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January 6, 2012

## VIA HAND DELIVERY

Honorable Lewis A. Kaplan  
United States District Judge  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl Street  
New York, New York 10007-1312

Re: Case No. 11-cv-0691 (LAK); *Chevron Corporation v. Steven Donziger, et al.*, In  
the United States District Court for the Southern District of New York

Dear Judge Kaplan:

Chevron is not entitled to attachment, much less entry of the temporary restraining order requested in Chevron's January 5, 2012 letter to the Court.

First, although the intermediate Ecuadorian appellate court has issued its opinion affirming the trial court's judgment, the judgment is still not final and enforceable. Chevron does not even argue that the Ecuadorian judgment is final and enforceable. Instead, Chevron relies on alleged statements from a news article that enforcement will be sought. This attempt to finesse the issue of enforceability is disingenuous. Absent potential enforceability, the legal situation has not changed from a year ago when Chevron first cried "Wolf" to persuade the Court to enter an injunction to prevent immediate harm. In fact, the news story on which Chevron relies does not say that the judgment is enforceable, it states only that the Ecuadorian Plaintiffs are "going to start the necessary actions for the ruling to be enforced."<sup>1</sup>

Second, before the Ecuadorian judgment will become enforceable under Ecuadorian law, several events must occur over a substantial period of time. To begin, both parties have three days to seek clarification or amplification from the Ecuadorian appellate court for portions of the decision. Art. 281, Code of Civil Procedure. The Ecuadorian Plaintiffs, at least presently, plan

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<sup>1</sup> Chevron's attachment motion and request for Temporary Restraining Order dodge the issue of the massive environmental contamination that occurred in Ecuador from 1964-1992 as a result of substandard drilling practices to cut production costs and the fact that open pits of toxic waste still permeate the concession property, despite Chevron's so-called remediation. The Ecuadorian Plaintiffs incorporate their responses to Chevron's Motion for Attachment, including their denials that they ghost-wrote the judgment, their rejection of Chevron's argument that fraud led to the judgment, and their assertion that the extensive scientific evidence that resulted from the judicial inspections shows that the contamination and pollution of the lands, water, and lives support the judgment and the awarded damages.

to use that procedure provided them by Ecuadorian law. Should such requests for clarification and amplification be submitted to the Ecuadorian appellate court by either party, the other party has an opportunity to respond to the requests. Art. 282, Code of Civil Procedure. The Ecuadorian appellate court will then issue its pronouncement on any requests received and may or may not modify its opinion as a result. There is no deadline under Ecuadorian law for the appellate court to issue such a pronouncement. Regardless, after the appellate court acts on this request for clarification, it then sends the judgment that results, if any, to the trial court for certification and execution.<sup>2</sup> Art. 302, Code of Civil Procedure. Under Ecuadorian law, only after trial court certification does a judgment become enforceable. *Id.*

Third, even assuming a judgment is certified against Chevron, Chevron has the right under Ecuadorian law to post a bond to prevent enforcement of the judgment while it appeals to the Ecuadorian high court. Art. 11, Law of Appeals. Bonds are set at the discretion of the appellate court. *Id.* Posting of the bond suspends enforcement of the judgment. *Id.* Thus, Chevron controls whether the judgment will be enforced during that time. Since Chevron can prevent enforcement pending appeal and since the Court can take judicial notice that Chevron, with publicly announced profits in excess of \$21 billion over the first nine months of 2011 and total assets of \$204 billion,<sup>3</sup> can post a bond in the full amount of the judgment, Chevron does not face the prospect of imminent or irreparable harm. Despite its pleas for the Court's assistance, Chevron needs no assistance. Chevron has the ability *on its own* to prevent enforcement of the judgment at such time as the judgment becomes enforceable.

Fourth, the relief Chevron seeks is improper and unprecedented. The remedy Chevron seeks has *never* been granted under similar facts. Chevron has not, and cannot, cite a single decision from any court at any time in the history of the United States where a judgment debtor brought a lawsuit challenging the judgment entered against it as fraudulent (or for any other reason) and then was permitted to attach the judgment creditor's interest in that very same judgment.<sup>4</sup> Not even Chevron's favorite 1880 case from more than a century ago (*Wehle*)—

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<sup>2</sup> Chevron's attack on the Ecuadorian appellate panel as consisting of "temporary" judges reflects either its lack of understanding about Ecuadorian judicial procedure or, more likely, is yet another strategic distortion of different procedural rules to try to insinuate wrongdoing. The "temporary" judges are akin to judges sitting "by designation" in U.S. Federal court proceedings. In any event, the makeup of the Ecuadorian appeals court cannot be grounds for a TRO or an order of attachment, and Chevron's attack on the court's makeup is yet another impermissible attempt to have this Court sit in judgment of Ecuadorian law and procedure.

<sup>3</sup> Chevron Corporation 2011 3Q Quarterly Report, available at <http://www.chevron.com/investors/financialinformation/>.

