert witnesses, even as "narrowed", reveals Chevron's plan to litigate in the Claim Nine trial issues of fraud, and to re-litigate Ecuadorian issues of law and fact.

On June 30, 2011, Chevron served expert reports for 29 experts. Following a motion to strike experts filed by the Lago Agrio plaintiffs, on August 4 Chevron reduced its list to 19 experts, calling this a "substantially narrowing." These 19 experts fall into the following categories:

- Three experts [Grau, Caron and Elena] will testify on whether the Ecuadorian judicial system provides due process and impartial tribunals.[4]
- Five experts [Bourie, Jones, Oquendo, Paulsson, and Ponce] will testify on international law matters, and specifically as to whether the Ecuadorian trial court erred in applying Ecuadorian law.[5] Aug. 8, 2011 Order, Dkt. No. 187, at 3.
- Four experts [Leonard, McMenamin, Turell, and Younger] will testify on the subject of alleged fraud in the writing of the judgment and in the preparation of the Cabrera report. *Id.*[6]
- Five experts [Bellamy, Hinchee, Kelsh, McHugh, and Wasserstrom] will testify as to "the lack of basis and evidentiary support for parts of the Ecuadorian judgment including, *inter alia*, the alleged lack of any evidence of a causal connection between alleged health problems and the alleged environmental contamination. *Id.* at 4.
- Two experts [Kaczmarek and Priest] will testify regarding the Ecuadorian oil

[4] Grau and Elena were also designated by Chevron as rebuttal experts, on August 5, 2011.

[5] Ponce was also designated by Chevron as a rebuttal expert, on August 5, 2011.

[6] Leonard and McMenamin were also designated as rebuttal experts by Chevron on August 5, 2011.

industry and its importance to Ecuador's economy, and whether the judgment is penal or regulatory in character. *Id.* at 4.

Chevron's August 4 expert list makes plain that Chevron intends to re-litigate the merits of the Ecuadorian trial. Chevron has designated experts to testify that the Ecuadorian trial court allegedly erroneously applied Ecuadorian law, that the environmental and other scientific and cultural testimony presented in Ecuador failed to support the Ecuadorian Court's damages award, and on the ramifications and effects in Ecuador of the Ecuadorian judgment. These experts will support Chevron's effort to get a "do-over"; that is, to re-litigate in New York the case Chevron lost in Ecuador. Donziger, as a person with direct financial, professional and reputational interests in the judgment that was ***won*** in the trial court in Ecuador (discussed in part F, *infra*), should be entitled to intervene in this action to try to protect that judgment and, therefore, his own interests.

Chevron's August 4 expert list also makes plain that Chevron intends to litigate fraud issues directly implicating Donziger in the Claim 9 trial. Four forensic "fraud" experts will testify that there was fraud in the writing of the judgment and that there was fraud in connection with the Cabrera report. Donziger is alleged by Chevron (and by this Court) to have been a "central figure" in the fraud charged by Chevron, and as such he should be permitted to intervene in the Claim Nine trial to defend against these charges, all of which directly and substantially overlap with Chevron's severed RICO and tort claims.

D. Chevron's August 8 subpoena directed to "The Lago Agrio plaintiffs' enterprise, 'the 'Entity'" also reveals Chevron's true plan, to litigate RICO issues in the Claim Nine trial.

On August 8, 2011, Chevron served all counsel with a Deposition Subpoena and a Notice of Deposition directed to "The Lago Agrio plaintiffs' enterprise, the 'Entity'", "c/o Managing Agent, Steven Donziger, Law Offices of Steven R. Donziger."[7] *See* Exhibits A and B to the Declaration of Jan Nielsen Little ("Little Decl."), filed herewith. The subpoena defines "The

[7] In a motion filed August 9, Dkt. No. 194, Donziger seeks a ruling declaring this subpoena null and void, in asmuch as a) there is no such "Entity", and b) he is not the Managing Agent of any such imaginary entity.

Entity" as "the group of attorneys, financiers, Ecuadorian organizations, and others, who, as alleged in the Complaint and as discussed in pages 5-7 of Judge Kaplan's June 28, 2011 Memorandum Opinion, are behind the fraudulent Lago Agrio Judgment … who identify with, represent the interests of, or have the authority to act on behalf of the LAGO AGRIO PLAINTIFFS , who are slated to receive a substantial sum of money if the Judgment is enforced, or who played any role in connection with the fraudulent Cabrera report or ghostwriting of the Judgment." Little Decl., Ex. A, at Schedule A, ¶ 29.

This August 8 subpoena, directed to "The Lago Agrio plaintiffs' enterprise, 'The Entity,'" which is the focus of Chevron's RICO allegations, further demonstrates that Chevron intends to litigate issues relating to its RICO claims in this Claim Nine trial.

E. Chevron's recent deposition strategy reveals its focus for the trial of Claim Nine: Donziger, Donziger, Donziger.

Finally, that Chevron 's trial of Claim Nine will be "All Donziger All the Time" is also demonstrated by the five fact witnesses Chevron is seeking to depose. Last week, Chevron deposed a law student who worked for Donziger, and on Tuesday of this week Chevron noticed four depositions that all revolve around Donziger.

The non-expert depositions Chevron has noticed to date are as follows:

- Brian Parker, who as a law student who worked with Donziger as a legal intern;
- "The Entity", Chevron's name for the RICO "enterprise" alleged in its complaint, to which it has nominated Donziger as its "Managing Agent";
- Andrew Woods, Donziger's current employee/associate;
- Laura Garr, who as a law student and for a year after law school worked with Donziger as a legal intern; and
- Aaron Page, an attorney who has worked with Donziger.