<sup>4</sup> Chevron cites several cases from the 1800's and early 1900's for the proposition that a debtor can attach an interest in a debt that it owes, but all are inapposite. *Wehle v. Conner*, 83 N.Y. 231 (1880), was a suit brought against the "sheriff of the city and county of New York, for alleged neglect to return within the time prescribed three executions in favor of plaintiff, against Henry L. Butler." It did not involve a plaintiff judgment debtor challenging the judgment it owed and seeking to attach the defendant judgment creditor's interest in that same judgment. Nor do Chevron's other cited cases provide support for Chevron's outlandish request. Those cases involved plaintiff debtors attaching a different or unrelated debt owed to the defendant—none involved the factual scenario presented here of a judgment debtor attaching the judgment creditor's interest in the very judgment that the debtor challenged via its lawsuit. See, e.g., *Pasquinelli v. Southern Macaroni*, 272 Pa. 468, 472 (Pa. 1922) (present suit excluded

before the statute Chevron relies on was even a dream in the legislature's mind—or even its case from the civil law jurisdiction of Louisiana (*Richardson*) granted such outrageous relief.

There is a reason this has never been done before. Allowing attachment (or a TRO based on attachment) under these circumstances would permit Chevron to successfully lodge a collateral attack on the Ecuadorian judgment by preventing any enforcement of that judgment, even before that judgment is final. Thus, contrary to Chevron's urging, the requested order of attachment implicates important notions of international comity, which are still being considered by the Second Circuit.<sup>5</sup>

Fifth, the Second Circuit's Order of May 12, 2011, disposes of Chevron's requested relief. In that Order, the Second Circuit stayed this Court's original injunction insofar as it restrained the Ecuadorian Plaintiffs from "directly or indirectly funding" recognition or enforcement proceedings. (*See* Dkt. 314). This Court should not, and cannot, grant Chevron an order prohibiting the Ecuadorian Plaintiffs from "assigning . . . their interest in the Ecuadorian judgment" because it would once again restrain them from funding any recognition or enforcement proceedings.

Sixth, the Second Circuit's Order of September 19, 2011, also disposes of Chevron's requested relief. In that Order, the Second Circuit vacated the global anti-suit injunction in its entirety. The relief Chevron seeks here in its proposed temporary restraining order is in its legal effect indistinguishable from the preliminary injunction that was dissolved by the Second Circuit and which restrained the Ecuadorian Plaintiffs from "receiving benefit from . . . any action or proceeding for recognition or enforcement of any judgment entered against Chevron." (Dkt. 77). Chevron does not, and cannot, offer any explanation as to how an order restraining the Ecuadorian Plaintiffs from "collecting on [the] proceeds" of the "Ecuadorian judgment" is any different than the injunctive relief that has already been rejected by the Second Circuit. An order that would prevent the Ecuadorian Plaintiffs from collecting on the proceeds of any judgment (should one become enforceable) would directly contradict the Second Circuit's September 19,

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goods "which were the subject of the former litigation"); *Haas v. LeFebvre*, 176 Wis.2d 510 (Wis. 1993) (per curiam) (allowing plaintiff to garnish \$5,000 he owed defendant as part of settlement in present case based on a "pre-existing judgment debt" defendant owed him in a prior, unrelated case); *Richardson v. Gurney*, 9 La. 285 (La. 1836) (allowing plaintiff to attach prior debt he owed in an unrelated suit he instituted against creditor "for a larger sum"). The other cases Chevron cites are even further removed from the facts of this case. *See, e.g., Norton v. Norton*, 3 N.E. 348, 354 (Ohio 1885) (corporation reached a debt owed to it by stockholder through garnishing the corporation); *La Varre v. Int'l Paper*, 37 F.2d 141, 148 (E.D.S.C. 1929) (allowing attachment of unrelated debt owed by plaintiff for purposes of obtaining jurisdiction over defendant).

<sup>5</sup> Chevron will have its fair turn in every court in which the Ecuadorian Plaintiffs seek to enforce the judgment to contest, and to attempt to resist, actions for enforcement of the Ecuadorian judgment. The United States is not the only forum where a company can challenge the enforcement of sovereign nation's judgment. In addition, Chevron concedes that the company has yet another right of appeal in Ecuador where it can challenge alleged defects the company believes exist in the appellate judgment. The notion that Chevron can run back to the United States, after it ran away from the Southern District of New York almost a decade ago, to somehow get relief -- when the company has conceded it has other avenues to defend itself -- should be treated with appropriate skepticism.

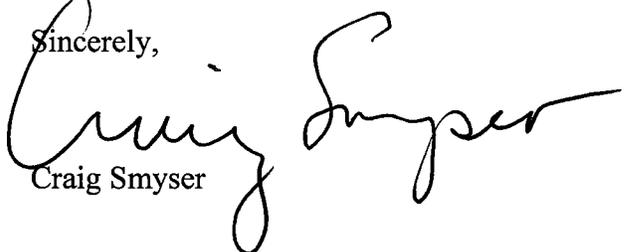
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2011 Order. Chevron's proposed attachment order, which states "no sums will be paid to Defendants until further order of this Court," does precisely that.

Seventh, Chevron's January 5, 2012 letter offers no new arguments for entry of a temporary restraining order. The Ecuadorian Appellate Court is not required to mention in its opinion the five arguments (in some cases, the same arguments that Chevron has been making for years now) that Chevron raised to the Appellate Court; it is only required to rule on them, which it did by rejecting them and affirming the trial court's judgment. Affirmance of a lower court judgment is not a basis for a temporary injunction to attach assets; yet, stripped to its essentials, that appears to be the entire basis for Chevron's request.

Chevron's latest histrionics and hysteria justify neither a temporary restraining order nor an order of attachment. The Court should deny Chevron's unprecedented requests.

Sincerely,



Craig Smyser

cc: All counsel of record via e-mail