This deposition activity shows Chevron's true colors. With Chevron using 100% of its fact depositions for people who worked for or with Donziger, no one can credibly claim that Chevron's trial of Claim Nine will not be centrally focused on Donziger.

F. Donziger, who has a direct, substantial and legally protectable interest in the subject matter of this case, should be allowed to intervene fully.

Finally, Donziger also has a clear, legally protectable financial interest in the subject matter of this case, as Donziger explained in detail in his original intervention application. *See* Case No. 11-CV-0691 (LAK) Dkt. No. 295, at 5-7. A central premise of Chevron's Complaint is that Donziger, in concert with other lawyers, organized and prosecuted the Ecuadorian lawsuit, not to force Chevron to pay for the environmental devastation its subsidiary wreaked on the Ecuadorian Amazon and its peoples, but rather to obtain "a financial windfall of unprecedented proportion[.]" Amended Complaint, Case No. 11-CV-0691 (LAK) Dkt. No. 283, ¶ 58; *see also id.* ¶ 65. By ignoring Chevron's own allegations and concluding that Donziger does not have any interest in this action because he does not possess an enforceable attorney's "charging lien" under New York Judiciary Law section 475,[8] the Court, we submit, committed a clear error, which should be rectified.

First, contrary to the Court's May 31 Order, a lawyer can have a contingent-fee interest *without* having a valid New York charging lien. A charging lien is simply "a security interest in the favorable result of litigation … , giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client." *Chadbourne & Parke, LLP v. AB Recur Finans*, 794 N.Y.S.2d 349, 350 (App. Div. 2005). As the Second Circuit has observed, "an attorney's charging lien is ***not*** the only potential source of remuneration for terminated counsel. Under New York law, the attorney still has an avenue to recover legal fees owed via a plenary action in *quantum meruit* for the reasonable value of services rendered. This remedy . . . is distinct from the charging lien remedy[.]" *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) (emphasis added).[9] Similarly, a New York case cited by the Court in its May 31

[8] *See* May 31 Order, at 7-8.

[9] Because Donziger continues to have an attorney-client relationship with the plaintiffs, this case presents none of the "public policy repercussions that arise when ***discharged*** counsel is permitted to intervene as of right in his former client's action to protect an interest in legal fees." *Butler, Fitzgerald & Potter*, 250 F.3d at 178 (emphasis added) (declining to decide whether discharged counsel's financial stake in former client's action is the type of interest contemplated by Rule 24(a)).

Order held that an attorney "m[ight] be entitled to compensation" even though a charging lien under Judiciary Law section 475 "[could not] be used to ***secure*** such compensation for several reasons." *Max E. Greenberg, Cantor & Reiss v. State*, 512 N.Y.S.2d 587, 588 (App. Div. 1987) (emphasis added).

Moreover, Donziger ***does*** have a valid New York charging lien. As this Court's own prior decisions have acknowledged repeatedly, Donziger helped file the original *Aguinda* action in the Southern District of New York and represented the plaintiffs for several years in that venue before the case was dismissed and sent to Ecuador at Chevron's request.[10] Published decisions document that Donziger appeared formally for the plaintiffs while the case was in New York.[11] And although Chevron has claimed (and this Court previously has agreed) that "the Lago Agrio litigation is not the refiled *Aguinda* action," the Second Circuit has rejected that notion as being "without merit." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 390 n.5 (2d Cir. 2011).

Accordingly, Donziger has a direct pecuniary interest in the subject matter of this action, entitling him to intervene in it—or more accurately, to reenter it—as a matter of right. Additionally, Donziger has cognizable professional and reputational interests in the subject matter of the action that further entitle him to intervene. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 709 F.2d 175 (2d Cir. 1983) (intervention may be appropriate where professional conduct of party seeking intervention will be focus of action); *N. Y. Public Interest Research Grp. v. Regents of the Univ. of the State of N.Y.*, 516 F.3d 350 (2d Cir. 1975) (finding right to intervene where action would impact intervenor's business, even though the asserted interest did not constitute a property right); *see also Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d

[10] *See, e.g., In re Chevron Corp.*, 749 F. Supp. 2d 141, 148-49 (S.D.N.Y. 2010) ("In 1993, a group of residents of the Oriente region brought a class action in this Court against Texaco arising from TexPet's role in the Consortium. . . . Donziger, then two years out of law school, was one of the lawyers who represented the plaintiffs."); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 287 (S.D.N.Y. 2010) (Kaplan, J.) (referring to Donziger as "one of the lead counsel for the plaintiffs in the Lago Agrio Litigation").

[11] *See In re Aguinda*, 241 F.3d 194, 197 (2d Cir. 2001) (listing Steven Donziger as "of counsel"); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 472 (2d Cir. 2002) (listing Steven Donziger as "on the brief").

123, 130 (2d Cir. 2001) ("Rule 24(a)(2) requires not a property interest but, rather, 'an interest relating to the property or transaction which is the subject of the action.'").

In short, Donziger has sufficient interests to support intervention as of right or, in the alternative, full permissive intervention.

III. CONCLUSION

For the foregoing reasons, Donziger respectfully requests the Court to reconsider its May 31, 2011 Order which gave Donziger only limited intervention rights. Donziger requests that this Court grant him full intervention to participate in the litigation of Chevron's Ninth Claim for Declaratory Judgment.

Respectfully submitted,

Dated: August 11, 2011

By: _____

ELLIOT R. PETERS
JOHN W. KEKER (admitted *pro hac vice*)
JAN NIELSEN LITTLE (admitted *pro hac vice*)
KEKER & VAN NEST LLP
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: 415.391.5400
Facsimile: 415.397.7188
Email: epeters@kvn.com
Email: jkeker@kvn.com
Email: jlittle@kvn.com

Attorneys for Intervenors
STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER and DONZIGER & ASSOCIATES, PLLC